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.)

Court Reporters are not provided. Please consult our Court's website, www.scscourt.org, for the rules, policies, and required forms for appointment by stipulation of privately-retained court reporters.

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- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

LAW AND MOTION TENTATIVE RULINGS
DATE: MAY 15, 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	16CV292208	Corinthian International Wage and Hour Cases (JCCP4886)	See Line 1 for tentative ruling.
LINE 2	21CV386656	Alvarez-King v. Bill Brown Construction Company (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	23CV410792	Andrews, et al. v. Fortinet, Inc. (Class Action/PAGA)	See Line 3 for tentative ruling.
LINE 4	21CV388049	Magat v. HRB Resources LLC, et al.	See Line 4 for tentative ruling.
LINE 5	20CV361771	Geierman v. Grocery Delivery E-Services USA, Inc., et al. (Class Action)	See Line 5 for tentative ruling.
LINE 6	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	Unopposed application for admission pro hac vice is GRANTED. No appearance necessary. Court will sign proposed order.
LINE 7	23CV423638	Nguyen v. Naftoon, Inc. (Class Action/PAGA)	See Line 7 for tentative ruling.

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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: Corinthian International Wage and Hour Cases (JCCP4886)
Case No.: 16CV292208

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on May 15, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

These are two coordinated cases arising out of alleged Labor Code violations. On June 11, 2015, plaintiff Adrian Turner ("Turner") filed a putative class action against her former employer, defendant Corinthian International Parking Services, Inc. ("Defendant"), alleging various Labor Code violations in 2015 ("*Turner* Action").

On January 21, 2016, plaintiff Mykale Rocquemore ("Rocquemore") filed a representative action against Defendant asserting a single claim for civil penalties under the Private Attorneys General Act of 2004 ("PAGA") ("*Rocquemore* Action"). The PAGA claim is predicated on allegations that Defendant failed to compensate Rocquemore and the other aggrieved employees for all hours worked, missed meal periods and rest breaks, and necessary business expenses.

On October 28, 2016, the court granted Defendant's petition for coordination of the *Turner* Action and the *Rocquemore* Aciton.

On July 1, 2019, Turner filed the operative Second Amended Class Action Complaint for Damages ("SAC"), which sets forth the following causes of action: (1) Violation of California Labor Code sections 510 and 1198 (Unpaid Overtime); (2) Violation of California Labor Code sections 226.7 and 512, subdivision (a) (Unpaid Meal Period Premiums); (3) Violation of California Labor Code section 226.7 (Unpaid Rest Period Premiums); (4) Violation of California Labor Code sections 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (5) Violation of California Labor Code sections 201 and 202 (Final Wages Not Timely Paid; (6) Violation of California Labor Code section 2802 (Unreimbursed Business Expenses); and (7) Violation of California Business & Professions Code section 17200, et seq. (Unfair Competition/Unfair Business Practices).

Defendant filed an Answer to Plaintiff's SAC on August 2, 2019.

Thereafter, the court granted Plaintiff's motion to certify the class.

The parties reached a settlement. Turner and Rocquemore (collectively, "Plaintiffs") moved for preliminary approval of class action settlement.

On September 13, 2023, the court adopted its tentative ruling continuing the motion for preliminary approval of settlement to November 8, 2023. The court explained that there was a problem with the structure of the payment calculations and the parties needed to modify the settlement agreement to provide for two separate calculations and payments (i.e., one for class claims and one for the PAGA claim). The court also asked the parties to submit an amended class notice.

On October 25, 2023, Plaintiffs' counsel filed a supplemental declaration, which contained the parties' Second Amendment to Class Action Settlement Agreement ("Second Settlement Amendment") and an amended class notice.

On November 8, 2023, the court granted preliminary approval of the settlement and approved the amended class notice. The court entered a formal order memorializing its decision on November 14, 2023. Plaintiff filed a Notice of Entry of Order Granting Plaintiffs' Amended Motion for Preliminary Approval of Class Action Settlement on November 27, 2023.

Now before the court is Plaintiffs' motion for final 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

> The case has been settled on behalf of the following class:
> [A]ll current and former hourly-paid or non-exempt individuals who were employed by Defendant within the State of in California at any time during the Class Period.

The Class Period is defined as the period of time from June 11, 2011 to the date of preliminary approval of the settlement.

As discussed in connection with preliminary approval, Defendants will pay a gross, non-reversionary amount of $1,050,000. The gross settlement amount includes attorney fees of $350,000 (1/3 of the gross settlement amount), actual litigation costs, a total service award of $30,000 ($15,000 for each class representative), a PAGA Payment of $50,000 (75 percent of which is to be paid to the LWDA and the remaining 25 percent is to be distributed to PAGA group members), and settlement administration costs not to exceed $100,000.

The net settlement amount will be distributed to the participating class members on a pro rata basis based on the number of workweeks worked during the Class Period. Participating class members have 180 days from the date of mailing to cash their checks; if the total amount of uncashed checks equals or exceeds $100,000, the funds will be redistributed using the same formula for the initial distribution; if the total amount of uncashed checks is less than $100,000, the funds will be paid to California Rural Legal Assistance.

In exchange for the settlement, class members agree to release Defendant, and related entities and persons, from all claims that were or could have been asserted based on the facts alleged in the SAC by Plaintiffs. Additionally, class members employed during the PAGA Period (defined as the period between January 21, 2015 through the date of preliminary approval of the settlement) agree to release Defendant, and related entities and persons, from

all claims arising under PAGA during the PAGA Period that were or could have been asserted based on the facts alleged in the SAC by Plaintiffs. Plaintiffs further agree to a general release.

The settlement administrator declares that it initially received a data file from Defendant with contact and employment information for 3,371 class members. (Declaration of Bryn Bridley on Notice Dissemination and Settlement Administration ("Bridley Dec."), ¶ 4.) Subsequently, the settlement administrator received Rocquemore's information as well as information for two additional employees. (*Ibid.*) The settlement administrator states that the final class list included 3,374 class members. (*Ibid.*)

On December 22, 2023, the settlement administrator mailed notice packets to 3,372 class members. (Bridley Dec., ¶ 6.) Ultimately, 262 notice packets were deemed undeliverable. (*Id.* at ¶ 7.) There were no objections and one request for exclusion from Christopher Wong. (*Id.* at ¶¶ 10-11.) The estimated average settlement share amount is $154.21 and the estimated median settlement share amount is $75.44. (*Id.* at ¶ 14.)

The court has concerns regarding the adequacy of the notice. Plaintiff previously advised the court in connection with the motion for preliminary approval of settlement that there were approximately 3,825 class members. But the settlement administrator states that the final class list included 3,374 class members. Plaintiff does not explain this discrepancy; rather, Plaintiff simply states that the final tally is lower. It is unclear whether there are only 3,374 class members, whether additional class members were omitted from the class list, and why number of class members in the final class list is significantly lower than the parties' prior estimate. Additionally, the settlement administrator states that notice packets were only mailed to 3,372 class members. Thus, even assuming that there are only 3,374 members in the class, it appears that at least 2 class members did not receive notice packets. Plaintiff is directed to provide a supplemental declaration regarding this issue and clarifying why notice packets were only mailed to 3,372 class members.

Plaintiffs request a total service award of $30,000 ($15,000 for each class representative). Plaintiffs submitted declarations in support of the request, detailing their participation in the action. Turner declares that he spent approximately 80 hours in connection with this lawsuit, including discussing the case with class counsel, gathering information and

documents, providing information and documents to class counsel, reviewing pleadings, participating in a full-day deposition, responding to discovery requests, assisting class counsel with preparation for mediation, and reviewing settlement documents. (Declaration of Plaintiff Adrian Turner in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, ¶¶ 6, 9-14.) Rocquemore declares that she spent approximately 70-80 hours in connection with this lawsuit, including discussing the case with class counsel, gathering information and documents, providing information and documents to class counsel, reviewing pleadings, participating in a full-day deposition, responding to discovery requests, assisting class counsel with preparation for mediation, and reviewing settlement documents. (Declaration of Plaintiff Mykale Rocquemore in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, ¶¶ 6, 9-14.)

Moreover, Plaintiffs undertook risk by putting their names on the case because it might impact their future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].)

However, the requested service awards of $15,000 to each class representative are excessive. The average payment to each class member is approximately $154.21. Consequently, each sought-after service award would amount to more than 64 times the estimated average payout. Additionally, the amount requested is higher than the court typically awards for the amount of Plaintiffs time spent in connection with this action (i.e., approximately 80 hours of work). In light of the foregoing, the court finds that a total service award in the amount of $20,000 ($10,000 for each class representative) is reasonable and it approves the award in that lesser amount.

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 seeks attorney fees of $350,000 (1/3 of the gross settlement fund). Plaintiffs' counsel submits evidence demonstrating a total combined lodestar of $1,343,931, based on 1,639.7 hours of attorney and staff time. (Declaration of Carolyn H. Cottrell in Support of Plaintiffs' Motion for

Final Approval of Class Action Settlement ("Cottrell Dec."), , ¶¶ 95-98.) This results in a negative multiplier. The court finds the attorney fees are reasonable as a percentage of the common fund and they are approved.

Plaintiffs' counsel requests litigation costs in the amount of $112,256.78. Plaintiff's counsel provides evidence of incurred costs in that amount and the costs are approved. (Cottrell Dec., ¶¶ 104-108.) The settlement administration costs are also approved in the amount of $39,898. (Bridely Dec., ¶ 16.)

Accordingly, the motion for final approval of the class action settlement is CONTINUED to July 3, 2024, at 1:30 p.m. in Department 19. Plaintiff shall file a supplemental declaration with the additional information requested by the court no later than June 17, 2024. No additional filings are permitted.

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

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Calendar Line 2

Case Name: Alvarez-King v. Bill Brown Construction Company (Class Action/PAGA)
Case No.: 21CV386656

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on May 15, 2024, at 9:00 a.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class and representative action arising out of various alleged wage and hour violations. The operative First Amended Class and Representative Action Complaint ("FAC"), filed on December 14, 2021, sets forth causes of action for: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Compensation; (3) Failure to Provide Meal Periods; (4) Failure to Authorize and Permit Rest Breaks; (5) Failure to Indemnify Necessary Business Expenses; (6) Failure to Timely Pay Final Wages at Termination; (7) Failure to Provide Accurate Itemized Wage Statements; (8) Unfair Business Practices; and (8) Civil Penalties Under PAGA.

The parties have reached a settlement. Plaintiff Joshua Alvarez-King ("Plaintiff") moved for preliminary approval of the settlement.

On September 13, 2023, the court adopted its tentative ruling continuing the motion for preliminary approval of settlement to November 8, 2023. The court requested the parties identify a new *cy pres* recipient in compliance with Code of Civil Procedure section 384. The court further explained that the release of claims by PAGA Members was unclear because the terms "Released PAGA Claims" and "Released PAGA Period" were not defined in the settlement agreement. The court directed the parties to meet and confer regarding the amended of the settlement agreement to clarify the PAGA release. Lastly, the court asked the parties to make several changes to the class notice.

On October 27, 2023, Plaintiff's counsel filed a supplemental declaration, which contains the First Amended Joint Stipulation of Class Action and PAGA Action Settlement and Release ("Amended Settlement Agreement") and an amended class notice.

On November 8, 2023, the court granted the motion for preliminary approval of the settlement subject to approval of the second amended class notice.

On November 20, 2023, the court entered a formal order granting preliminary approval of the settlement and approving the amended class notice.

Now before the court is the motion by Plaintiff for final 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

> The case has been settled on behalf of the following class:
> [A]ll persons who worked for Defendant [Bill Brown Construction Company ("Defendant")] in California as an hourly paid, non-exempt employee at any time between September 13, 2017 to August 8, 2023.

The class also contains a subset of PAGA Members that are defined as "all persons who worked for Defendant in California as an hourly paid, non-exempt employee at any time between September 13, 2020 to August 8, 2023."

According to the terms of settlement, Defendants will pay a gross, non-reversionary settlement amount of $600,000. The gross settlement amount includes attorney fees of $199,980 (33 1/3 percent of the gross settlement amount), litigation costs not to exceed $25,000, a service award for the class representative not to exceed $10,000, settlement administration costs (estimated to be $7,950), and a PAGA allocation of $50,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Members).

The net settlement amount will be distributed to the class members on a pro rata basis based on the number of workweeks worked during the Class Period. Similarly, PAGA Members will receive a pro rata share of the 25 percent portion of the PAGA payment allocated to them based on the number of workweeks worked during the PAGA Period.

The settlement agreement originally provided that checks remaining uncashed more than 180 days after mailing would be void and the funds from those checks would be distributed to the Unclaimed Property Fund of the State Controller's Office. The parties subsequently executed an Amended Settlement Agreement, identifying Legal Aid at work as the *cy pres* recipient. The court approved the *cy pres* recipient.

In exchange for the settlement, class members agree to release Defendant, and related entities and persons, from all claims, rights, demands, liabilities, and causes of action that were or could have been pleaded based on, arising from, or related to the factual allegations set forth in the FAC and Plaintiff's notice to the LWDA. PAGA group members agree to release,

Defendant, and related entities and persons, from PAGA claims that were alleged, or could have been alleged, based on the facts alleged in this action. Plaintiff further agrees to a general release.

On January 31, 2024, the settlement administrator mailed notices to 187 class members. (Declaration of Lluvia Islas in Support of Plaintiff's Motion for Final Approval of Class and PAGA Action Settlement ("Islas Dec."), ¶¶ 3-5.) Ultimately, 5 notices were deemed undeliverable. (*Id.* at ¶¶ 6-7.) There were no objections or requests for exclusion. (*Id.* at ¶¶ 8-9.)

The settlement administrator declares that that the total number of workweeks exceeded 17,600 such that the escalator clause, which is set forth in paragraph 34 of the settlement agreement, was triggered. (Islas Dec., ¶ 11; Declaration of Kane Moon in Support of Plaintiff's Motion for Final Approval of Class and PAGA Action Settlement ("Moon Dec."), Ex. 1, ¶ 34.) The settlement administrator states that "Defendant decided to cut off the Class Period on May 2, 2021." (Islas Dec., ¶ 11.) The settlement administrator also states that the 187 class members worked a total of 17,528.71 workweeks during the class period. (*Id.* at ¶ 13.)

The highest individual settlement share to be paid is approximately $3,420.75, the lowest individual settlement share to be paid is approximately $12.89, and the average individual settlement share to be paid is approximately $1,691.44. (Islas Dec., ¶ 13.)

The court has concerns regarding the adequacy of the notice and the manner in which the parties' have applied the escalator clause. Plaintiff previously advised the court in connection with the motion for preliminary approval of settlement that there were approximately 212 class members who worked a total of 16,000 workweeks as of the date of mediation (i.e., 6/8/23). However, the settlement administrator now states that notice packets were only mailed to 187 class members. Additionally, the settlement administrator represents that Defendant has elected to cutoff the Class Period as of May 2, 2021, pursuant to the terms of the escalator clause, and the 187 class members worked a total of 17,528.71 workweeks during the Class Period.

It is unclear to the court how the parties determined that a Class Period end date of May 2, 2021 was appropriate. The escalator clause provides that Defendant "has the unilateral right to … cut-off the Class Period to end on the date that total workweeks reaches 17,600." (Moon Dec., Ex. 1, ¶ 34.) Accordingly to the settlement administrator, the total work weeks as of May 2, 2021 are 17,528.71, not 17,600 as required by the settlement agreement. Notably, Plaintiff does not address this discrepancy in his moving papers and there is no statement from Defendant regarding its purported decision to change the Class Period end date. The parties must submit supplemental declarations addressing this issue.

Furthermore, the court is concerned that the parties previously represented that there were 212 class members who worked a total of 16,000 workweeks as of the date of mediation (i.e., 6/8/23), but they are now representing that the class size and Class Period must be significantly reduced as 187 class members worked 17,528.71 workweeks as of May 2, 2021. The parties must submit a supplemental declaration addressing why their prior estimate differs so substantially from the numbers that are now being provided to the court.

Plaintiff requests an incentive award of $10,000 for the class representative. In connection with preliminary approval, Plaintiff submitted a declaration detailing his participation in the action and the court approved the incentive award. The court continues to approve the incentive award for purposes of 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 seeks attorney fees of $199,980 (33 1/3 percent of the gross settlement amount). Plaintiff's counsel provides evidence demonstrating a total lodestar of $111,872.50, based on 200.47 hours of work by attorneys billing an hourly rate of $325 to $750. (Moon Dec."), ¶ 42.) This results in a multiplier of 1.78. The court finds the attorney fees are reasonable as a percentage of the common fund and they are approved.

Plaintiff's counsel also requests costs in the amount of $15,770.60. Plaintiff's counsel provides evidence of incurred costs in that amount and the costs are approved. (Moon Dec.,

¶ 42.) The settlement administration costs are also approved in the amount of $7,950. (Islas Dec., ¶ 15 & Ex. B.)

Accordingly, the motion for final approval of the class action settlement is CONTINUED to July 3, 2024, at 1:30 p.m. in Department 19. The parties, both Plaintiff and Defendant, are ordered to file supplemental declarations addressing the issues identified by the court no later than June 17, 2024. No additional filings are permitted.

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: Andrews, et al. v. Fortinet, Inc. (Class Action/PAGA)
Case No.: 23CV410792

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on May 15, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

IV. INTRODUCTION

This class and representative action arises out of various alleged wage and hour violations. As is relevant here, plaintiff Lauren Andrews ("Lauren") filed her original Class Action Complaint ("Complaint") against defendant Fortinet, Inc. ("Defendant") on February 3, 2023.[1] The Complaint alleged class claims for violations of the Labor Code and the Unfair Competition Law ("UCL").

On February 27, 2023, plaintiff Lucas Andrews ("Lucas") filed a First Amended Complaint ("FAC") in this action, which alleged class claims for violations of the Labor Code and the UCL.[2]

On September 26, 2023, Lauren and Lucas (collectively, "Plaintiffs") filed a Second Amended Class and PAGA Action Complaint ("SAC"), which sets forth the following causes of action: (1) Failure to Pay All Minimum Wages; (2) Failure to Pay all Overtime Wages; (3) Meal Period Violations; (4) Rest Period Violations; (5) Failure to Pay All Sick Time; (6) Wage Statement Violations; (7) Waiting Time Penalties; (8) Failure to Reimburse Necessary Business Expenses; (9) Unfair Competition; and (10) PAGA Penalties.

The parties have reached a settlement.

Now before the court is Plaintiffs' motion for preliminary approval of the class and representative action settlement. The motion is unopposed.

V. 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

[1] At times, the court refers to the parties by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

[2] For reasons that are unclear to the court, Lauren was not named as a plaintiff in the FAC.

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.)

VI. DISCUSSION

A. Provisions of the Settlement

> This case has been settled on behalf of the following class:
> [A]ll persons who are or were previously employed by Defendant in California classified as a non-exempt employee during the Class Period.

(Declaration of Mehrdad Bokhour in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Bokhour Dec."), Ex. A ("Settlement Agreement"), ¶¶ 38, 39.) The

Class Period is defined as the period from February 3, 2019 through February 28, 2024. (Settlement Agreement, ¶ 7.) The class also includes a subset of aggrieved employees, who are defined as "all persons who are or were previously employed by Defendant in California classified as a non-exempt or hourly employee at any time from February 3, 2022 through February 28, 2024." (Settlement Agreement, ¶ 2.)

According to the terms of settlement, Defendant will pay a maximum, non-reversionary settlement amount of $2,026,613. (Settlement Agreement, ¶¶ 48, 49.) The gross settlement amount includes attorney fees up to $675,537.66 (1/3 of the gross settlement amount), litigation costs not to exceed $20,000, a PAGA allocation of $25,000 (75 percent to be paid to the LWDA and the remaining 25 percent to be paid to aggrieved employees), enhancement awards in the total amount of $20,000 (up to $10,000 for each class representative), and settlement administration costs not to exceed $8,000. (Settlement Agreement, ¶ 48.)

The settlement agreement states that the net settlement amount will be distributed to participating class members pro rata basis. (Settlement Agreement, ¶ 48.) Similarly, all aggrieved employees will receive a pro rata share of the 25 percent portion of the PAGA allocation. (*Ibid.*)

Class members have 180 days after mailing to cash their checks and any uncashed checks will be deemed void and those funds will be distributed to the Interdisciplinary Center for Healthy Workplaces at the University of California, Berkeley. (Settlement Agreement, ¶ 74.) The *cy pres* recipient is approved.

In exchange for the settlement payments, class members agree to release Defendant, and related persons and entities, from "the Released Class Claims for the Class Release Period." (Settlement Agreement, ¶¶ 31, 32, 51.) The "Released Class Claims" are defined as:

> all claims that were alleged, or reasonably could have been alleged, based on the facts stated in the Complaint, including claims for (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal periods or pay a premium in lieu thereof; (4) failure to authorize and permit rest periods or pay a premium in lieu thereof; (5) failure to timely pay final wages at the time of termination/end of employment; (6) failure to furnish accurate itemized wage statements; (7) failure to reimburse employees for business expenses; (8) unfair business practices; (9) failure to pay sick pay wages; and, (10) claims for statutory penalties for violation of California Labor Code sections 201-204, 210, 218.5, 218.6, 221, 226, 226.3, 226.7, 227.3, 246, 510, 512, 516, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 1199, and 2802-2804, Civil Code sections 3287 and 3289, and unfair and unlawful business practices.

(Settlement Agreement, ¶ 4.)

> The settlement agreement further provides that
> Plaintiffs and Defendant intend that the Settlement described in this Agreement will release and preclude any further claim, whether by lawsuit, administrative claim or action, arbitration, demand, or other action of any kind, by each and all of the Participating Class Members to obtain a recovery based on, arising out of, and/or related to any and all of the Released Class Claims.

(Settlement Agreement, ¶ 55.)

Additionally, in exchange for the settlement payments, aggrieved employees agree to release Defendant, and related persons and entities, from "the Released PAGA Claims for the PAGA Release Period." (Settlement Agreement, ¶¶ 31, 32, 53.) The "Released PAGA Claims" are defined as:

> all claims for PAGA penalties that were alleged, or reasonably could have been alleged during the PAGA Period, based on the facts stated in the Complaint and the PAGA Notice including claims for: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal periods or pay a premium in lieu thereof; (4) failure to authorize and permit rest periods or pay a premium in lieu thereof; (5) failure to timely pay final wages at the time of termination/end of employment; (6) failure to furnish accurate itemized wage statements; (7) failure to reimburse employees for business expenses; (8) unfair business practices; (9) failure to pay sick pay wages; (10) claims for penalties under the Private Attorneys General Act for violation of California Labor Code sections 201-204, 210, 218.5, 218.6, 221, 226, 226.3, 226.7, 227.3, 246, 510, 512, 516, 558, 1174, 1174.5, 1194, 1194.2, 1197, 1197.1, 1198, 1199, Civil Code sections 3287 and 3289, and 2802-2804, 2698, et seq.

(Settlement Agreement, ¶ 23.)

> The settlement agreement further provides that
> Plaintiffs and Defendant intend that the Settlement described in this Agreement will release and preclude any further claim, whether by lawsuit, administrative claim or action, arbitration, demand, or other action of any kind, by each and all of the Aggrieved Employees and the LWDA to obtain a recovery based on, arising out of, and/or related to any and all of the Released PAGA Claims. The Aggrieved Employees and the LWDA shall be notified in the Notice.

(Settlement Agreement, ¶ 56.)

Plaintiffs also agree to a general release. (Settlement Agreement, ¶¶ 58, 59.)

B. Fairness of the Settlement

Plaintiffs state that the settlement was reached through discovery, analysis, and mediation with the Mark Feder, Esq. (Bokhour Dec., ¶¶ 6, 14, 15, 17.) Plaintiffs' counsel conducted informal discovery, which included a sampling of payroll and time records, Defendant's written policies and procedures, and interviews with putative class members. (*Id.*

at ¶¶ 14, 15.) From the information provided, Plaintiffs determined that there were approximately 524 class members who worked 53,419 workweeks. (*Id.* at ¶ 10.) Plaintiffs estimate that Defendant's maximum potential liability for the all claims is approximately $7,796,912. (*Id.* at ¶¶ 27-43.) Plaintiffs provide a breakdown of this amount by claim. (*Ibid.*) Plaintiffs 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 average payment to class members will be approximately $2,440. (*Id.* at ¶ 10.)

The gross settlement amount represents approximately 25.9 percent of the potential maximum recovery. The proposed settlement amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D.Ca|. 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].)

However, upon review of the settlement, the court has concerns regarding the scope of the releases. In paragraphs 4, 31, 32, and 51 of the settlement agreement, class members agree to release Defendant, and related persons and entities, from claims that were alleged, or reasonably could have been alleged, based on the facts of the operative complaint. Similarly, in paragraphs 23, 31, 32, and 53 of the settlement agreement, aggrieved employees agree to release Defendant, and related persons and entities, from claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts of the operative complaint and the PAGA notice letter. These portions of the class release and PAGA release are reasonable.

However, paragraphs 55 and 56 of the settlement agreement render the class release and PAGA release overbroad. In those paragraphs, class members agree to release "any further claim … related to any and all of the Released Class Claims," and aggrieved employees agree to release "any further claim … related to any and all of the Released PAGA Claims." As drafted, these paragraphs extend the releases beyond claims that were alleged, or reasonably could have been alleged, based on the facts of the SAC and PAGA notice letter because they purport to encompass any further related claims. Such language impermissibly extends to

claims outside the scope of the operative complaint and potentially engulfs other employment claims, such as claims for discrimination or wrongful termination. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537 (*Amaro*) ["In a class action settlement, ' "[a] clause providing for the release of claims may refer to all claims, both potential and actual, that may have been raised in the pending action with respect to the matter in controversy." ' [Citation.] ' "[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." ' [Citation.] While these statements do not expressly address the limits of a class release, they contain an implicit boundary: a court cannot release claims that are outside the scope of the allegations of the complaint. This reading of *Villacres* is bolstered by the fact that it relied heavily on federal law. Nearly all federal circuits have found that '[a] settlement agreement may preclude a party from bringing a related claim in the future … only where the released claim is "based on the identical factual predicate as that underlying the claims in the settled class action." ' [Citations.] ' "Put another way, a release of claims that 'go beyond the scope of the allegations in the operative complaint' is impermissible." ' [Citation.]"].)

Furthermore, any claims released by aggrieved employees must be limited to all PAGA claims that could have been pled based on the facts alleged in the SAC or the PAGA notice letter. (See *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 79-86; see also *Amaro, supra,* 69 Cal.App.5th at pp. 541-543.) Paragraph 56, as drafted, could potentially be interpreted as a release of aggrieved employees' individual claims.

Prior to the continued hearing, the parties shall meet and confer regarding whether they can amend the terms of the releases to cure the overbreadth issue. Plaintiffs shall then file a supplemental declaration discussing the results of the parties' efforts and, if appropriate, attaching an amended settlement agreement.

The court otherwise 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 for each class representative).

> 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.)

The court notes that the amounts sought for the enhancement awards are higher than the court typically awards in these types of cases. Plaintiffs have provided declarations in support of their request, but do not provide an estimate of the time they spent in connection with this action. Prior to the final approval hearing, Plaintiffs shall file declarations specifically describing their participation in the action as well as an estimate of time spent.

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 $675,537.66 (1/3 of the gross settlement amount) and litigation costs not to exceed $20,000. 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

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 524 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 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. (Bokhour Dec., Ex. B.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion.

However, to the extent the parties modify the language of the class release and PAGA release, the notice must be updated to reflect any new or different terms.

Additionally, the notice shall be modified to include the following language regarding the final approval hearing:

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

The amended notice shall be provided to the court for approval prior to the continued hearing date.

VII. CONCLUSION

The motion for preliminary approval of the class and representative action settlement is CONTINUED to July 3, 2024, at 1:30 p.m. in Department 19. Plaintiffs shall file a supplemental declaration with the additional information requested by the court no later than June 17, 2024. No additional filings are permitted.

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: Magat v. HRB Resources LLC, et al.
Case No.: 21CV388049

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on May 15, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VIII. INTRODUCTION

This is a representative action arising out of various alleged wage and hour violations. The operative Complaint, filed on October 12, 2021, sets forth a single cause of action for Civil Penalties Under the Private Attorneys General Act (Labor Code §§ 2698, et seq.) ("PAGA").

On June 22, 2022, the parties submitted a Joint Stipulation to Submit Plaintiff's Individual PAGA Claim to Arbitration and Dismiss Without Prejudice Plaintiff's Non-Individual PAGA Claims; Proposed Order, which stated that "pursuant to the United States Supreme Court's recent decision in *Viking River Cruises, Inc. v. Moriana,* 596 U.S. __ (2022), the Parties have agreed that Plaintiff's individual PAGA claim should be submitted to arbitration, and Plaintiff's remaining, non-individual PAGA claims dismissed without prejudice."

Despite the request that the representative PAGA claims be dismissed without prejudice, the court (Hon. Patricia M. Lucas) stayed the representative PAGA claims in the Joint Stipulation to Submit Plaintiff's Individual PAGA Claim to Arbitration and Dismiss Without Prejudice Plaintiff's Non-Individual PAGA Claims; Order entered on June 27, 2022.

Now before the court is the motion by plaintiff Laura Soriano Giron Magat ("Plaintiff") to lift the stay on the representative PAGA claims.[3] Defendants HRB Resources LLC and H&R Block Enterprises LLC (collectively, "Defendants") oppose the motion.

IX. LEGAL STANDARD

Every California court has the inherent and statutory authority to provide for the orderly conduct of proceedings before it and to control its process and orders so as to make them conform to law and justice. (Code Civ. Proc., § 128, subds. (a)(3), (a)(8).)

[3] This matter was originally set for hearing on February 14, 2024, but was continued to May 15, 2024, to allow the parties to complete mediation.

X. DISCUSSION

Plaintiff argues the court should exercise its inherent authority to lift the stay on her representative PAGA claims because her representative PAGA claims are much narrower than her individual claims, which include claims for discrimination, harassment, and wrongful termination. Plaintiff further argues that continuing the stay would frustrate the purposes of PAGA.

The court is not persuaded by Plaintiff's arguments. Here, the court (Hon. Patricia M. Lucas) exercised its discretion to stay Plaintiff's representative PAGA claims in accordance with *Adolph v. Uber Technologies, Inc*. (2023) 14 Cal.5th 1104 (*Adolph*). (See *Adolph, supra,* 14 Cal.5th at p. 1123 [when a court has ordered a matter to arbitration, the court has discretion pursuant to section 1281.4 of the Code of Civil Procedure to stay the remaining claims pending the outcome of the arbitration].) As Defendants point out, a stay of representative PAGA claims under the circumstances presented here is practical—if the arbitrator determines that Plaintiff did not suffer any of the alleged wage and violations (i.e., determines that Plaintiff is not an aggrieved employee) and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding, and Plaintiff could no longer prosecute her representative PAGA claims due to lack of standing. (See *Adolph, supra,* 14 Cal.5th at p. 1124, citing *Rocha v. U-Haul Co. of California* (2023) 88 Cal.App.5th 65, 76–82 [the reviewing court concluded the arbitrator's finding that the plaintiffs did not suffer a section 1102.5 violation as alleged in the operative complaint precluded them from qualifying as "aggrieved employees" based on that same alleged violation].) Consequently, allowing the arbitration to proceed first promotes judicial economy and efficiency. Furthermore, proceeding with both the arbitration of Plaintiff's individual claims and the prosecution of her representative claims simultaneously could result in inconsistent judgments. The fact that Plaintiff has alleged additional claims in her arbitration (e.g., discrimination) does not undermine any of the foregoing conclusions. And Plaintiff has not demonstrated that she, or the other aggrieved employees, have or will suffer any prejudice as a result of the stay.

Accordingly, Plaintiff's motion to lift stay is DENIED.

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

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Calendar Line 5

Case Name: Geierman v. Grocery Delivery E-Services USA, Inc., et al. (Class Action)
Case No.: 20CV361771

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on May 15, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XI. INTRODUCTION

This is a class and representative action arising out of alleged violations of the Fair Credit Reporting Act ("FCRA") and the Labor Code. Plaintiff Jennifer Geierman ("Plaintiff") filed the operative First Amended Complaint ("FAC") against defendants Grocery Delivery E-Services USA, Inc. and Insperity Business Services, L.P. on March 18, 2020. The FAC sets forth the following causes of action: (1) Violation of 15 U.S.C. §§ 1681b(b)(2)(A) (FCRA); (2) Violation of 15 U.S.C. §§ 1681d(a)(1) and 1681g(c) (FCRA); (3) Failure to Provide Meal Periods (Lab. Code §§ 204, 223, 226.7, 512 and 1198); (4) Failure to Provide Rest Periods (Lab. Code §§ 204, 223, 226.7 and 1198); (5) Failure to Pay Hourly Wages (Lab. Code §§ 223, 510, 1194, 1194.2, 1197, 1997.1 and 1198); (6) Failure to Indemnify (Lab. Code § 2802); (7) Failure to Provide Accurate Written Wage Statements (Lab. Code § 226(a)); (8) Failure to Timely Pay All Final Wages (Lab. Code §§ 201, 202 and 203); (9) Unfair Competition (Bus. & Prof. Code §§ 17200 et seq.); and (10) Civil Penalties (Lab. Code §§ 2698 et seq.).

Plaintiff advised the court that the parties had reached a settlement and she moved for an order preliminarily approving the settlement. The motion was unopposed.

On December 21, 2022, the court (Hon. Patricia M. Lucas) denied the motion for preliminary approval of settlement without prejudice. The court explained that the proposed settlement agreement suffered from numerous deficiencies which prevented approval at that time. The court indicated that when there was a new agreement correcting the noted deficiencies, another motion for preliminary approval could be made.

Subsequently, Plaintiff moved for preliminary approval of an amended settlement agreement. The motion was unopposed.

On March 6, 2024, the court continued the motion for preliminary approval of the amended settlement. The court noted that the settlement agreement did not clearly identify the *cy pres* recipient. The court directed the parties to amend the settlement agreement to correct the issue. The court also requested the parties make several changes to the class notice.

On April 15, 2024, Plaintiff's counsel filed a supplemental declaration in support of the motion.

Now before the court is Plaintiff's motion for approval of the amended settlement.

XII. 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.)

XIII. DISCUSSION

A. Provisions of the Settlement

The Amended Joint Stipulation of Class Action Settlement and Release ("Amended Settlement Agreement") is entered into between Plaintiff, on behalf of herself and all others similarly situated, and "Defendants Grocery Delivery E-Services USA, Inc. and Insperity PEO Services, L.P.," who are defined collectively as "Defendants" in the Settlement Agreement. (Declaration of Shaun Setareh in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class ("Setareh Dec."), ¶ 12 & Ex. 1 ("Amended Settlement Agreement"), pp. 3:1-5 & 4:4-9, & ¶ VI.1.43.) The parties represent that Insperity PEO Services, L.P. was erroneously sued as Insperity Business Services, L.P. in the FAC.

The Settlement Agreement provides that the case has been settled on behalf of the following class:

> (1) any individual who applied for employment with Defendant Grocery Delivery E-Service USA, Inc. and had a background check performed in connection with their employment during the FCRA Class Period ("FCRA Class") or (2) any individual who worked for Defendant Grocery Delivery E-Service USA, Inc. in California as a Brand Ambassador during the Hourly Employee Class Period ("Brand Ambassador Class") or (3) non-exempt hourly employees who worked [for] Defendant Grocery Delivery E-Service USA, Inc. in California and who signed arbitration agreements during the Hourly Employee Class Period ("Hourly Employee Class").

(Amended Settlement Agreement, ¶ VI.1.7.) The "FCRA Class Period" means January 13, 2015 through October 29, 2020. (Amended Settlement Agreement, ¶ VI.1.11.) The "Hourly Employee Class Period" means January 13, 2016 through the date of preliminary approval. (Amended Settlement Agreement, ¶ VI.1.12.)

The class also includes a subset of "Aggrieved Employees" who are defined as "any person who was employed by Defendant Grocery Delivery E-Service USA from January 13, 2019 through the Preliminary Approval Date (the 'PAGA Period'), and shall specifically include any hourly-paid or non-exempt employees who worked for Defendant Grocery

Delivery E-Service USA in California during this period, including Aggrieved Employees who have not previously release[d] PAGA claims in the settlement of *Avila Davis v. Grocery E-Services USA Inc., et al.,* Case No. C18-02253, filed on November 6, 2018 in the Superior Court of California, County of Contra Costa, which is estimated to be 1,013 individuals through November 8, 2021." (Amended Settlement Agreement, ¶ VI.1.2.)

According to the terms of Settlement Agreement, Grocery Delivery E-Services USA, Inc. and Insperity PEO Services, L.P will pay a non-revisionary gross settlement amount of $945,391.45. (Amended Settlement Agreement, ¶¶ VI.1.1.9, VI.1.19, VI.2.1.1, VI.2.1.4.) The gross settlement amount includes attorney fees up to $315,130.48 (1/3 of the gross settlement amount), litigation costs of up to $20,000, PAGA penalties in the amount of $10,000 (75 percent of which will be distributed to the LWDA and 25 percent of which will be distributed to Aggrieved Employees), settlement administration costs not to exceed $40,000, and a service award to Plaintiff of $7,500. (Amended Settlement Agreement, ¶¶ VI.1.1.9, VI.1.1.19, VI.1.1.34, VI.2.1.1, VI.2.1.4.)

The net settlement will be allocated as follows: 70 percent to the FCRA Class; 20 percent to the Brand Ambassador Class; and 10 percent to the Hourly Employee Class. (Amended Settlement Agreement, ¶ VI.1.1.20.)

The Amended Settlement Agreement originally stated that checks remaining uncashed more than 180 days after mailing would be void and the funds from those checks would be sent to the Alliance for Children's Rights. (Amended Settlement Agreement, ¶ VI.3.2.8.) The Amended Settlement Agreement also stated that checks remaining uncashed more than 180 days after mailing would be void and the funds from those checks would be sent to Legal Aid at Work. (Amended Settlement Agreement, ¶ VI.2.1.9.) The court asked the parties to amend the settlement agreement to fix this discrepancy.

Plaintiff's counsel has now filed a supplemental declaration stating that the parties executed an Amendment to the Joint Stipulation of Class Action Settlement. (Supplemental Declaration of Shaun Setareh in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("Supp. Setareh Dec."), ¶ 3 & Ex. 1.) The amendment clarifies that

the *cy pres* recipient is Alliance for Children's Rights. (*Ibid.*) The court approves the *cy pres* recipient.

In exchange for the settlement, class members agree to release Grocery Delivery E-Services USA, Inc. and Insperity PEO Services, L.P, and related entities and persons, from:

> claims that reasonably arise out of the same set of operative facts plead in the Complaint and First Amended Complaint in the Action, or that were reasonably related to the allegations in the Complaint and First Amended Complaint in the Action with respect to the alleged violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 et seq. that accrued during the FCRA Class Period; wage and hour claims that were brought in this Action, including but not limited to allegations that Defendants misclassified hourly non-exempt employees as exempt, failed to provide employees with lawful meal periods, failed to provide employees with lawful rest periods, failed to pay premium wages when non-exempt employees were not provided with lawful meal and/or rest periods, failed to pay minimum and/or overtime wages, failed to reimburse employees for all necessary business expenses in violation of the Labor Code, including but not limited to sections, 201, 202, 204, 223, 226.7, 510, 512, 1194, 1194.2, 1197, 1197.1, 1198, 2802 and Business and Professions Code section 17200 et seq.; for derivative claims for inaccurate wage statements and waiting time penalties under Labor Code sections 203 and 226, that accrued during the Hourly Employee Class Period, and civil penalties under the Labor Code Private Attorneys General Act (Labor Code section §§ 2698 et seq.), that accrued during the applicable Period.

(Amended Settlement Agreement, ¶¶ VI.1.5, VI.1.40.)

B. Fairness of the Settlement

Plaintiff asserts that the settlement is fair, reasonable, and adequate, given the strength of Plaintiff's claims, the inherent risks of litigation, and the costs of pursuing litigation. Plaintiff states that the parties engaged in informal discovery, which included the disclosure of the relevant FCRA forms, sample arbitration agreements, applicable employee handbooks and policies, Plaintiff's personal file, Plaintiff's payroll records, a sampling of class members time records, and information regarding the size of each class and the number of weeks worked by the Brand Ambassador and Hourly Employee classes. (Setareh Dec., ¶ 6.) Plaintiff then hired an expert to analysis this data with respect to potential damages and penalties. Subsequently, the parties attended mediation with Steven J. Rottman, Esq. and later settled the matter. (*Id.* at ¶ 7.) Plaintiff estimates that Defendants faced a maximum potential liability of $5,570,747 for all claims. (*Id.* at ¶ 8.) Plaintiff provides a detailed breakdown of this amount by claim. (*Ibid.*) Plaintiff estimates that the net recovery is $552,760.97 with an average estimated individual settlement payment to each FCRA Class Member of $39.08, to each Brand

Ambassador Class Member of $678.23, and to each Hourly Employee Class Member of $46.14.

The settlement represents approximately 16.9 percent of the maximum potential value of Plaintiff's claims. 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.Ca|. 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].)

Upon review, the court concludes that the Amended Settlement Agreement corrects the deficiencies noted in the court's prior order. Additionally, the court finds that the settlement is fair. It provides for a significant recovery and eliminates the risk and expense of continued litigation.

C. Incentive Award, Fees, and Costs

Plaintiff requests a service award in the amount of $7,500.

> 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.)

Prior to the final approval hearing, the class representative shall file a declaration specifically detailing her participation in the action and an estimate of time spent. The court will make a determination 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.) Plaintiff's counsel will seek attorney fees of $315,130.48 (1/3 of the gross settlement amount). 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.

D. Conditional Certification of Class

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.)

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

Here, Plaintiff states that the FCRA Class is made up of 9,901 individuals, the Brand Ambassador Class is made up of 163 individuals, and the Hourly Employee Class is made up of 1,198 individuals. Plaintiff asserts that the class members can be ascertained from Defendants' records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. In sum, the court finds that the proposed classes 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).)

Plaintiff's counsel has now filed a supplemental declaration with an amended class notice. (Supp. Setareh Dec., Ex. 2.) The amended notice generally complies with the requirements for class notice. (*Ibid*.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion.

Additionally, the parties have made the changes requested by the court in its prior order. Specifically, Section 11 of the class notice accurately reflects the language of the release of claims. Section 12 of the notice now states that class members may object in writing to the settlement. Lastly, Section 17 contains the requisite language regarding the final fairness hearing. Consequently, the court approves the amended class notice.

IV. CONCLUSION

Accordingly, the motion for preliminary approval of the amended settlement is GRANTED. The final fairness hearing is set for November 13, 2024, 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 6

Case Name: Sagemcom Broadband SAS v. DIVX, LLC, et al.
Case No.: 23CV424785

Unopposed application for admission pro hac vice is GRANTED. No appearance necessary. Court will sign proposed order.

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Calendar Line 7

Case Name: Nguyen v. Naftoon, Inc. (Class Action/PAGA)
Case No.: 23CV423638

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on May 15, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XIV. INTRODUCTION

This is a putative class and representative action arising out of various alleged wage and hour violations. On September 25, 2023, plaintiff Bryan Nguyen ("Plaintiff") filed a Class Action Complaint ("Complaint") against defendant Naftoon, Inc. ("Defendant"), which alleged causes of action for: (1) Failure to Pay Minimum Wages [Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197]; (2) Failure to Pay Overtime Compensation [Cal. Lab. Code §§ 1194 and 1198]; (3) Failure to Provide Meal Periods [Cal. Lab. Code §§ 226.7 and 512]; (4) Failure to Authorize and Permit Rest Breaks [Cal. Lab. Code § 226.7]; (5) Failure to Indemnify Necessary Business Expenses [Cal. Lab. Code § 2802]; (6) Failure to Timely Pay Final Wages at Termination [Cal. Lab. Code §§ 201-203]; (7) Failure to Provide Accurate Itemized Wage Statements [Cal. Lab. Code § 226]; and (8) Unfair Business Practices [Cal. Bus. & Prof. Code §§ 17200, et seq.].

On November 20, 2023, Defendant filed the instant Petition to Compel Arbitration, Dismiss Class Claims, and Dismiss or Stay Proceedings ("Petition"). Two days later, Defendant filed a Notice of Errata, containing an amended declaration from Don Tena ("Tena").

On December 5, 2023, Plaintiff filed an opposition to the Petition.

On December 7, 2023, Plaintiff filed a First Amended Class Action and Representative Complaint ("FAC"), which sets forth the following causes of action: (1) Failure to Pay Minimum Wages [Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197]; (2) Failure to Pay Overtime Compensation [Cal. Lab. Code §§ 1194 and 1198]; (3) Failure to Provide Meal Periods [Cal. Lab. Code §§ 226.7 and 512]; (4) Failure to Authorize and Permit Rest Breaks [Cal. Lab. Code § 226.7]; (5) Failure to Indemnify Necessary Business Expenses [Cal. Lab.

Code § 2802]; (6) Failure to Timely Pay Final Wages at Termination [Cal. Lab. Code §§ 201-203]; (7) Failure to Provide Accurate Itemized Wage Statements [Cal. Lab. Code § 226]; (8) Unfair Business Practices [Cal. Bus. & Prof. Code §§ 17200, et seq.]; and (9) Civil Penalties Under PAGA [Cal. Lab. Code §§ 2699, et seq.].

On April 17, 2024, Defendant filed a reply in support of its Petition.

On April 24, 2024, the court continued the hearing on the Petition to May 15, 2024, to allow the parties to submit further briefing. Specifically, the court asked the parties to address: (1) what effect, if any, the filing of the FAC has on the Petition (e.g., does the filing of the FAC render the Petition moot); (2) what relief, if any, does the Petition seek with respect to the PAGA claim (e.g., is the scope of the notice of Petition broad enough to encompass any relief sought with respect to the PAGA claim); (3) what action(s) should the court take with respect to the PAGA claim; (4) why the terms of the arbitration agreement as quoted in their papers differ, in some respects, from the terms set forth in the signed copy of the arbitration agreement attached to the Petition as Exhibit A; (5) whether the terms as they appear the arbitration agreement attached to the Petition as Exhibit A are accurate and controlling here; and (6) what is the proper interpretation and effect of the terms as set forth in the arbitration agreement attached to the Petition as Exhibit A.

On May 3, 2024, the parties submitted supplemental briefing as requested by the court.

II. DISCUSSION

A. Procedural Issues

As an initial matter, Plaintiff objects to the Petition on several procedural grounds.

First, Plaintiff asserts that he did not receive adequate notice because the Petition, filed on November 20, 2023, did not include information regarding the date and time of the hearing. However, on December 6, 2023, Plaintiff filed an Amended Notice of Hearing on Petition to Compel Arbitration, Dismiss Class Claims, and Dismiss or Stay Proceedings ("Amended Notice"), which listed the original date and time of the hearing on this matter. Plaintiff fails to explain why the Amended Notice is inadequate.

Moreover, any defect in the notice of Petition is inconsequential. When a party opposes a motion on the ground of insufficient notice but otherwise addresses the merits and

does not claim any prejudice, the party waives any defect or irregularity. (*Carlton v. Quint* (2007) 77 Cal.App.4th 690, 697-698 (*Carlton*); *Altafulla v. Ervin* (2015) 238 Cal.App.4th 571, 577 (*Altafulla*).) Here, Plaintiff waived any defect in notice by opposing the merits of the Petition and not demonstrating any prejudice.

Second, Plaintiff maintains that he was not properly served with the Petition because the Petition was not personally served on him pursuant to Code of Civil Procedure section 1290.4, subdivision (b)(1). However, Defendant was not required to personally serve Plaintiff with the Petition. Code of Civil Procedure section 1290.4, subdivision (b)(1) governs service of petitions on persons who have "not previously appeared in the proceeding." As Plaintiff filed the Complaint, he had already appeared in the proceeding at the time the Petition was filed. Consequently, service of the Petition on Plaintiff was governed by Code of Civil Procedure section 1290.4, subdivision (c) and Plaintiff has not argued, or established, that service was improper under that subdivision.

Furthermore, any defect in service is inconsequential. When a party opposes a motion on the ground of insufficient service but otherwise addresses the merits and does not claim any prejudice, the party waives any defect or irregularity. (*Carlton, supra, 7*7 Cal.App.4th at pp. 697-698; *Altafulla, supra*, 238 Cal.App.4th at p. 577.) Here, Plaintiff waived any defect in service by opposing the merits of the Petition and not claiming any prejudice.

Third, Plaintiff contends the Petition does not comply with Code of Civil Procedure section 1290 because there is no named respondent. Despite the fact that the Petition describes the parties as "plaintiff" and "defendant," it is readily apparent the Petition is directed to Plaintiff and Plaintiff was entitled to file a response thereto. Notably, Plaintiff does not argue that he suffered any prejudice as a result of the purported labeling error and he cites no legal authority providing that a petition to compel arbitration should be denied as a result of any such error. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When [a party] fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."]; see also *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 619, fn. 2 ["[A] point which is merely suggested by a

party's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion."].)

Finally, Plaintiff asserts that the Petition is defective because Defendant did not request or demand arbitration of the dispute prior to filing the Petition as required by Code of Civil Procedure section 1281.2. Plaintiff's assertion lacks merit. Code of Civil Procedure section 1281.2 does not mandate that the petitioning party demand arbitration, but requires only a showing that the other party has refused to arbitrate. (*Hyundai Amco America, Inc. v. S3H, Inc.* (2014) 232 Cal.App.4th 572, 577.) Consequently, when a plaintiff has filed a lawsuit rather than commencing arbitration proceedings as required by the parties' agreement, the filing of the lawsuit establishes the plaintiff's refusal to arbitrate the controversy and the defendant is entitled to compel arbitration without first making a demand for arbitration. (See *ibid.* [a subcontractor was entitled to compel arbitration without first having made a demand because the general contractor's filing of a lawsuit against the subcontractor rather than commencing arbitration proceedings as required by the parties' agreement affirmatively established the general contractor's refusal to arbitrate the controversy].) Here, Plaintiff filed the Complaint against Defendant, which is sufficient to establish Plaintiff's refusal to arbitrate the controversy.

B. Scope of Petition and Effect of Filing of FAC

Plaintiff argues that the scope of the Petition seeks no relief with respect to the PAGA claim or, alternatively, is not broad enough to encompass any relief sought with respect to the PAGA claim. Plaintiff also contends that the filing of the FAC renders the Petition moot.

In the Notice of Hearing on Petition to Compel Arbitration, Dismiss Class Claims, and Dismiss or Stay Proceedings ("Notice"), Defendant states that it seeks to compel Plaintiff to arbitrate any and all claims that arise from, relate to, or have any relationship whatsoever to his employment with Defendant, including Plaintiff's individual claims. (Notice, p. 1:23-26.) The Notice further states that Defendant requests the court dismiss or, in the alternative, stay the action pending completion of arbitration. (*Id.* at p. 2:1-2.)

After the filing of the Petition, Plaintiff filed an opposition to the Petition, stating that he intended to bring a PAGA claim based on the conduct alleged in the Complaint and the

forthcoming PAGA claim was not subject to arbitration. Two days later, Plaintiff filed the FAC. Defendant addressed Plaintiff's argument regarding the newly added PAGA claim in reply.

Additionally, the parties submitted supplemental briefing regarding the arbitrability of the PAGA claim alleged in the FAC.

In light of the foregoing, the court finds that the relief initially sought in the Notice is broad enough to encompass the relief Defendant now seeks with respect to the newly added PAGA claim. In the Notice, Defendant sought to compel arbitration of Plaintiff's individual claims and, in the alternative, a stay of proceedings pending the individual arbitration. With respect to the newly added PAGA claim, Defendant asks the court to compel arbitration of Plaintiff's individual claim and stay the representative claim. Thus, the relief sought falls within the scope of the Notice.

For the same reasons, the filing of the FAC does not render the Petition moot and Plaintiff does not cite any legal authority to the contrary. Additionally, both parties have had the opportunity to fully brief the issue as they addressed the PAGA claim in the opposition, reply, and supplemental briefing. Consequently, the court may properly address the Petition to the extent it seeks to compel arbitration of Plaintiff's individual PAGA claim and stay the representative PAGA claim.

C. Legal Standard

As an threshold matter, Beltran disputes that the FAA applies in this case, arguing that he is a transportation worker and therefore falls within the exception set forth in Section 1 of the FAA. (See *Garrido v. Air Liquide Industrial U.S. LP* (2015) 241 Cal.App.4th 833, 839 (*Garrido*) ["Section 1 of the FAA exempts from coverage of the FAA 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' (9 U.S.C. § 1; see *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 109 [149 L. Ed. 2d 234, 121 S. Ct. 1302].) This ' "any other class of workers engaged in foreign or interstate commerce" ' has been defined to mean 'transportation workers.' (*Circuit City*, at p. 121.)"].)

However, Plaintiff has not established that he qualifies as a transportation worker. Plaintiff declares that he was a "Finance Manager" for Defendant and he completed paperwork required for the sale of automobiles between banks and consumers. (Declaration of Bryan Nguyen in Support of Response to Defendant Naftoon, Inc.'s Petition to Compel Arbitration, Dismiss Class Claims, and Dismiss or Stay Proceedings, ¶¶ 2, 4.) There is no evidence that Plaintiff directly transported any goods interstate. (See *Garrido, supra*, 241 Cal.App.4th at p. 840 [" 'The most obvious case where a plaintiff falls under the FAA exemption is where the plaintiff directly transports goods in interstate, such as [an] interstate truck driver whose primary function is to deliver mailing packages from one state into another.' [Citation.] '[T]he FAA is inapplicable to drivers … who are engaged in interstate commerce.' "].) Rather, the only evidence in the record demonstrates that Plaintiff's position is more akin to the "account manager" in *Hill v. Rent-A-Center, Inc*. (11th Cir. 2005) 398 F.3d 1286, 1288-1290, who was held not to be a transportation worker. Consequently, the exception set forth in Section 1 of the FAA does not apply.

As the exception does not apply and the arbitration agreement at issue expressly provides that it is governed by the FAA, the FAA also applies here. (See *Davis v. Shiekh Shoes, LLC* (2022) 84 Cal.App.5th 956, 963 [where the contract unambiguously states that the FAA governs the arbitration agreement, the FAA applies].)

Notably, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Avila v. Southern California Specialty Care, Inc*. (2018) 20 Cal.App.5th 835, 840.)

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

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"];

Rosenthal v. Great Western Fin'l Securities Corp. (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal, supra,* 14 Cal.4th at p. 413.) "In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

D. Analysis

Defendant submits evidence that the arbitration agreement attached to the Petition as Exhibit A was signed by Plaintiff, by hand, on June 20, 2022. (Declaration of Don Tena in Support of Petition to Compel Arbitration, Dismiss Class Claims, and Dismiss or Stay Proceedings ("Tena Dec."), ¶¶ 1-5 & Ex. A; Declaration of William D. Wheelock, ¶¶ 2-3.) The arbitration agreement provides that Plaintiff and Defendant agree to pursue any claims they might have against each other or that might arise in the future exclusively through binding arbitration. (Tena Dec., Ex. A, ¶¶ 3-4.) The arbitration agreement expressly states that it covers any and all claims which arise out of the employment context, including claims pursuant to PAGA. (*Id.* at ¶ 4.) The arbitration agreement further states that the arbitrator only has authority to hear and adjudicate individual claims and does not have authority to make the arbitration proceeding a class, representative, or collective action, or to award relief to a group of employees. (*Id.* at ¶ 9.) Under the terms of the agreement, Plaintiff expressly agreed to waive the right to bring "a class, collective, representative or PAGA claim (unless prohibited by controlling law) seeking relief on behalf of others." (*Ibid.*) The arbitration agreement provides that any non-arbitrable claims shall be stayed pending the final adjudication of the arbitrable claims. (*Ibid.*)

In opposition, Plaintiff does not dispute that his handwritten signature appears on the arbitration agreement attached to the Petition as Exhibit A. Furthermore, Plaintiff does not dispute that the arbitration agreement encompasses his individual wage and hour claims as alleged in the FAC. Therefore, Defendant has met its burden of persuasion to establish the existence of a valid arbitration agreement between the parties. (See *Gamboa v. Northeast*

Community Clinic (2021) 72 Cal.App.5th 158, 164-166 [if the moving party meets its initial prima facie burden (e.g., by attaching a copy of the arbitration agreement purporting to bear the opposing party's signature) and the opposing party does not dispute the existence of the arbitration agreement, then nothing more is required for the moving party to meet its burden of persuasion]; *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747, 755 [same].)

Instead, Plaintiff argues in opposition that the class action waiver is unenforceable under *Gentry v. Superior Court* (2007) 42 Cal. 4th 443 and Labor Code section 229 prohibits arbitration of his wage and hour claims. However, both of these arguments are predicated on Plaintiff's earlier contention that the FAA does not apply. As the court has determined that the FAA governs here, both of Plaintiff's arguments lack merit.

Next, as Defendant persuasively argues, Plaintiff's class claims must be dismissed because the arbitration agreement contains an enforceable class action waiver (i.e., it expressly provides that the parties may only file claims in their individual capacities and may not file or participate in class or collective actions).

Finally, with respect to Plaintiff's representative PAGA claim, the arbitration agreement arguably contains a waiver Plaintiff's right to bring representative PAGA claims (i.e., PAGA claims on behalf of other aggrieved employees) that is unenforceable under California law. (See *Nickson v. Shemran, Inc*. (2023) 90 Cal.App.5th 121, 130 ["Here, the Agreement purports to waive Nickson's right "to make any claims … in a private attorney general capacity." That waiver is unenforceable as a matter of state law. [Citation.]"].) Thus, the court must address whether the waiver of the representative PAGA claims can be severed from the agreement. (See *ibid*.)

"[W]hether to sever is within the trial court's discretion." (*Navas v. Fresh Venture Foods, LLC* (2022) 85 Cal.App.5th 626, 636–637.)

> " 'In deciding whether to sever terms rather than to preclude enforcement of the provision altogether, the overarching inquiry is whether the interests of justice would be furthered by severance; the strong preference is to sever unless the agreement is "permeated" by unconscionability.' [Citation.] [¶] An agreement to arbitrate is considered 'permeated' by unconscionability where it contains more than one unconscionable provision. [Citation.] 'Such multiple defects indicate a systematic effort to impose arbitration on [the nondrafting party] not simply as an alternative to litigation, but as an inferior forum that works to the [drafting party's] advantage.' [Citation.] An arbitration agreement is also deemed 'permeated' by unconscionability if 'there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement.' [Citation.] If 'the court would have to, in effect, reform the

> contract, not through severance or restriction, but by augmenting it with additional terms,' the court must void the entire agreement." (*Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 292.)

(*De Leon v. Pinnacle Property Management Services, LLC* (2021) 72 Cal.App.5th 476, 492–493.)

Here, the arbitration agreement contains a severability provision, which provides that "[i]f any term or provision, or portion of this agreement, is declared void or unenforceable, it shall be severed and the remainder of this agreement shall be enforceable." (Tena Dec., Ex. A, ¶ 15.) Furthermore, the arbitration clause plainly has a lawful purpose consistent with both the FAA and California's public policy. (See, e.g., *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807, 821, 831 [recognizing there is a "strong public policy of this state in favor of resolving disputes by arbitration" and remanding for enforcement of arbitration agreement after voiding unconscionable provision providing for biased arbitrator].) Voiding the clause as it pertains to the entire PAGA claim would have the effect of depriving Defendant of its right to contract for bilateral arbitration based on the mandatory joinder rule of *Iskanian* that *Viking River* declared preempted. Moreover, the PAGA waiver is of the type which the court routinely construes under *Viking River Cruises, supra,* 142 S.Ct. at p. 1924. Given the United States Supreme Court's clear direction in *Viking River* that courts should interpret these provisions to require arbitration of individual PAGA claims where the agreement at issue permits, the court is unwilling to find it should not do so here, and to instead find that this partially enforceable provision tips the entire agreement into unenforceable, "permeated by unconscionability" territory. Thus, the court finds that severance furthers the interests of justice here and Defendant is entitled to enforce the arbitration agreement consistent with *Viking River*.

Notably, the arbitration agreement provides that claims that are found not subject to arbitration shall be stayed pending the outcome of the arbitration. A stay of the representative PAGA claim is also consistent with *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 (*Adolph*). (See *Adolph, supra*, 14 Cal.5th at p. 1123 [when a court has ordered a matter to arbitration, the court has discretion pursuant to section 1281.4 of the Code of Civil Procedure to stay the remaining claims pending the outcome of the arbitration].)

Accordingly, the Petition is GRANTED. Plaintiff's individual claims, including his individual PAGA claim, are compelled to mandatory arbitration. The class claims are

dismissed. Plaintiff's representative PAGA claim is stayed pending completion of the individual arbitration.

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

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