Filed 10/22/18 Alonzo v. First Transit, Inc. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ANGEL ALONZO et al., Plaintiffs and Respondents, v. FIRST TRANSIT, INC., Defendant and Respondent; ERIC P. CLARKE, Appellant.	B277109 (Los Angeles County Super. Ct. No. BC433932)

APPEAL from an order and judgment of the Superior Court of Los Angeles County, Elihu M. Berle, Judge. Affirmed in part, reversed in part, and remanded with directions.

Law Offices of Mark Yablonovich and Mark Yablonovich, for Appellant Eric P. Clarke.

Hunter Pyle Law, Hunter Pyle and Chad Saunders for Plaintiffs and Respondents Angel Alonzo et al.

Littler Mendelson, Theodore R. Scott and David J. Dow for Defendant and Respondent First Transit, Inc.

Blank Rome, Laura Reathaford and Harrison M. Brown for Association of Southern California Defense Counsel as Amicus Curiae on behalf of Defendant and Respondent First Transit, Inc.

Kim E. Card, Acting Chief Counsel and Dan L. Gildor, Counsel, Department of Industrial Relations for Labor and Workforce Development Agency as Amicus Curiae upon the request of the Court of Appeal.

INTRODUCTION

This is the second appeal in this class action. In the first appeal, we affirmed the trial court's order denying Eric P. Clarke's ex parte application for leave to intervene but reversed the judgment entered after the court approved a settlement. We held the trial court failed to separately review and approve the settlement of claims under the Private Attorneys General Act (PAGA) (Lab. Code, § 2698 et seq.).[1] (*Alonzo v. First Transit, Inc.* (Oct. 15, 2015, B253699) [nonpub. opn.] (*Alonzo I*).) On remand, the trial court approved a revised settlement, and Clarke appealed again.

After the parties filed their briefs in this appeal, the Supreme Court decided *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260 (*Hernandez*), which held that unnamed class

---

[1] Undesignated statutory references are to the Labor Code.

members do not have standing to appeal from a judgment in a class action unless they intervened in the class action or filed a motion to vacate the judgment. (*Id.* at p. 273.) We requested supplemental briefing on whether Clarke has standing to appeal in light of *Hernandez*. We conclude *Hernandez* did not alter or clarify the rules of appellate procedure we applied in *Alonzo I*. Thus, the law of the case doctrine applies, and Clarke has standing to appeal from the judgment approving the settlement of the PAGA claims. Under *Hernandez*, however, Clarke does not have standing to appeal from the judgment approving the settlement of the remaining class claims.

On the merits we largely affirm the trial court's order and judgment because, even if we adopted the standard for reviewing and approving settlements of PAGA actions proposed by Clarke, the settlement complies with that standard. We also reject Clarke's contentions that the settlement resulted from improper collusion and that the settlement created an inappropriate conflict of interest between counsel for plaintiffs and the state. We vacate the order approving the settlement, however, and remand for the limited purpose of clarifying that 25 percent of the civil penalties paid under the settlement will be distributed to all aggrieved employees and not only those who returned claim forms.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Clarke*

Clarke worked as a bus driver for First Transit, Inc. from February 2000 to June 2006. Following a leave of absence, First Transit terminated Clarke's employment in February 2007. In 2008 Clarke filed a lawsuit against First Transit and others in Los Angeles County Superior Court seeking civil penalties under PAGA for alleged violations of Labor Code provisions, including those governing meal and rest breaks (§§ 226.7, 512), wage statements (§ 226), wages and overtime (§§ 204, 510), and compensation following an employee's discharge or resignation (§§ 201, 202). (*Eric Clarke v. First Transit, Inc.* (Super. Ct. Los Angeles County, 2008, No. BC384583) (*Clarke*).) Clarke, however, did not wait the time prescribed by statute after notifying the Labor and Workforce Development Agency (LWDA) before he commenced a civil action against First Transit. (See former § 2699.3, subd. (a)(2)(A).)

The trial court stayed the *Clarke* action in February 2009 because Clarke had previously filed a putative class action against First Transit in 2007 (which First Transit removed to federal court) that was likely to resolve common factual and legal issues. Eventually, after the plaintiffs in this case filed their putative class action and reached a tentative settlement, the trial court in *Clarke* extended the stay in that action until final resolution of this case.

B. *Alonzo I*

In March 2010 Angel Alonzo and approximately 65 other named plaintiffs filed a putative class action alleging, among

other things, First Transit violated Labor Code provisions governing rest breaks (§ 226.7), wage statements (§ 226), and compensation after an employee is discharged or resigns (§§ 201, 202 & 203). The complaint included a cause of action for unfair competition under Business and Professions Code section 17200 et seq., but it did not seek civil penalties under PAGA for qualifying violations of the Labor Code. In July 2012 the trial court certified the class defined in the second amended complaint. As a member of the class, Clarke received notice of the pending action, and, on October 25, 2012, he opted out.

The parties conducted discovery and reached a settlement in February 2013 following two days of mediation. In June 2013 the trial court preliminarily approved a settlement pursuant to which First Transit agreed to pay up to $2 million to settle the class claims. As part of the settlement, the plaintiffs agreed to file a third amended complaint that added claims for civil penalties under PAGA, and First Transit agreed to pay $10,000 of the settlement amount to the Labor and Workforce Development Agency (LWDA) to resolve the PAGA claims. The settlement agreement did not distribute to the aggrieved employees any of the $10,000 allocated to the PAGA claims.

Following the trial court's preliminary approval, the class representatives provided notice of the settlement to class members.[2] By September 8, 2013, 350 class members had

---

[2] The order certifying the class described the class as follows: "All bus operators that worked for FIRST TRANSIT, driving bus routes associated with Community DASH Packages 2 and/or 6 in Los Angeles County, at any time during the Class Period in unit(s) represented for purposes of collective bargaining by

submitted claims, which accounted for 83 percent of the $2 million allotted to the class. None of the class members objected to the proposed settlement.

On October 2, 2013 Clarke filed an ex parte application for leave to intervene. Clarke asserted he was entitled to intervene because, among other reasons, he had an interest in the parties' resolution of the PAGA claims, which he argued the parties had drastically undervalued and colluded in settling. The trial court denied Clarke's application as untimely, and Clarke appealed.

We affirmed the trial court's order denying Clarke's ex parte application to intervene. We stated Clarke had standing to appeal from the judgment because "resolution of the PAGA claims in this action will bar the PAGA claims alleged in [*Clarke*]." (*Alonzo I*, *supra*, at p. 11.) We reversed the judgment because the settlement did not allocate 25 percent of the civil penalties to the aggrieved employees, as required by section 2699, subdivision (i), and because the trial court did not specifically review and approve the civil penalties allocated to the PAGA claims, as required by section 2699, subdivision (*l*)(2). (*Alonzo I*, at pp. 17-18.) We also directed the trial court to allow Clarke to participate in the final approval hearing for purposes of contesting the settlement of the PAGA claims. (*Id*. at p. 20.)

Teamsters Local Union 572." The "Class Period" included members of the class who worked for First Transit on or after August 13, 2003.

C. *Remand*

On remand Alonzo filed a renewed motion for final approval of the settlement and an addendum to the settlement agreement that increased the amount allocated to the PAGA claims from $10,000 to $13,333.33, 25 percent of which would be distributed to class members. The trial court ruled the proposed settlement "was entered into in good faith; is fair, reasonable and adequate; and satisfies the standards and applicable requirements for final approval" under California law, including California Rules of Court, rule 3.769. Among other things, the court ruled (1) the parties "thoroughly litigated" the case for over three years before reaching settlement, (2) the parties attended two mediation sessions with an experienced wage and hour mediator, (3) no class member other than Clarke objected to any terms of the settlement, (4) the parties reached the settlement through arm's-length bargaining in a mediation, and (5) investigation and discovery were sufficient to fully apprise the court and counsel of the claims, which gave the settlement a presumption of fairness.

Regarding the settlement of the PAGA claims, the trial court stated, "Actions pursuant to the PAGA are not class actions" and "are not subject to [the] requirement that the Court conduct a fairness hearing." (See Cal. Rules of Court, rule 3.769(g) ["[b]efore final approval [of a settlement or compromise of an entire class action or a cause of action in a class action], the court must conduct an inquiry into the fairness of the proposed settlement"].) Instead, the court stated, PAGA requires only that the court "review and approve any penalties sought as part of a proposed settlement agreement."

"Nevertheless," the court ruled, "the Court considered the PAGA penalty and its fairness through inquiry at the time the court granted [its initial] final approval of the Settlement. Though not separately articulated in the record at the time of final approval the Court did review the PAGA settlement taking into consideration that the gross settlement exceeded the maximum exposure on the main claims such that there were excess funds to be allocated to the PAGA penalty, that the trial court has wide discretion to reduce PAGA penalties, and that Plaintiffs admitted that Defendants had significant defenses which could result in greatly reduced PAGA penalties." The court reiterated that the allocation of settlement funds to the PAGA penalty is "fair, reasonable, and adequate." The court found the portion of settlement proceeds allocated to PAGA penalties (.67 percent of the total settlement fund) in this case was higher than the average awarded in other public cases of similar size in Los Angeles County (.55 percent) and federal cases in California (.57 percent). The court rejected Clarke's argument that the parties had to notify the class of the proposed settlement of the PAGA claims before the court could give final approval to the settlement, stating "PAGA settlements do not require notice to the aggrieved employees."

In other respects the court treated the PAGA claims as part of the class action. For example, at the hearing on the renewed motion for final approval, the court stated that 25 percent of "the total PAGA penalty" would be "distributed to class members who [did] not opt out," rather than to all employees affected by the alleged Labor Code violations. In its order granting final approval of the class action settlement, the court formally approved the distribution of 25 percent of the amount allocated to

civil penalties under PAGA "to those Class Members who timely submitted claim forms." The court also purported to bind only Alonzo "and all Class Members" who did not opt out of the class. Following entry of the order and judgment, Clarke timely appealed.

D. *Alonzo II (This Appeal)*

On appeal the parties filed briefs on whether the trial court erred in approving the revised settlement. We requested supplemental briefing from the parties and invited amicus curiae briefs from the LWDA and other organizations on the standards a trial court should apply in reviewing and approving a class action settlement that includes a release of PAGA claims. The following day the Supreme Court decided *Hernandez*, and we asked the parties and amicus curiae to file supplemental briefs on whether under *Hernandez* Clarke has standing to appeal. Alonzo and First Transit also filed a motion to dismiss the appeal in light of *Hernandez*.

DISCUSSION

A. *PAGA Claims and Judgments*

The Legislature enacted PAGA in 2003 to allow aggrieved employees to act as private attorneys general and recover civil penalties for Labor Code violations. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, 980-981 (*Arias*); *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 578 (*Villacres*).) The Legislature's declared purpose in enacting PAGA was "to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves." (*Arias*,

at p. 986.) Thus, an employee suing under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies. . . . In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the [LWDA]." (*Arias*, at p. 986; accord, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380 (*Iskanian*).)

PAGA actions are therefore limited to the recovery of civil penalties that labor law enforcement agencies can recover. (See *Arias*, *supra*, 46 Cal.4th at p. 986 [under PAGA, employees plaintiffs may seek "recovery of civil penalties that otherwise would have been assessed and collected by the [LWDA]"]; *Lopez v. Friant & Associates, LLC* (2017) 15 Cal.App.5th 773, 780 (*Lopez*).) Civil penalties available under PAGA do not include statutory damages recoverable by individual plaintiffs in actions prior to PAGA's enactment. (*Lopez*, at p. 780; *Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1241-1242; see *Iskanian*, *supra*, 59 Cal.4th at p. 381.)[3] For example, before

---

[3] Some courts have referred to the statutory damages available to individual employees prior to the enactment of PAGA as "statutory penalties." (See, e.g., *Iskanian*, *supra*, 59 Cal.4th at p. 381; *Villacres*, *supra*, 189 Cal.App.4th at p. 579.) The Supreme Court in *Iskanian* also used the term "statutory damages" to refer to this preexisting remedy, and another court adopted that term to avoid confusion with "civil penalties." (See *Esparza v. KS Industries, L.P.*, *supra*, 13 Cal.App.5th at p. 1242 [avoiding the term "statutory penalties" because "it includes the word 'penalties' and is potentially confusing when discussing how

PAGA, employees could (and still can) seek actual or statutory damages under section 226, subdivision (a), for a knowing and intentional failure by an employer to provide itemized wage statements. (See *Lopez*, at pp. 781-782.) Those statutory damages are not recoverable under PAGA. (*Lopez*, at pp. 781-784.) An employee bringing a claim under PAGA, however, may recover civil penalties for certain violations of section 226, subdivision (a), under section 226.3.[4] Similarly, before PAGA,

---

'civil penalties' differ from 'statutory damages'"]; see also *Lopez*, *supra*, 15 Cal.App.5th at p. 781, fn. 3 [acknowledging confusion between the terms].) We also use the term "statutory damages" to avoid confusion with "civil penalties" and because some provisions of the Labor Code authorizing statutory damages describe them as an alternative to actual damages recoverable by an employee who has suffered injury. (See, e.g., § 226, subd. (e)(1) [an employee "suffering injury" as a result of a knowing and intentional violation of section 226, subdivision (a), "is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000)"]; but see § 203 [referring to amounts an employee may recover for a violation of sections 201, 201.3, 201.5, 201.9, 202, and 205.5 as "a penalty" and "penalties"].)

[4] Section 226.3 provides: "Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in

employees could (and still can) seek unpaid wages and statutory damages from employers who willfully fail to pay wages due an employee who is discharged or quits. (§ 203; *Iskanian*, at p. 381.) Again, an employee may not recover these amounts under PAGA, but can recover civil penalties for the same violation under section 256 in a PAGA action. (§ 256; *Iskanian*, at p. 381; *Esparza v. KS Industries, L.P.*, *supra*, 13 Cal.App.5th at p. 1242.) Thus, for some Labor Code violations, an employer is potentially liable for unpaid wages and interest, statutory damages, and civil penalties under PAGA. (*Dunlap v. Superior Court* (2006) 142 Cal.App.4th 330, 340; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 378.)

PAGA sets forth administrative procedures an aggrieved employee must follow before bringing an action to recover civil penalties. Among them is the requirement the employee give written notice to the employer and the LWDA of the specific provisions of the Labor Code the employee alleges the employer violated, including the facts and theories supporting the alleged violation. (§ 2699.3, subd. (a)(1)(A).) "If the [LWDA] elects not to

---

subdivision (a) of Section 226. The civil penalties provided for in this section are in addition to any other penalty provided by law. In enforcing this section, the Labor Commissioner shall take into consideration whether the violation was inadvertent, and in his or her discretion, may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake." *Lopez* acknowledges but does not address a split in authorities regarding the precise circumstances in which an employee may seek civil penalties under PAGA for violations of section 226, subdivision (a). (See *Lopez*, *supra*, 15 Cal.App.5th at p. 784, fn. 6.)

investigate, or investigates without issuing a citation, the employee may then bring a PAGA action." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 545 (*Williams*); see § 2699.3, subd. (a)(2)(A); *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 866 (*Julian*).) Thus, the LWDA has "the initial right to prosecute and collect civil penalties" under the Labor Code. (*Caliber Bodyworks, Inc. v. Superior Court*, *supra*, 134 Cal.App.4th at p. 376; accord, *Julian*, at p. 866.) The LWDA receives 75 percent of the civil penalties recovered in an action brought by an aggrieved employee. (§ 2699, subd. (i); *Arias*, *supra*, 46 Cal.4th at pp. 980-981.) The other 25 percent of "civil penalties recovered by aggrieved employees" is distributed "to the aggrieved employees." (§ 2699, subd. (i); *Arias*, at pp. 980-981.)

An aggrieved employee may bring a PAGA claim as a class action. (See *Arias*, *supra*, 46 Cal.4th at pp. 975, 981, fn. 5; *Miranda v. Anderson Enterprises, Inc.* (2015) 241 Cal.App.4th 196, 201, fn. 3.) Aggrieved employees who bring a representative action under PAGA, however, need not satisfy class action requirements. (*Arias*, at p. 975.) And unlike most class actions under Code of Civil Procedure section 382, a representative action under PAGA does not give nonparty aggrieved employees the right to receive notice or to opt out of the action. (See *Arias*, at p. 987.) Yet because an employee who brings an action under PAGA does so as the "proxy or agent" of the state, a judgment in an employee's action under PAGA "binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government." (*Arias*, at p. 986.) The Supreme Court explained in *Arias* that, when an employee plaintiff prevails in a PAGA action by proving the employer has committed a Labor Code violation, "[n]onparty

employees may then, by invoking collateral estoppel, use the judgment against the employer to obtain remedies *other than civil penalties* for the same Labor Code violations." (*Arias*, at p. 987, italics added.) "If the employer had prevailed, however, the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment *as to remedies other than civil penalties*." (*Id.*, italics added; see *Julian*, *supra*, 17 Cal.App.5th at p. 867 ["a judgment unfavorable to the employee binds the government, as well as all aggrieved nonparty employees potentially entitled to assert a PAGA action"].) As to civil penalties, the application of claim or issue preclusion does not violate the due process rights of absent employees because such employees "do not own a personal claim for PAGA civil penalties." (*Williams*, *supra*, 3 Cal.5th at p. 547, fn. 4; see *Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425, 436 ["[b]ecause a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees' due process rights in PAGA arbitrations"].)

In the event an aggrieved employee wishes to settle a PAGA claim, section 2699, subdivision (*l*), requires the superior court to "review and approve any penalties sought as part of [the] proposed settlement agreement." (Lab. Code, § 2699, subd. (*l*)(2).) Such review and approval must "ensur[e] that any negotiated resolution is fair to those affected." (*Williams*, *supra*, 3 Cal.5th at p. 549.)

B. *Standing To Appeal*

1. *Applicable Law*

Code of Civil Procedure section 902 allows "[a]ny party aggrieved" to appeal from a judgment. Thus, in general, "'only parties of record may appeal.'" (*Hernandez*, *supra*, 4 Cal.5th at p. 263.) "[A] nonparty that is aggrieved by a judgment or order may become a party of record and obtain a right to appeal by moving to vacate the judgment. [Citation.] Additionally, a nonparty may appeal if a judgment or order has a res judicata effect on the nonparty. [Citation.] Such an effect on the nonparty must, however, be ""immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment [or order]"" in order to confer standing." (*People v. Hernandez* (2009) 172 Cal.App.4th 715, 720; accord, *In re The Clergy Cases I* (2010) 188 Cal.App.4th 1224, 1233; *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 295 (*Marsh*); see also *In re Colton's Estate* (1912) 164 Cal. 1, 5 ["any person having an interest recognized by law in the subject-matter of the judgment, which interest is injuriously affected by the judgment, is a party aggrieved and entitled to be heard upon appeal"].)

In *Hernandez* the Supreme Court considered when an unnamed class member becomes a party of record with the right to appeal from a judgment in a class action under Code of Civil Procedure section 902. (*Hernandez*, *supra*, 4 Cal.5th at p. 263.) The Supreme Court followed *Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199 (*Eggert*) and held that unnamed class members do not become parties of record with the right to appeal unless they formally intervene in the class action before the action is final or file a motion under Code of Civil Procedure

section 663 to vacate the judgment. (*Hernandez*, at pp. 263, 273; see *Eggert*, at p. 201.) Prior to *Hernandez*, some Court of Appeal decisions had diverged from *Eggert* and followed federal law, which gives unnamed class members who object in a timely manner standing to appeal a judgment following settlement of a class action without having had intervened in the action. (See, e.g., *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387, 395-396; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 253; *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1128-1132; *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal.App.3d 134, 139 (*Trotsky*).) This trend in the Court of Appeal became sufficiently established to appear in Witkin's treatise as settled law. (See 9 Witkin, Cal. Procedure (5th Ed. 2008) Appeal, § 24, p. 87 ["nonnamed class members who timely object to approval of a class action settlement at a fairness hearing have power to appeal without first intervening in the action"].)

Hernandez rejected that trend. The Supreme Court noted that cases distinguishing *Eggert* focused their analyses on the requirement in Code of Civil Procedure section 902 that the appellant must be "aggrieved," and failed to consider the statutory requirement that the appellant must also be a "party." (*Hernandez*, *supra*, 4 Cal.5th at p. 270.) *Hernandez* followed *Eggert* in reaffirming that an unnamed class member becomes a "party" for purposes of Code of Civil Procedure section 902 only by timely intervening in the action or moving to set aside the judgment. (*Hernandez*, at p. 272.)

2. *Clarke Has Standing To Appeal the Order and Judgment on the Claims for PAGA Civil Penalties*

Clarke argues this court's holding in *Alonzo I*, that he had standing to challenge the settlement and subsequent judgment, is "law of the case and may not be disturbed." Clarke is correct.

"'"The doctrine of 'law of the case' deals with the effect of the *first appellate decision* on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case."'" (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1127.) The doctrine "gives finality to appellate decisions, precluding courts from revisiting issues that [have] been determined in earlier appellate proceedings between the same parties." (*Franco v. Arakelian Enterprises, Inc.* (2015) 234 Cal.App.4th 947, 957.)

Because the law of the case doctrine can be "harsh" (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491), courts have "declined to adhere to it where its application would result in an unjust decision, e.g., where there has been a manifest misapplication of existing principles resulting in substantial injustice, or where the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations." (*Id.* at pp. 491-492; see *In re Hansen* (2014) 227 Cal.App.4th 906, 920 ["it is well-settled that the doctrine of law of the case will not be applied 'when an intervening decision has altered or clarified the controlling rules of law'"]; *Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 770,

fn. 2 ["[t]he law of the case is not applied when there has been an intervening change in the law"].)

Alonzo and First Transit argue the law of the case doctrine does not apply because *Hernandez* altered or clarified the rules of appellate procedure after *Alonzo I*. In particular, they argue *Alonzo I* relied on *In re The Clergy Cases I*, *supra*, 188 Cal.App.4th 1224 and *Marsh*, *supra*, 43 Cal.App.4th 289 in stating that a "nonparty may have standing to appeal . . . where 'a judgment or order has a res judicata effect on the nonparty'" (*Alonzo I*, *supra*, B253699 at p. 11), and *Hernandez* overruled those cases. Alonzo and First Transit read too much into *Hernandez*.

The Supreme Court in *Hernandez* clarified that, in the context of a class action in which class members may opt out of the class, the preclusive effect of a judgment is not a sufficient reason for giving unnamed class members standing to appeal. (*Hernandez*, *supra*, 4 Cal.5th at p. 272.) As noted, *Hernandez* held unnamed members of a certified class do not become "parties of record" with a right to appeal unless they timely intervene or file a motion to vacate or set aside the judgment. (*Id.* at p. 267.) *Hernandez* rejected the reasoning of *Trotsky* and its progeny, which gave unnamed class members who informally object to settlement during fairness hearings the right to appeal the court's order overruling their objections. (See *Hernandez*, at p. 269; see also *ibid.* [listing cases that followed *Trotsky*].) The Court of Appeal in *Trotsky* reasoned that a class member who objected in the trial court was "a party aggrieved" under Code of Civil Procedure section 902 and thus had standing to appeal. (*Trotsky*, *supra*, 48 Cal.App.3d at p. 139.) While such appellants may be "aggrieved" by a class action judgment, *Hernandez* held

they "are not considered 'parties' to the litigation" as required by Code of Civil Procedure section 902. (*Hernandez*, at p. 266; see also *Eggert*, *supra*, 20 Cal.2d at p. 201 [holding appellants failed to become "parties of record"].)

Hernandez did not mention, overrule, or affect the continuing viability of the cases we relied on in *Alonzo I*, namely, *In re The Clergy Cases I*, *supra*, 188 Cal.App.4th 1224 and *Marsh*, *supra*, 43 Cal.App.4th 289. Those cases did not address the circumstances in which a nonparty may become a "party of record" under Code of Civil Procedure section 902. (Cf. *Hernandez*, *supra*, 4 Cal.5th at p. 263 ["[t]he issue we address is when does an unnamed class action member become a party of record with the right to appeal a class action settlement or judgment under section 902"].) Instead, they addressed circumstances in which a nonparty has a right to appeal despite the fact the appellant is not a party of record. In *In re The Clergy Cases I*, *supra*, 188 Cal.App.4th 1224 the plaintiffs entered into a settlement agreement with a religious organization that allowed individual friars to object to the release of particular documents. (*Id.* at p. 1229.) When the trial court overruled objections by the friars and ordered the release of the documents, the friars appealed. The court held the friars had standing to appeal the order requiring the disclosure of confidential files about them even though the friars were not parties to the underlying actions. (*Id.* at pp. 1232-1233.) The court in *In re The Clergy Cases I* stated that, because the settlement agreement "will affect the personal and pecuniary interests of the [friars], and they will be bound by the effects of res judicata," the friars were "aggrieved persons with the right to appeal the disclosure orders." (*Id.* at p. 1233; see *People v. Hernandez*, *supra*, 172 Cal.App.4th at p.

720 ["a nonparty that is aggrieved by a judgment or order may become a party of record and obtain a right to appeal by moving to vacate the judgment," and "[a]dditionally, a nonparty may appeal if a judgment or order has a res judicata effect on the nonparty"].) In *Marsh*, *supra*, 43 Cal.App.4th 278 an expert witness appealed from an order establishing the hourly fee the defendant had to pay the witness for his deposition testimony as an expert for the plaintiff. (*Id.* at p. 293.) The expert did not move to vacate the order pursuant to Code of Civil Procedure section 663. (*Marsh*, at p. 295.) The court held the expert still had standing to appeal from the order because it bound the expert witness as well as the parties, and the order's "injurious effect [was] immediate, pecuniary and substantial." (*Id.* at pp. 295-296.)

Moreover, the Supreme Court's reasoning in *Hernandez* does not apply to *In re The Clergy Cases I* or *Marsh* because neither of those cases was a class action. And it is not even clear the trial court in this case treated the PAGA claims as part of the class action, as required for the "bright-line rule" of *Hernandez*.[5] (See *Hernandez*, at p. 272.) *In re The Clergy Cases I* and *Marsh* remain good law, and *Alonzo I*, which relied on these cases, is law of the case in this appeal. Clarke has standing to appeal the

---

[5] Alonzo argued in the trial court that the PAGA claims were not part of the class action for purposes of applying California Rules of Court, rule 3.769, which requires trial courts to conduct a fairness hearing before approving the settlement of a class action. In this court Alonzo argues the PAGA claims were part of the class action for purposes of applying *Hernandez*.

order and judgment on the PAGA claims, and the motion by Alonzo and First Transit to dismiss his appeal is denied.

3. *Clarke Does Not Have Standing To Appeal the Order and Judgment on the Non-PAGA Claims for Statutory Damages*

Clarke does not have standing to challenge the judgment approving the settlement of the non-PAGA claims for statutory damages, which is not binding on him. Although Clarke primarily challenges the propriety of the settlement of the PAGA claims, he also challenges the settlement in its entirety. In particular, Clarke contends the addition of the PAGA claims in the third amended complaint made class counsel "proxies of the State" and created a conflict of interest with the class. Clarke, however, opted out of the class, did not intervene in the class action, and did not move to vacate the judgment. He has a weaker argument for standing than the objectors in *Hernandez*, who were members of the class and thus bound by the class settlement. (See *Hernandez*, *supra*, 4 Cal.5th at p. 272; see *Roos v. Honeywell Internat., Inc.* (2015) 241 Cal.App.4th 1472, 1485 ["[o]bjectors to a class settlement who are not members of the class typically cannot demonstrate standing . . . because they will not be affected by the settlement"].) Clarke is not bound by the settlement of Labor Code claims not subject to PAGA (see *Arias*, *supra*, 46 Cal.4th at p. 987), and he is free to pursue his individual claims under the Labor Code against First Transit.

C. *The Settlement Satisfies Clarke's Proposed Standard for Settling PAGA Claims*

Clarke contends the trial court failed to adequately review the settlement of the PAGA claims. He argues that the framework for approving class action settlements under California Rules of Court, rule 3.769 applies to the settlement of PAGA claims brought in connection with a class action and that PAGA requires courts to determine whether "the relief provided for under PAGA [is] genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public." Alonzo argues that California Rules of Court, rule 3.769 does not apply to the settlement of PAGA claims and that a trial court need only "review and approve" a proposed PAGA settlement, without even necessarily inquiring into the fairness of the proposed settlement.

Other than the requirement in section 2699, subdivision (*l*)(2), that the court "review and approve" a settlement of a civil action filed under PAGA and the Supreme Court's statement that such settlements must be "fair to those affected" (*Williams*, *supra*, 3 Cal.5th at p. 549), "neither the California legislature, nor the California Supreme Court, nor the California Courts of Appeal, nor the [LWDA] has provided any definitive answer to [the] vexing question" of the appropriate standard for approving the settlement of PAGA claims, whether brought as a class or representative action. (*Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (C.D.Cal. 2017) 253 F.Supp.3d 1074, 1075.) We have no need in this appeal to weigh in on this question, however, because the settlement approved by the trial court satisfies the standard Clarke proposes. Therefore, we assume without deciding that California Rules of Court, rule 3.769 applies to the settlement of the PAGA claims alleged

in the third amended complaint and that PAGA requires courts to determine whether the relief provided in a settlement of PAGA claims is genuine, meaningful, and consistent with the underlying purposes of the statute.

1. *(Arguably) Applicable Law*

a. *Class Action Settlements*

California Rules of Court, rule 3.769(a) sets forth detailed procedures for settling class actions in California and requires court approval of "[a] settlement or compromise of an entire class action, or of a cause of action in a class action." (See *In re Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118.) The court must consider the substance of the proposed settlement to prevent fraud, collusion, or unfairness to the class. (*Id.* at p. 1118; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800 (*Dunk*); see rule 3.769(g) [court must "conduct an inquiry into the fairness of the proposed settlement" before final approval].) "'The court must determine the settlement is fair, adequate, and reasonable.'" (*In re Cellphone Termination Fee Cases*, at p. 1117; accord, *Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93; *Dunk*, at p. 1801.)

A presumption of fairness arises 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." (*Dunk*, *supra*, 48 Cal.App.4th at p. 1802; accord, *Luckey v. Superior Court*, *supra*, 228 Cal.App.4th at p. 94.) Courts have cautioned, however, that "this is only an initial presumption; a trial court's

approval of a class action settlement will be vacated if the court 'is not provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise.'" (*Munoz v. BCI Coca–Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408 (*Munoz*); see *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 801 [the trial court must have information necessary "for 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation'"]; *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 120 (*Kullar*) [same].)

Factors for evaluating the fairness and reasonableness of a settlement include "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." (*Dunk*, *supra*, 48 Cal.App.4th at p. 1801; accord, *Clark v. American Residential Services LLC*, *supra*, 175 Cal.App.4th at p. 799.) Some courts have stated that the """most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement."""" (*Kullar*, *supra*, 168 Cal.App.4th at p. 130; see *Munoz*, *supra*, 186 Cal.App.4th at pp. 407-408.) "The list of factors is not exhaustive and should be tailored to each case." (*Dunk*, at p. 1801.)

Trial courts have broad discretion to determine whether a settlement is fair and reasonable. (*Clark v. American*

Residential Services LLC, *supra*, 175 Cal.App.4th at p. 799; see *In re Cellphone Termination Fee Cases*, *supra*, 180 Cal.App.4th at p. 1118 ["[t]rial court orders approving class action settlements and awarding attorney fees are reviewed for abuse of discretion"].) The reviewing court's task is not to make an independent determination whether the terms of the settlement are fair, adequate and reasonable, but only to determine whether the trial court acted within its discretion. (*Kullar*, *supra*, 168 Cal.App.4th at pp. 127-128.) We review the trial court's findings of fact for substantial evidence and its conclusions of law de novo. (*In re Cellphone Termination Fee Cases*, at p. 1118.) "'To merit reversal, both an abuse of discretion by the trial court must be "clear" and the demonstration of it on appeal "strong."'" (*Cho v. Seagate Technology Holdings, Inc.* (2009) 177 Cal.App.4th 734, 743; accord, *7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1146.)

b. *PAGA Settlements*

Clarke argues an agreement to settle PAGA claims in connection with a class action must be "fair, reasonable, and adequate" and must provide "genuine and meaningful" relief that is "consistent with the underlying purpose of the statute to benefit the public." This standard appears to be derived from *O'Connor v. Uber Techs., Inc.* (N.D.Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*). In that case a federal district court considered the preliminary approval of a class action settlement that included a release of claims that could have been (but were not) brought under PAGA and that would have extinguished PAGA claims already pending in other litigation (*O'Connor*, at pp. 1113, 1122.)

The court first analyzed whether the proposed settlement was fair, adequate, and reasonable under federal law (*id.* at p. 1121) and separately considered the proposed settlement of the PAGA claims (*O'Connor*, at pp. 1131-1132).

The court in *O'Connor* adopted the standard the LWDA had proposed in that case. (*O'Connor*, *supra*, 201 F.Supp.3d at pp. 1113, 1133.) The court stated "the LWDA rightly has stressed" that "'when a PAGA claim is settled, the relief provided for under the PAGA be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public and, in the context of a class action, the court evaluate whether the settlement meets the standards of being "fundamentally fair, reasonable and adequate" with reference to the public policies underlying the PAGA.'" (*Id.*, at p. 1133.) Those public policies include "'augmenting the state's enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance.'" (*Id.* at pp. 1132-1133; see *Williams*, *supra*, 3 Cal.5th at p. 546 [PAGA "sought to remediate present violations and deter future ones"]; *Arias*, *supra*, 46 Cal.4th at p. 980 [the declared purpose of PAGA was to augment state enforcement efforts to achieve maximum compliance with labor laws].) The court in *O'Connor* added: "While a proposed settlement must be viewed as a whole, [citation] the Court must evaluate the adequacy of compensation to the class *as well as* the adequacy of the settlement in view of the purposes and policies of PAGA. In doing so, the court may apply a sliding scale. For example, if the settlement for the [Federal Rule of Civil

Procedure] Rule 23 class is robust, the purposes of PAGA may be concurrently fulfilled." (*O'Connor*, at pp. 1134-1135.)[6]

The court in *O'Connor* concluded the proposed settlement in that case did not satisfy this standard because, among other reasons, the overall compensation to the class was "relatively modest when compared to the verdict value." (*O'Connor*, *supra*, 201 F.Supp.3d at p. 1135.) "[T]he adequacy of settlement as a whole," the court stated, thus "turns in large part on whether the PAGA aspect of the settlement can stand on its own." (*Ibid.*) The court determined the proposed settlement could not stand on its own because the plaintiffs agreed to settle the PAGA claims for only 0.1 percent of the potential verdict value, "a reduction [for which] the LWDA has found has no rational basis." (*Ibid.*) The court applied a "more 'exacting' standard in determining whether [the] settlement [was] fair, adequate, and reasonable" because, unlike the circumstances here, the agreement covered the claims of members of a certified class as well as those of drivers who fell outside the class definition. (*Id.* at p. 1121.)

---

6 In its amicus brief filed in this action, the LWDA endorses the "sliding scale" approach the court adopted in *O'Connor*. The LWDA states that proposed settlements "in which the PAGA penalties are low in relation to total exposure" may nevertheless warrant approval "if the overall monetary relief obtained (typically damages on other claims in a certified class action) is significant, thus achieving (in part) the deterrent effect that penalties could otherwise achieve."

2. *The Settlement Provides Genuine and Meaningful Relief Consistent with PAGA's Purposes*

The trial court found the settlement's allocation of funds to the PAGA penalties were "fair, reasonable, and adequate" in light of "all the evidence . . . submitted and the valuation of all the claims." The court did not expressly find the settlement provided "'genuine and meaningful'" relief that is "'consistent with the underlying purpose of the statute to benefit the public.'" (See *O'Connor*, *supra*, 201 F.Supp.3d at p. 1133.) Substantial evidence, however supports such a finding because the settlement of the class action is "robust," thus "concurrently fulfill[ed]" the purposes of PAGA. (*O'Connor*, at p. 1135; see *7-Eleven Owners for Fair Franchising v. Southland Corp.*, *supra*, 85 Cal.App.4th at p. 1162 [any error in failing to determine whether the class met the standard for certification was harmless because the findings the trial court made satisfied that standard].) The trial court found, and Clarke does not dispute, that "the gross settlement exceeded the maximum exposure" on the class claims for alleged Labor Code violations not subject to PAGA. The trial court previously found in connection with its order granting approval of the initial settlement that First Transit's maximum exposure was $1,708,990, and the gross settlement provided up to $2,000,000.[7] "By providing fair compensation to the class members as employees and substantial monetary relief, [the] settlement not

---

[7] At the time the trial court granted final approval of the initial settlement agreement, class members had claimed $948,651.46 of the net settlement amount with an average recovery per class member of $2,710.

only vindicates the rights of the class members as employees, but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA." (See *O'Connor*, at p. 1134.)

Clarke argues the settlement does not satisfy PAGA's purpose because it undervalues the PAGA claims. He contends the value of the PAGA penalties for just one of the alleged Labor Code violations for one year is more than $3 million. "Thus," Clarke argues, "the revised amount of PAGA penalties of only $13,333 is suspect." Clarke, however, fails to consider the value of the settlement as a whole, which *O'Connor* advises courts to consider when the overall compensation to the class is substantial compared to the "verdict value." (See *O'Connor*, *supra*, 201 F.Supp.3d at p. 1135.) Unlike the settlement proposed in *O'Connor*, the settlement here need not "stand on its own" for approval. (See *ibid.*)

Moreover, Clarke argued to the trial court that the PAGA claims were worth at least $3 million, but the trial court discounted the potential value of the civil penalties in part due to the strength of First Transit's potential defenses. (See *Kullar*, *supra*, 168 Cal.App.4th at p. 130.) Alonzo identified at least three defenses that could undermine the strength of the PAGA claims, or defeat them altogether, including that certain of the alleged acts were inadvertent or were not Labor Code violations at all. Clarke does not dispute the trial court's conclusion regarding the strength of these defenses.[8] He

---

[8] Clarke challenges only the weaknesses Alonzo identified in Clarke's PAGA action, including that Clarke failed to exhaust administrative remedies before filing his complaint. Clarke does

contends only that the value of the PAGA claims should not be discounted to account for the stage of the litigation because the plaintiffs "never intended" to litigate and have not litigated those claims. This argument ignores the derivative nature of the PAGA claims asserted in this action, which the trial court found were litigated "for over three years."

Clarke also argues the trial court could not have properly evaluated the PAGA claims to determine if the settlement was genuine, meaningful, and consistent with the underlying purposes of PAGA because "the parties did not present a range of values for the PAGA claims, nor any evidence of any discovery related thereto." But they did. Clarke provided the court the same estimated value of the PAGA civil penalties he asserts on appeal, and Alonzo provided the court additional information concerning the number of drivers affected by alleged violations (to establish the basis for civil penalties) and the number of pay periods for those drivers (for purposes of calculating the corresponding civil penalties). This information was sufficient "for the court to intelligently evaluate the adequacy of the settlement." (*Kullar*, *supra*, 168 Cal.App.4th at p. 129; see *Munoz*, 186 Cal.App.4th at p. 409 [*Kullar* does not "require [an] explicit statement of value; it requires a record which allows 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation'"].) And as stated, because the PAGA claims here are derivative of the underlying alleged Labor Code violations, the parties' discovery on those claims, which the trial court found "sufficient to allow the Court

---

not contest the availability or strength of First Transit's defenses in this action.

and counsel to be fully apprised of the premises," was equally sufficient to allow the court to evaluate the settlement of the PAGA claims.[9]

3. *The Settlement Was Not a "Product of Collusion"*

The trial court reaffirmed its previous ruling that the settlement was entitled to a presumption of fairness. As indicated, the court stated it had "considered the PAGA penalty and its fairness through inquiry at the time the court granted final approval of the [initial] Settlement, [and] [t]hough not separately articulated in the record at the time of final approval the Court did review the PAGA settlement." The court concluded the settlement of the PAGA claims was fair because (1) the gross settlement exceeded First Transit's maximum exposure on the alleged Labor Code violations, (2) section 2699, subdivision (e)(2), gives the trial court "wide discretion to reduce PAGA penalties," and (3) Alonzo admitted First Transit "had significant defenses which could result in greatly reduced PAGA penalties."

Clarke contends "the last minute inclusion of PAGA claims in this settlement was a collusive effort to effectuate a class

---

[9] We agree with Clarke's contention that the amounts of settlements allocated to PAGA civil penalties in other settlements approved by other courts are not relevant to the fairness or adequacy of the settlement in this action. Although the trial court noted "the allocation of .0067 in this case is higher than the average of .0055 in Los Angeles County of similar-sized cases and the average of .0057 in federal cases of similar size," the trial court does not appear to have relied on this comparison in determining the fairness or adequacy of the settlement.

settlement." Clarke, however, has not shown the trial court abused its discretion in finding the settlement was fair. Clarke does not challenge the substantial evidence supporting the trial court's findings or contend the trial court's conclusions are arbitrary or capricious. (See *In re Cellphone Termination Fee Cases*, *supra,* 180 Cal.App.4th at p. 1118.) Instead, he presents circumstantial evidence suggesting the inclusion of the PAGA claims in the settlement "was clearly nothing more than a bargaining chip, a deal sweetener, to induce a class settlement." Such an unsupported allegation, even if true, did not make the settlement unfair. Indeed, as the court in *O'Connor* acknowledged, settlements of PAGA claims that allocate a disproportionate amount of settlement funds to the state "would come at the expense of the workers, who might otherwise benefit from a larger non-PAGA settlement." (*O'Connor*, *supra*, 201 F.Supp.3d at p. 1134.)[10]

4. *The Settlement Did Not Create an Inappropriate Conflict of Interest*

Clarke contends the trial court erred in approving the PAGA settlement because "class counsel and the class representatives represented parties with conflicting interests,"

---

10 Clarke also argues the parties' "collusion" denied him "the ability to recover PAGA penalties in his PAGA Action." Clarke, however, failed to show the trial court abused its discretion in finding the settlement was fair, and in any event, he will receive his share of the PAGA penalties to the extent he was affected by the Labor Code violations alleged in the third amended complaint.

namely, the aggrieved employees and the state.[11] He argues the settlement, which allocates only $13,333 to the PAGA claims, "has not worked out to the benefit of the State." PAGA protects the state's interest, however, by requiring aggrieved employees who want to file a claim to notify the state of alleged violations and give the state the opportunity to investigate and commence an enforcement action. (Former § 2699.3, subd. (a).)[12] Clarke does not contend Alonzo failed to comply with this requirement. Thus, the settlement protected the state's interest to the extent required by PAGA. Moreover, counsel for plaintiffs in every case that involves a release of claims under PAGA necessarily represent the interests of both aggrieved employees and the state. Accepting Clarke's argument would call into question the integrity of every such settlement.

---

[11] Alonzo argues Clarke forfeited this argument by failing to raise it in the trial court. In the trial court (although not set out under a separate heading), Clarke argued a conflict of interest arose when counsel for Alonzo "agreed to sell out the State in order to procure a recovery for the class and hundreds of thousands of dollars of attorneys' fees."

[12] At the time Alonzo filed this action, section 2699, subdivision (*l*), did not require employee plaintiffs to submit proposed settlement agreements to the LWDA. It does now, thus further protecting the state's interest in PAGA actions. (See § 2699, subd. (*l*)(2) [effective July 1, 2016].)

D. *The Trial Court Did Not Err in Rejecting Clarke's Argument That the Class Notice Was Deficient*

Clarke opposed approval of the revised settlement agreement because class members did not receive a revised notice informing them that an additional $3,333 would be allocated to them as their share of the PAGA penalties. Among other things, Clarke argues that "notice of the fact that the settlement would bar all PAGA claims, including [his] claims for millions of dollars . . . should have been given to the class." The trial court rejected Clarke's argument, ruling that "PAGA settlements do not require notice to the aggrieved employees." Assuming for the sake of Clarke's argument that class members were entitled to notice of the PAGA settlement, the initial notice provided in this case was sufficient.

"The purpose of a class notice in the context of a settlement is to give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement." (*Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 252, disapproved on another ground in *Hernandez*, *supra*, 4 Cal.5th at p. 274, fn. 4; see *Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 644 [class notice """must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members"""]; *Cho v. Seagate Technology Holdings, Inc.*, *supra*, 177 Cal.App.4th at p. 746 [same].) "The notice should allow class members to evaluate a proposed settlement. Notice should describe the formula or plan for computing individual settlement class member recoveries." (*Duran*, at p. 644; see *Cellphone Fee Termination Cases*, *supra*, 186 Cal.App.4th at p. 1393 ["'[t]he aggregate amount

available to all claimants was specified and the formula for determining one's recovery was given," and "[n]othing more specific is needed"']; see also *id.* at p. 1392 [citing with approval federal cases rejecting objections that there was no way to calculate the actual value of the settlement as to each class member].)

The notice sent to members of the class in this case satisfied these requirements. The notice apprised class members that the proposed settlement released claims under PAGA, identified the aggregate amount available to claimants and the bases for deductions from that amount, and described the method used to calculate payments to each claimant. Although the notice did not inform class members they would receive approximately $5 more as their share of civil penalties under PAGA, this omission was not material. (See *Pearson v. Target Corp.* (7th Cir. 2018) 893 F.3d 980, 986 [only material alterations to a class settlement generally require a new round of notice to the class and a new hearing under [Federal Rule of Civil Procedure] Rule 23(e)]; *In re Baby Products Antitrust Litigation* (3d Cir. 2013) 708 F.3d 163, 175, fn. 10 [same].)[13] Moreover, courts generally do not require supplemental notice where an amendment to a settlement agreement provides additional benefits to a class and does not adversely affect any legal rights. (*Keepseagle v. Vilsack* (D.D.C. 2015) 102 F.Supp.3d 306, 313 [collecting cases];

---

[13] California courts may look to federal law when seeking guidance on issues of class action procedure. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 318; *Schoshinski v. City of Los Angeles* (2017) 9 Cal.App.5th 780, 800, fn. 10; *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 823.)

see *Shaffer v. Cont'l Cas. Co.* (9th Cir. 2010) 362 Fed.Appx. 627, 631 ["[a]lthough changes were made to the release after potential class members received the notice, the changes did not render the notice inadequate because they narrowed the scope of the release"]; *In re Integra Realty Resources, Inc.* (10th Cir. 2001) 262 F.3d 1089, 1111 [supplemental notices were not required where the proposed amendment merely "expanded the rights of class members"]; *In re Prudential Ins. Co. of Am. Sales Practices Litig.* (D.N.J. 1997) 962 F.Supp. 450, 473, fn. 10 ["[c]lass members need not be informed of the [final changes] to the settlement because the Proposed Settlement is only more valuable with these changes"], affd., (3d Cir. 1998) 148 F.3d 283.) The revised settlement allocated class members an immaterial, additional recovery and did not adversely affect any legal rights because the original notice informed recipients the settlement would resolve any claims they may have under PAGA.

E. *In One Respect the Revised Settlement Still Does Not Comply with PAGA*

Clarke contends the revised settlement does not comply with section 2699, subdivision (i), because it directs payment of 25 percent of civil penalties only to "Class Members Who Did Not Opt Out," thus excluding aggrieved employees who opted out of the class, rather than to "all employees affected by the Labor Code violation[s]" alleged by Alonzo. Clarke is correct on this point.

Section 2699, subdivision (i), provides in relevant part, "civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the [LWDA] . . . and 25 percent to the aggrieved employees." The statute's second

reference to "aggrieved employees" could mean the same aggrieved employee(s) who "recovered" the civil penalties by bringing the PAGA action or it could refer to all employees who were "employed by the alleged violator and against whom one or more of the alleged violations was committed." (See § 2699, subd. (c) [defining "aggrieved employee"].) The Supreme Court resolved this ambiguity in *Iskanian*, *supra*, 59 Cal.4th 348 by stating that 25 percent of the civil penalties recovered in a PAGA action is to be distributed among "all employees affected by the Labor Code violation." (*Iskanian*, at p. 382; see *Williams*, *supra*, 3 Cal.5th at p. 545 [PAGA "deputiz[es] employees harmed by labor violations to sue on behalf of the state and collect penalties, to be shared with the state and other affected employees"]; *Julian*, *supra*, 17 Cal.App.5th at p. 865 ["a portion of the [PAGA] penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation"].)[14] Because the

---

[14] Some federal authorities have suggested that the 25 percent recovery provided by section 2699, subdivision (i), is a litigation "incentive" retained by the employee who filed the lawsuit. (See *Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1123 ["the twenty-five percent portion of the penalty awarded to the aggrieved employee . . . is thus an incentive to perform a service to the state, not restitution for wrongs done to members of the class"]; *Varsam v. Laboratory Corp. of America* (S.D.Cal. 2015) 120 F.Supp.3d 1173, 1181 [25 percent of civil penalties goes "to the aggrieved employees 'who initiated the claim under PAGA, not to the group of aggrieved employees on whose behalf the claim was prosecuted'"]; see also *Vargas v. Central Freight Lines, Inc.* (S.D.Cal. Sept. 25, 2017, No. 16-CV-00507-JLB) 2017 WL 4271893, p. 3 ["[s]eventy-five percent of the civil penalties are distributed to the LWDA,

settlement here does not provide for payment of 25 percent of the PAGA civil penalties to all aggrieved employees, the settlement does not yet comply with PAGA.[15]

First Transit's primary argument, that the settlement complies with PAGA because section 2699, subdivision (i), does not require that a portion of civil penalties "go to 'all' aggrieved

---

and the remainder is distributed to the aggrieved employee(s) who initiated the claim"]; *Hernandez v. Best Buy Stores, LP* (S.D.Cal., June 6, 2017, No. 13CV2587 JM (KSC)) 2017 WL 2445438, p. 3, fn. 3 [25 percent of award paid to plaintiff "could be viewed as akin to a lead plaintiff service award, which also serves to benefit only the employee willing to prosecute the case"].) Prior to *Iskanian*, at least one California court also suggested the 25 percent share of civil penalties went to the employee bringing the case as opposed to all aggrieved employees. (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1195 ["[i]f an employee successfully recovers an award of civil penalties, PAGA requires that 75 percent of the recovery be paid to the Labor and Workforce Development Agency, with the remaining 25 percent going to the employee"].)

[15] Alonzo and First Transit argue Clarke forfeited this argument by not raising it in the trial court. While Clarke did not specifically argue in opposition to the renewed motion for final approval that the settlement failed to comply with section 2699, subdivision (i), as interpreted by *Iskanian*, he came pretty close by citing *Iskanian* for the proposition that PAGA requires 25 percent of civil penalties be paid "'to all employees affected by the Labor Code violation.'" In any event, the relevant facts are undisputed and Alonzo and First Transit addressed the issue in their briefs on appeal. (See *Duran v. Obesity Research Institute, LLC*, *supra*, 1 Cal.App.5th at p. 646.)

employees," contradicts the language of *Iskanian*. First Transit's alternative argument, that the trial court's order approving the settlement actually provides for payment of 25 percent of civil penalties to all aggrieved employees, contradicts the language of the settlement agreement. And the language of the trial court's order (drafted by counsel for Alonzo) states that 25 percent of civil penalties "is going to be distributed on a pro-rata basis to those Class Members who timely submitted claim forms." That category of employees does not include "all employees affected by the [alleged] Labor Code violation[s]," as required by *Iskanian*. Therefore, the order granting final approval of the class action settlement must be corrected to state that 25 percent of the civil penalties paid under the settlement will be distributed to all aggrieved employees. (See *Cho v. Seagate Technology Holdings, Inc.*, *supra*, 177 Cal.App.4th at p. 748 [vacating an order approving class action settlement and remanding for the limited purpose of clarifying the scope of the class and re-notifying class members of the settlement].)

DISPOSITION

The order granting final approval of the class action settlement is vacated, and the judgment is reversed. The matter is remanded with directions for the trial court to modify the order approving the settlement to state that 25 percent of the civil penalties paid under PAGA will be distributed to all aggrieved employees, and to enter a new judgment. In all other respects the order is affirmed. The requests for judicial notice filed on June 30, 2017 and March 28, 2018 are denied. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.