

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department - Non-Limited		Entered by:
TITLE OF CASE: Eric Almaraz vs. Steven Brant		
LAW AND MOTION MINUTE ORDER		Case Number: 20CECG03430

Hearing Date:	September 27, 2023	Hearing Type:	Motion - PAGA Settlement
Department:	403	Judge:	Jon M. Skiles M
Court Clerk:	J. Xiong	Reporter:	Not Report

Appearing Parties:	
Plaintiff: Not Present	Defendant: Not Present
Counsel:	Counsel:

☐ Off Calendar

☐ Continued to ☐ Set for ___ at ___ Dept. ___ for ___

☐ Submitted on points and authorities with/without argument. ☐ Matter is argued and submitted.

☐ Upon filing of points and authorities.

☐ Motion is granted ☐ in part and denied in part. ☐ Motion is denied ☐ with/without prejudice.

☐ Taken under advisement

☒ No party requested oral argument pursuant to Local Rule 2.2.6 and CRC 3.1308(a)(1).

☒ Tentative ruling becomes the order of the court. No further order is necessary.

☒ Pursuant to CRC 3.1312(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

☒ Service by the clerk will constitute notice of the order.

☒ See attached copy of the Tentative Ruling.

☐ Judgment debtor ___ sworn and examined.

☐ Judgment debtor ___ failed to appear.
Bench warrant issued in the amount of \$ ___

JUDGMENT:

☐ Money damages ☐ Default ☐ Other ___ entered in the amount of:
Principal \$___ Interest \$___ Costs \$___ Attorney fees \$___ Total \$___
☐ Claim of exemption ☐ granted ☐ denied. Court orders withholdings modified to \$___ per ___

FURTHER, COURT ORDERS:

☐ Monies held by levying officer to be ☐ released to judgment creditor. ☐ returned to judgment debtor.
☐ \$___ to be released to judgment creditor and balance returned to judgment debtor.
☐ Levying Officer, County of ___, notified. ☐ Writ to issue
☐ Notice to be filed within 15 days. ☐ Restitution of Premises
☐ Other: ___

(34)

Tentative Ruling

Re: ***Almaraz v. Brant, et al.***
Superior Court Case No. 20CECG03430

Hearing Date: September 27, 2023 (Dept. 403)

Motion: Joint Motion for Approval of PAGA Settlement and Attorney's Fees

Tentative Ruling:

To grant and approve the settlement. To grant the requested attorney's fees. To deny the request for costs.

Explanation:

Under Labor Code section 2699, "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to [PAGA]. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court." (Lab. Code, § 2699, subd. (i)(2).)

The statute does not explain what exactly the trial court should consider when reviewing a proposed PAGA settlement. However, recently the Court of Appeal in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56 did provide some guidance. The court explained that "many federal district courts have applied the 'fair, reasonable, and adequate' standard from class action cases to evaluate PAGA settlements." (*Id.* at pp. 75–76.)

"Despite the fact that "'a representative action under PAGA is not a class action'", and is instead a 'type of qui tam action', a standard requiring the trial court to determine independently whether a PAGA settlement is fair and reasonable is appropriate. Class actions and PAGA representative actions have many differences, with one salient difference being that certain due process protections afforded to unnamed class members are not part of PAGA litigation because aggrieved employees do not own personal claims for PAGA civil penalties. Nonetheless, the trial court must 'review and approve' a PAGA settlement, and the Supreme Court has in dictum referred to this review as a 'safeguard[]'. The Supreme Court has also observed that trial court approval 'ensur[es] that any negotiated resolution is fair to those affected.' When trial court approval is required for certain settlements in other qui tam actions in this state, the statutory standard is whether the settlement is 'fair, adequate, and reasonable under all the circumstances.' Thus, while PAGA does not require the trial court to act as a fiduciary for aggrieved employees, adoption of a standard of review for settlements that prevents 'fraud, collusion or unfairness', and protects the interests of the public and the LWDA in the enforcement of state labor laws is warranted. Because many of the factors used to evaluate class action settlements bear on a settlement's fairness—including the strength of the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the settlement amount—these factors can be useful in

evaluating the fairness of a PAGA settlement." (*Id.* at pp. 76–77, internal citations omitted.)

"Given PAGA's purpose to protect the public interest, we also agree with the LWDA and federal district courts that have found it appropriate to review a PAGA settlement to ascertain whether a settlement is fair in view of PAGA's purposes and policies. We therefore hold that a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77, internal citations and footnote omitted.)

On the other hand, "PAGA does not provide that aggrieved employees must be heard on the approval of PAGA settlements... PAGA provides no mechanism for aggrieved employees, including those pursuing PAGA lawsuits, to be heard in objection to another PAGA settlement. This concession is dispositive, and we will not read a requirement into a statute that does not appear therein." (*Id.* at p. 79, internal citation omitted.)

1. Notice to LWDA

The moving party has given notice of the settlement to the LWDA, so it may address the court regarding it, if it so chooses. (Lab. Code, § 2966, subd. (l)(2).) The proposed settlement was uploaded to the LWDA on May 17, 2023. (Elkin Decl. ¶ 9, Exh. B.)

2. Is the Settlement Fair, Adequate, and Reasonable?

As mentioned above, the Court of Appeal in *Moniz v. Adecco USA, Inc.*, *supra*, 72 Cal.App.5th 56 stated that the trial court should review PAGA settlements to determine whether they are fair, adequate and reasonable. (*Moniz, supra*, at pp. 75–77.) "Because many of the factors used to evaluate class action settlements bear on a settlement's fairness—including the strength of the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the settlement amount—these factors can be useful in evaluating the fairness of a PAGA settlement." (*Id.* at p. 77.)

a. Strength of the Case

In addition to eighteen causes of action brought against defendants for Labor Code violations in an individual capacity and related to plaintiff's alleged wrongful termination, the Complaint alleges a sole representative cause of action for penalties under PAGA based on violations of Labor Code sections 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802. (Complaint, ¶¶ 19, 177.) There is no significant discussion regarding the strength of the case. The memorandum explains that plaintiff's maximum liability theory is based on every PAGA member suffering a reporting time pay violation, meal period violation, and rest period violation during every PAGA pay period. (Memorandum, § D(3).) This is based primarily on the allegations that once the new payroll software was introduced, employees were instructed to enter meals and breaks

on their time sheets that did not occur and were different from the hours actually worked. (Complaint, §§ 26-28.)

The discussion of the weaknesses of the case includes that defendant Trust-All Roofing has a limited number of employees which inherently limits recovery of penalties and that California's appellate courts are divided as to whether failure to pay premium wages for missed meal and rest periods can give rise to derivative wage statement liability which would limit the claims asserted in this action. (Elkin Decl., ¶ 7.)

The decision to settle the claims includes the fact that defendant Brant, the primary owner and operator of Trust-All Roofing passed away during the pendency of this action. The settlement is being paid from Mr. Brant's estate which limits the amount of funds available for payment of any settlement or judgment against the defendant. This is in addition to factors such as the savings in time and expense, lack of guaranteed outcome at trial, delay in resolution of the dispute should the parties continued on to trial, and the court's discretion to reduce any award of PAGA penalties. (Elkin Decl., ¶ 7.)

b. Stage of the Proceeding

A presumption of fairness exists where the settlements is reached through arm's length mediation between adversarial parties, where there has been investigation and discovery sufficient to allow counsel and the court to act intelligently, and where counsel is experienced in similar litigation. (*Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1802.)

Counsel represents that the settlement was reached following thorough legal and factual research and analysis and thorough review of data relative to the claims in this action. (Elkin Decl., ¶ 8.) Counsel states the settlement reflects his estimate of a total amount of civil penalties plaintiff and PAGA members could reasonably expect the court to award at trial. (*Ibid.*) The statements are vague as to what information was provided by defendant, if any, or otherwise possessed by plaintiff's counsel, in order to assess the value of the claims. The only records specifically cited as reviewed in assessing the claim are payroll records confirming a total of seventeen aggrieved employees during the PAGA period. (*Id.* at ¶ 15.) Counsel attests to having reviewed sufficient information to determine the settlement fairly reflects an amount that could be awarded at trial. This factor weighs in favor of approval.

c. Risks of Litigating Case through Trial

Counsel notes that there will be savings in time and expense by parties in not continuing to litigate the claims for penalties and that there is no guarantee of an outcome on the PAGA claims at trial, and the changing statutory law on PAGA which risks prevailing on liability and recovery of penalties. (Elkin Decl., ¶ 7.) Litigating a complex PAGA action is inherently expensive, and the litigation could continue beyond entry of judgment if either party appealed adverse rulings. (*Ibid.*) Given the nature of the cross-complaint challenging the PAGA statute itself, there was an increased likelihood of protracted litigation in the event the action could not be settled. This factor warrants a discount to the claims in favor of settlement.

Additionally, given the source of payment is the remaining estate of decedent Brant after creditor's claims, there is also a risk that the estate would be unable to satisfy any judgment against it. This factor likewise warrants a discount to the claims in favor of settlement.

d. *Amount of Settlement*

The gross settlement is a minimum of \$60,000, but to assess the reasonableness of this amount, the court needs a valuation of the total potential penalties.

The only new information provided with this second motion for approval of the PAGA settlement is plaintiff counsel's having reviewed payroll records for the relevant time period identifying a total of 17 aggrieved employees, including plaintiff. (Elkin Decl. ¶ 15.) Using this information to calculate the mathematical average payment, as opposed to the pro rata share based on workweeks during the PAGA period called for in the settlement agreement, each of the 17 aggrieved employees would receive approximately \$570 as their share of the remaining 25% of PAGA penalties. There is no estimate of the potential recovery to which the court can compare this figure, however it is not an insubstantial amount. Taken with counsel's assessment that the settlement represents reflects his estimate of the total civil penalties that could reasonably be expected at trial, this is sufficient to demonstrate the settlement is fair, adequate and reasonable.

A declaration from defendant providing admissible evidence of the number of employees and pay periods involved would also have been helpful in assessing the value of the claim. The settlement agreement stated this information would be provided with the motion for approval. (Elkin Decl., Ex. A, "Settlement Agreement and Release of Claims," § 1(b).)

The significant limiting factor in the amount available to settle the PAGA claim is the source of funds being the estate of Mr. Brant. Plaintiff additionally notes that there is a risk that the trial court would exercise its discretion to reduce the amount of penalties even if plaintiff prevailed at trial. Although there is room to request the parties expand further in their analysis of the value of the settlement, there is sufficient information to determine the settlement is fair, adequate and reasonable under the circumstances.

e. *Experience and Views of Counsel*

Plaintiff's counsel attests to the settlement as fair, adequate and reasonable. (Elkin Decl., ¶ 8.) He is a highly experienced attorney in class and representative actions and has focused the majority of his ten-year legal career on employment law. (*Id.* at ¶ 2.) He further attests to the settlement providing substantial monetary benefits to PAGA members and being the product of diligent efforts, arduous settlement negotiations and the best possible result for the PAGA members under the circumstances. (*Id.* at ¶ 8.) Counsel's qualifications and assessment of the settlement weigh in favor of approval.

f. *Government Participation*

Defendant Brandt filed a cross complaint against Xavier Becerra, then-Attorney General of State of California, Labor Commissioner Lilia Garcia Brower, and Secretary of California Labor and Workforce Development Agency Julia A. Su, and the California Labor and Workforce Development Agency, challenging the constitutionality of California's PAGA statute, however it does not appear as though the state cross-defendants participated in the mediation resulting in the global settlement. This factor does not favor either approval or disapproval of the settlement.

g. *Attorney's Fees and Costs*

The settlement agreement provides that plaintiff's counsel would get up to \$21,000 (35% of the total gross recovery) in attorney's fees. (Elkin Decl. ¶¶ 7, 12, 13, Exh. A, "Settlement Agreement and Release of Claims," § 4.)

Courts have approved awards of fees in class actions that are based on a percentage of the total common fund recovery. (*Laffitte v. Robert Half Internat.* (2016) 1 Cal.5th 480, 503.) It appears that the same reasoning would apply to PAGA settlements, which bear similarities to class actions. However, the court may also perform a lodestar calculation to double check the reasonableness of the fee request. (*Id.* at pp. 504-506.)

The declaration of Michel Elkin includes a table summarizing the hours of each attorney who worked on the matter, their years of experience and hourly rate. (Elkin Decl., ¶ 12.) The lodestar amount calculated by counsel is \$110,530.00. (*Ibid.*) Reducing each attorney's hourly rates to better reflect those of local counsel results in a lodestar amount that well exceeds the fees of \$21,000 to be approved with the settlement. The requested fees are sufficiently supported and are approved.

The motion seeks the approval of \$2,303.66 in costs to plaintiff's counsel. (Elkin Decl. ¶¶ 13, 14, Exhs. C-dd.) Although the costs are supported with invoices, the language of the "Settlement Agreement and Release of Claims" does not include language that would allow the court to award costs to plaintiff. (See, "Settlement Agreement and Release of Claims," §§ 4, 10.) Section 4, "Consideration" states: "Each party shall bear their own attorney's fees and costs." Section 10, "No Attorney's Fees and Costs" states: "Except as otherwise set forth herein, the Parties will bear their own respective costs and fees, including attorneys' fees incurred in connection with the PAGA Action and the negotiation and execution of this Agreement." The agreement sets forth that attorneys' fees up to 35% can be requested from the settlement in section 4 but does not include an allowance for costs in calculating the net amount of the settlement subject to distribution. The "net Settlement Sum" is the gross settlement of at least \$60,000 less 35% in fees. (*Id.* at § 4.) The net Settlement Sum is then divided, with 75% going to the LWDA and 25% to the aggrieved employees. (*Ibid.*) As such, the court cannot approve the reimbursement of costs sought from the settlement. It is not a matter of proof of costs, these are the terms the parties agreed upon.

h. *Incentive Payment to Plaintiff*

The settlement does not provide for an enhancement payment from the PAGA settlement to the individual plaintiff. This factor weighs in favor of approval of the settlement.

i. *Scope of the release*

... PAGA's statutory scheme and the principles of preclusion allow, or "authorize," a PAGA plaintiff to bind the state to a judgment through litigation that could extinguish PAGA claims that were not specifically listed in the PAGA notice where those claims involve the same primary right litigated. Because a PAGA plaintiff is authorized to settle a PAGA representative action with court approval (§ 2699, (l)(2)), it logically follows that he or she is authorized to bind the state to a settlement releasing claims commensurate with those that would be barred by res judicata in a subsequent suit had the settling suit been litigated to judgment by the state.

(*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 83.)

Here, while broad, the release at section 6 of the settlement agreement is limited essentially to the same primary right and PAGA penalties that could be pursued by the LWDA, predicated on the same PAGA claims asserted in this action. Further, section 8 of the release specifies that the agreement does not release any claims that cannot be released as a matter of law. This factor weighs in favor of approval.

3. *Conclusion*

Although it would be reasonable to request further evidence supporting the strength of the PAGA claims, specifically for the plaintiff to provide a valuation of the potential penalties sought in the complaint, the relatively small number of employees during the PAGA period is a significant limitation on the claim. The parties have included sufficient additional evidence and information to allow the court to evaluate the settlement. The settlement reached is a reasonable result given the uncertainties of trial and financial constraints of the defendant estate. Therefore, the court intends to approve the settlement and attorney's fees of \$21,000 provided for in the settlement.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JS on 9/25/2023.
(Judge's initials) (Date)

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-2000	<i>FOR COURT USE ONLY</i>
TITLE OF CASE: Eric Almaraz vs. Steven Brant	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: 20CECG03430

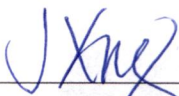
I certify that I am not a party to this cause and that a true copy of the:

Minute Order and Tentative Ruling

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: **Fresno, California 93724-0002**

On Date: **09/27/2023**

Clerk, by , Deputy
J. Xiong

Michael Elkin
 Elkin Gamboa, LLP
 4119 W. Burbank Blvd., Suite 110
 Burbank, CA 91505

Thomas E. Campagne
 Campagne & Campagne A Professional Corporation
 1685 North Helm Avenue
 Fresno, CA 93727

Aaron Jones
 Attorney General's Office
 455 Golden Gate Ave., Suite 11000
 San Francisco, CA 94102

Charles Hamamjian
 Sagase, Watkins & Wieland, PC
 5260 N. Palm Ave # 400
 Fresno, CA 93704

☐ Clerk's Certificate of Mailing Additional Address Page Attached