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May 31, 2022

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VIA LWDA PAGA FILING PORTAL

CALIFORNIA LABOR & WORKFORCE DEVELOPMENT AGENCY
ATTN: PAGA ADMINISTRATOR
1515 CLAY STREET, SUITE 801
OAKLAND, CA 94612

Re: Justin Lie v. Benihana International, Inc.
Superior Court of The State of California, County of San Mateo
Case No. 21-CIV-00153
LWDA-CM-811950-20

To Whom It May Concern:

My firm, Littler Mendelson, P.C., represents Defendant Benihana International, Inc. in the above referenced matter. On May 31, 2022, Plaintiff Justine Lie and Defendant Benihana International, Inc., pursuant to the parties' stipulated agreement, filed a joint motion to approve PAGA settlement and dismiss the of PAGA action (the "Motion"), set to be heard on July 5, 2022. Enclosed as **Exhibit A** is a true and correct copy of that Motion, and all corresponding documents with the exception of the exhibits to the Request for Judicial Notice.

Should you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in blue ink that reads "Chad D. Greeson".

Chad D. Greeson

Enclosure

EXHIBIT A

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Attorneys for Defendant
BENIHANA INTERNATIONAL, INC.

(Additional Counsel on Following Page)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

JUSTIN LIE, individually and on behalf of
himself and all others similarly situated,

Plaintiff,

v.

BENIHANA INTERNATIONAL, INC., a
Delaware Corporation; and DOES 1-50,
inclusive,

Defendants.

Case No. 21-CIV-00153

**JOINT NOTICE OF MOTION AND
MOTION TO APPROVE PAGA
SETTLEMENT AND DISMISSAL OF
PAGA ACTION**

ASSIGNED FOR ALL PURPOSES TO
JUDGE NANCY FINEMAN, DEPT. 4

Hearing Date: July 5, 2022
Time: 2:00 p.m.
Dept.: 4 CR N

Complaint Filed: Jan. 12, 2021
First Amd. Compl. Filed: Dec. 5, 2021
Second Amd. Comp. Filed: Jan. 18, 2022

///

///

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on behalf of himself and all other similarly situated
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1 **TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

2 **YOU ARE HEREBY NOTIFIED THAT** on July 5, 2022, or as soon thereafter as the
3 matter can be heard, in Department 4 CR N of the above-entitled Court before Honorable Judge
4 Nancy Fineman, Plaintiff Justin Lie (“Plaintiff”) and Defendant Benihana International, Inc.
5 (“Benihana”) (collectively, the “Parties”) jointly will and hereby do move for an order: (1)
6 approving the Parties’ PAGA Settlement and the payment described therein resolving Lie’s
7 individual claims for relief under the California Private Attorneys General Act (Cal. Lab. Code §
8 2698 *et seq.* (“PAGA”)); (2) dismissing Lie’s individual wage and hour claims *with prejudice*; (3)
9 dismissing the representative PAGA claims of the Aggrieved Employees, other than those of
10 Plaintiff *without prejudice*; and (4) having all Parties bear their own respective fees and costs except
11 as expressly provided in the PAGA Settlement Agreement.

12 This Joint Motion is based on this Notice, the accompanying Memorandum of Points and
13 Authorities, the Declaration of Chad Greeson, the Declaration of Christina Lucio, and the complete
14 files and records in this action. The Labor Workforce Development agency has been served with
15 this Motion.

16 DATED: May 26, 2022

LITTLER MENDELSON, P.C.

19 By: 

20 Constance E. Norton
21 Chad D. Greeson

22 Attorneys for Defendant BENIHANA
23 INTERNATIONAL, INC.

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1 **I. INTRODUCTION**

2 Plaintiff Justin Lie (“Plaintiff”) and Defendant Benihana International, Inc. (“Defendant”
3 or “Benihana”) (collectively, the “Parties”) entered into a Settlement Agreement after extensive
4 negotiations to resolve and settle Lie’s *individual* right to assert PAGA claims arising from his prior
5 employment with Benihana. The Parties entered into a PAGA Settlement Agreement and
6 Stipulation for Approval of PAGA Settlement and Dismissal of PAGA Action (“PAGA
7 Settlement”) to resolve, settle, and discharge Lie’s operative PAGA complaint by dismissing Lie’s
8 individual PAGA claims *with prejudice* and dismissing the PAGA claims without prejudice. A true
9 and correct copy of the PAGA Settlement is attached as **Exhibit A** to the Declaration of Chad
10 Greeson (“Greeson Decl.”) filed in support. The Parties provided notice to the Labor and Workforce
11 Development Agency (“LWDA”) previously of this proposed PAGA Settlement and have again
12 provided notice to the LWDA with this filing.

13 The Parties ask the Court to approve the PAGA Settlement because it is fair, adequate, and
14 reasonable under California law. Most importantly it impacts no rights or violations associated
15 with any employee except Plaintiff. Further, it protects the interest of the public and the LWDA in
16 the enforcement of California’s labor laws. Specifically, the PAGA settlement should be approved
17 based on the six factors California courts use to evaluate PAGA settlements.

18 *First*, Plaintiff’s PAGA claims face significant procedural, legal, and factual hurdles.
19 *Second*, the law concerning the remaining claims is not settled and prevailing on such claims will
20 be time-consuming, risky, complicated, and expensive to litigate. For instance, Plaintiff signed a
21 valid and enforceable arbitration agreement with a PAGA waiver in connection with his
22 employment with Defendant. The validity of such waivers is now under review by the U.S.
23 Supreme Court. Plaintiff’s PAGA claims are also subject to *res judicata* and/or collateral estoppel
24 based on the broad release of PAGA claims in a prior-filed and court-approved PAGA action
25 settlement. Additionally, the Parties dispute whether the law or the facts support statutory Labor
26 Code violations giving rise to the two remaining PAGA claims at issue in the operative complaint
27 for failure to properly calculate sick leave pay (Lab. Code § 246(l)) and expense reimbursement
28 (Labor Code § 2802). *Third*, the Parties have agreed to allocate some funds to settle the disputed

1 PAGA claims even though there is a substantial uncertainty and significant risk of no recovery if
2 the claims were litigated. Given the facts and circumstances, the Court has discretion and authority
3 to approve a PAGA settlement even if the Parties had allocated *no money* to settle the PAGA claims
4 remaining, as other California courts have done in the past. *Fourth*, the Parties have not engaged in
5 significant discovery, but the key legal issues turn on largely undisputed facts including lack of
6 evidence showing that Plaintiff took sick leave or incurred a reasonable and necessary business
7 expense during the relevant PAGA period. *Fifth*, the LWDA has been put on notice of the proposed
8 settlement and has declined to intervene or oppose it. *Sixth*, counsel for the Parties are qualified and
9 experienced in assessing and evaluating wage and hour issues and have concluded that this case
10 should be settled rather than litigated as contemplated in the PAGA Settlement. The expertise and
11 views of the Parties’ counsel, thus, weigh in favor of approving the PAGA settlement.

12 Based on the totality of the circumstances, as summarized above and discussed more fully
13 below, the Parties’ proposed PAGA Settlement is fair, reasonable, and adequate. It furthers
14 important public policy objectives by acknowledging the goals of Labor Code enforcement and
15 allocating settlement funds to resolve the PAGA claims asserted. The proposed PAGA Settlement
16 releases Plaintiff Justin Lie’s individual standing to bring a PAGA claim—it has no impact on the
17 rights of the LWDA or any other allegedly aggrieved employees. Consequently, the Court should
18 approve the Parties’ PAGA settlement and enter an order dismissing the action *with prejudice* as to
19 Plaintiff individually and *without prejudice* to any other allegedly aggrieved employees.

20 **II. RELEVANT FACTS**

21 On about November 5, 2020, Lie filed a notice with the LWDA under the California Private
22 Attorneys General Act (Cal. Lab. Code § 2698 *et seq.*) (“PAGA”) asserting various alleged Labor
23 Code and wage and hour violations. Plaintiff also provided a copy of the PAGA notice to Defendant
24 (the “PAGA Notice”). Greeson Decl., ¶ 3.

25 Subsequently, on January 12, 2021, Lie filed a PAGA action against Defendant in the
26 Superior Court of State of California, County of San Mateo, designated as Case No. 21-CIV-00153
27 (“Complaint”). Plaintiff sought PAGA penalties predicated on the following alleged violations of
28 the California Labor Code [“Labor Code”]: (1) Labor Code §§ 216, 225.5, 1182.12, 1194, 1197,

1 and 1198 and California’s Industrial Welfare Commission’s [“IWC”] Order No. 5-2001 (Unpaid
2 Minimum Wage); (2) Labor Code §§ 216, 225.5, 510, 515, 1194, 1197, 1198 and IWC Order No.
3 5-2001 (Unpaid Overtime); (3) Labor Code §§ 226.7, 512, and IWC Order No. 5-2001 (Unpaid
4 Meal Period Premiums); (4) Labor Code § 226.7 and IWC Order No. 5-2001 (Unpaid Rest Period
5 Premiums); (5) Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (6) Labor Code
6 § 351 (Unpaid Tips); (7) Labor Code § 246 (Unpaid Sick Leave); (8) Labor Code § 204 (Unpaid
7 Semi-monthly Wages and Meal/Rest Premiums); (9) Labor Code §§ 201-203 (Unpaid Wages upon
8 Separation); (10) Labor Code § 226 (Inaccurate Wage Statements); (11) Labor Code §§ 1174, 1175,
9 and IWC Order No. 5-2001; (12) Labor Code § 2802 (Unpaid Business Expenses). Through the
10 PAGA complaint, Lie sought to represent himself, the State of California, and current and former
11 employees of Defendant allegedly aggrieved. Greeson Decl., ¶ 4.

12 On or about December 2, 2021, Lie filed a First Amended Complaint (“FAC”) pursuant to
13 the Court’s Minute Order dated November 16, 2021, dismissing all of the previously asserted
14 PAGA claims except for the following: (a) Labor Code § 246 (Unpaid Sick Leave); (b) Labor Code
15 §§ 201-203 (Unpaid Wages upon Separation); and (c) Labor Code § 2802 (Unpaid Business
16 Expenses). Greeson Decl., ¶ 5. Plaintiff agreed to dismiss, and this Court allowed Plaintiff to
17 dismiss, these PAGA claims by filing the First Amended Complaint because of an early-filed and
18 court-approved PAGA settlement and release in *Ari Gold et al. v. Benihana National Corp. et al.*
19 [“Gold Action” or “Gold Class and PAGA Settlement”]. The *Gold Action* was filed on June 30,
20 2016, in San Diego Superior Court, Civil Case No. 37-2016-0002230. In the *Gold Action*, the court
21 approved granted final approval of a Class and PAGA Action Settlement and entered judgment on
22 August 17, 2021. Greeson Decl., ¶¶ 6-7; Declaration of Christina Lucio (“Lucio Decl.”) Lucio
23 Decl., ¶ 6; Request for Judicial Notice (“RFJN”) Nos. 1-7.

24 On or about January 5, 2022, counsel for the Parties met and conferred and entered a
25 stipulation where Lie agreed to dismiss his PAGA claim for the alleged violation of Labor Code
26 sections 201-203, because the claims were also expressly released by the *Gold Class and PAGA*
27 Settlement. Greeson Decl., ¶ 6. Lucio Decl., ¶ 6. Additionally, the Parties agreed that a PAGA
28 plaintiff cannot recover waiting time penalties for an alleged violation of Labor Code section 2802

1 for business expense reimbursement, because expense reimbursements are not wages subject to
2 Labor Code sections 201-203. Greeson Decl., ¶ 6. Lucio Decl., ¶ 6.

3 This Court granted this stipulation, approving the dismissal of these barred PAGA claims,
4 by permitting Plaintiff to file a Second Amended Complaint (“SAC”), leaving two PAGA claims
5 based on alleged violations of: (1) Labor Code § 246 (Unpaid Sick Leave); and (2) Labor Code §
6 2802 (Unpaid Business Expenses). *See* Greeson Decl., ¶ 7; Lucio Decl., ¶ 7.

7 On or about February 14, 2022, Lie submitted a demand for arbitration to AAA related to
8 his individual wage and hour claims (“Arbitration Demand”), which were not covered by the *Gold*
9 Class and PAGA Action Settlement because Plaintiff opted out of the class action settlement. *See*
10 Greeson Decl., ¶ 8; Lucio Decl., ¶ 8. The PAGA letter, the Complaint, the FAC, the SAC, and the
11 Arbitration Demand are collectively referred to herein as the “Lawsuit.”

12 Before initiating arbitration, Lie and Benihana, through their respective counsel, negotiated
13 a confidential settlement of Plaintiff’s non-PAGA claims, including a general release of claims and
14 a Civil Code section 1542 waiver, for which additional consideration is being provided and is
15 memorialized in a separate Confidential Settlement Agreement and Release. Additionally, the
16 Parties entered into the PAGA Settlement Agreement and Stipulation, which has now been
17 submitted to the Court for review and approval. Greeson Decl., ¶¶ 11 - 26, Ex. A, PAGA
18 Settlement; Lucio Decl., ¶¶ 9-17.

19 On April 1, 2022, Benihana filed a Notice of Motion and Motion to Approve PAGA
20 Settlement and Dismissal of PAGA Action (the “Motion”). The unopposed Motion was heard on
21 April 26, 2022. The Court denied the Motion without prejudice and directed Plaintiff or his counsel
22 to file a declaration in setting forth the facts relied on for dismissal of the representative claims in
23 the SAC. The Court asked the Parties to include a declaration from Plaintiff or his counsel in any
24 renewed motion, “setting forth the weighing of risks to demonstrate that the proposed settlement
25 of Plaintiff’s individual claims and dismissal” with prejudice to Plaintiff but without prejudice to
26 the representative claims is warranted. Greeson Decl., ¶ 23.

27 Accordingly, the Parties submit this Joint Motion for the Court to approve the PAGA
28 Settlement Agreement and Stipulation and to dismiss the SAC with prejudice as to Plaintiff’s

individual claims, and without prejudice as to any alleged aggrieved employees under PAGA.

III. THE COURT SHOULD APPROVE THE PARTIES PAGA SETTLEMENT

A. Statutory & Legal Requirements for PAGA Settlement Approval

Under PAGA, a trial court must review and approve any settlement of PAGA claims. Cal. Lab. Code § 2699(l)(2). Additionally, the proposed settlement must be submitted simultaneously to the LWDA. *Id.* However, PAGA does not establish a clear standard for evaluating PAGA settlements. *Id.*; *Wanderer v. Kiewit Infrastructure West Co.*, 2020 U.S. Dist. LEXIS 158189, *6 (E.D. Cal. Aug. 31, 2020) (noting that the LWDA has stated that “it is not aware of any existing case law definitively establishing a standard to review PAGA settlements.”)

Although 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.” *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 77 (2021) (citing *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-1801 (1996)). California courts have approved PAGA settlements where (1) the statutory requirements of PAGA are satisfied; and (2) where the settlement is fair, reasonable, and adequate in view of PAGA’s public policy goals. In applying these factors, the *Moniz* court reasoned as follows:

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.

Moniz, 72 Cal. App. 5th 56, 76. *Moniz* instructs trial courts to “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 laws.” *Id.*, 77.

Thus, to determine whether a PAGA settlement is fair in view of PAGA’s purposes and policies, California state and federal courts generally apply the fair, reasonable, and adequate standard from class action cases. *Moniz*, 72 Cal. App. 5th at 75-76; *Chamberlain v. Baker Hughes, a GE Co., LLC*, 2020 WL 4350207, at *4 (E.D. Cal. July 29, 2020) (“where PAGA claims also

1 appear, a district court must independently determine that a proposed settlement agreement is
2 ‘fundamentally fair, adequate, and reasonable’ before granting approval.”); *Rincon v. W. Coast*
3 *Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, at *6 (S.D. Cal. Feb. 12, 2018) (approving
4 standard for evaluating PAGA settlements that “(1) meet the statutory requirements set forth by
5 PAGA, and (2) are fundamentally fair, reasonable, and adequate in view of PAGA’s public policy
6 goals.”)

7 California federal district court cases have relied on reasonableness factors in the class
8 action context to evaluate whether a PAGA settlement is fair, reasonable, and adequate including
9 those established by the Ninth Circuit in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
10 1998). *Id.*, see also *Rincon*, 2018 U.S. Dist. LEXIS 22886, at *6; see also. *Patel v. Nike Retail*
11 *Servs.*, 2019 U.S. Dist. LEXIS 77988, *5-*6 (N.D. Cal. May 8, 2019) (identifying *Hanlon* factors
12 relevant to evaluating a PAGA settlement including (1) the strength of plaintiff’s case; (2) the risk,
13 expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement;
14 (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of
15 government participation; and (6) the expertise and views of counsel.”)

16 Additionally, these factors are evaluated in light of PAGA’s public policy goals of
17 “benefit[ing] the public by augmenting the state’s enforcement capabilities, encouraging
18 compliance with Labor Code provisions, and deterring noncompliance.” *O’Connor v. Uber Techs.,*
19 *Inc.*, 201 F. Supp. 3d 1110, 1135 (N.D. Cal. 2016) (citing LWDA’s Resp. at 2 (quoting Cal. Lab.
20 Code § 90.5(a)).

21 Applying the *Hanlon* factors here shows the PAGA Settlement is fair, reasonable, and
22 adequate. Therefore, the Court should approve the PAGA settlement where Plaintiff Justin Lie—
23 and Plaintiff *only*—has agreed to relinquish his individual right to pursue a PAGA claim.

24 **B. The Parties Served the LWDA with Notice of the Proposed Settlement, and**
25 **the LWDA Has Not Responded**

26 *First*, Plaintiff satisfied PAGA’s initial notice requirements by providing a letter dated
27 November 5, 2020 to the LWDA and Plaintiff’s employer, Benihana International, Inc., pursuant
28 to California Labor Code section 2698 *et seq.* Greenson Decl., ¶ 3. The notice includes the remaining

1 PAGA claims alleged in this action for an alleged violation of Labor Code section 246(l) regarding
2 the proper calculation of sick pay as well as failure to provide business expense reimbursements
3 under section 2802 for the purchase of knives, pens, and other items. Greeson Decl., ¶ 3.

4 *Second*, Plaintiff also waited longer than the statutory period before filing a PAGA claim –
5 filing his original complaint on January 12, 2021. RFJN, Ex. 8. Third, Defendant previously filed
6 a motion for approval of the PAGA settlement, and the LWDA did not indicate any response or
7 opposition to the proposed PAGA settlement. RFJN, Ex. 9. Consequently, the court can now
8 consider whether the proposed PAGA settlement is fair, reasonable, and adequate in view of
9 PAGA’s public policy goals.

10 *Third*, Pursuant to California Labor Code section 2699(1), Benihana will provide a copy of
11 the PAGA Settlement and this Joint Motion to the LWDA concurrently with the filing of the instant
12 motion for settlement approval, as set forth in the accompany proof of service. In addition,
13 Benihana shall submit to the LWDA a copy of the Court’s judgment and order approving the PAGA
14 Settlement within ten (10) days after entry of judgment and order.

15 **C. The Proposed PAGA Settlement Is Fair, Reasonable, and Adequate**

16 A PAGA settlement should be reviewed and a settlement should be evaluated under the
17 “fair, reasonable, and adequate standard” applicable to analogous class actions. *Moniz*, 72 Cal. App.
18 5th 769, 75-76 (approving the trial court’s application of the “fair, reasonable, and adequate”
19 standard from class action cases by citing California federal cases including *Chamberlain*, U.S.
20 Dist. LEXIS 134582, * 10-11 and *Rincon*, 2018 U.S. Dist. LEXIS 22886, at *6.)

21 The proposed PAGA settlement of Lie’s individual right to assert a PAGA claim is fair,
22 reasonable, and adequate under *Hanlon*. The only party impacted by approving the PAGA
23 settlement and subsequent dismissal is Plaintiff Justin Lie. The PAGA settlement relates only to
24 Lie’s individual right to bring a PAGA claim and does not affect the rights of any other allegedly
25 aggrieved employees.

26 Plaintiff no longer chooses to pursue a PAGA action and voluntarily decided to resolve his
27 individual right to assert a PAGA claim in exchange for the settlement payment outlined in the
28 PAGA Settlement. Greeson Decl., Ex. B, PAGA Settlement ¶¶ 1- 4; Lucio Decl., ¶¶ 12; 28. The

consideration for Plaintiff's release is fair and reasonable when considered against all relevant *Hanlon* factors including (1) the strength of Lie's Lawsuit; (2) the risk, expense, and complexity of Lie's Lawsuit; (3) the amount of the settlement in connection with the Lawsuit; (4) the extent of discovery completed prior to settlement; and (5) the expertise and view of counsels. *Moniz v. Adecco USA, Inc.*, 72 Cal.App.5th 56; *Chamberlain v. Baker Hughes, a GE Co., LLC*, 2020 WL 4350207 (E.D. Cal. July 29, 2020); *Rincon v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886 (S.D. Cal. Feb. 12, 2018); *Patel v. Nike Retail Servs.*, 2019 U.S. Dist. LEXIS 77988 (N.D. Cal May 8, 2019); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Accordingly, the Parties respectfully request that the Court approve the PAGA Settlement.

1. Strength of Lie's Case

Lie alleged a single PAGA cause of action in his Second Amended Complaint for (1) failure to properly pay sick leave; and (2) failure to reimburse business expenses. Lie's claims are barred for two reasons. *First*, the claims are barred by PAGA Action settlement and release in *Ari Gold v. Benihana National Corp., et al.*, Superior Court of California, County of San Diego, Case No. 37-2016-00022320-CU-OE-NC (the "*Gold Action*"). The release in the *Gold Action* settlement¹, with order granting final approval of settlement filed on June 26, 2021, states as follows:

[A]ll claims by the Class Members alleged in the initial and Amended Complaints and PAGA letters, or that could have been alleged based on the facts asserted therein, including but not limited to claims under the Fair Labor Standards Act based on the facts asserted. This release expressly includes: Any and all claims, debts, rights, demands, obligations or liabilities of every nature and description,

¹ The operative complaint in the *Gold Action* alleged, on behalf of a putative class of all Benihana's non-exempt employees in California for a period beginning June 26, 2014, the following class action claims: (1) Violation of California Labor Code §§ 510 and 1198 (Unpaid Overtime); (2) Violation of California Labor Code §§ 1182.12, 1194, 1197, 1197.1, and 1198 (Unpaid Minimum Wages); (3) Violation of California Labor Code §§ 226.7, 512(a), and 1198 (Failure to Provide Meal Periods); (4) Violation of California Labor Code § 226.7 and 1198 (Failure to Provide Rest Periods); (5) Violation of California Labor Code §§ 226(a), 1174(d) and 1198 (Non-Compliant Wage Statements and Failure to Maintain Records); (6) Violation of California Labor Code §§ 201 and 202 (Wages to Timely Paid Upon Termination); (7) Violation of California Labor Code § 204 (Failure to Timely Pay Wages During Employment); (8) Violation of California Labor Code § 1198 and California Code of Regulations, Title 8, Section 11160 Subdivision 5(A) (Failure to Provide Reporting Time Pay); (9) Violation of California Labor Code § 1198 and California Code of Regulations, Title 8, Section 11050 Subdivision 4(C) (Failure to Compensate for Split-Shifts); (10) Violation of California Labor Code §§ 221, 224 and 351 (Collecting or Receiving Wages Already Paid); (11) Violation of California Business & Professions Code §§ 17200, et seq. (Unlawful Business Practices); and, (12) Violation of California Business & Professions Code §§ 17200, et seq. (Unfair Business Practices). *See* RFJN, Ex. 3.

whether known or unknown, for damages, penalties, liquidated damages, punitive damages, interest, attorneys' fees, litigation costs, restitution, or equitable relief pled in the initial and Amended Complaints and PAGA Letters or claims that could have been pled related to or arising out of the allegations set forth in the initial and Amended Complaints and PAGA Letters or arising from the same or similar facts, including but not limited to: (i) all claims for the failure to pay wages, the failure to calculate and pay overtime and minimum wages, including claims pursuant to California Labor Code sections 210, 221, 223, 224, 225.5, 351, 510, 558, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198 or 1199 and claims under the Fair Labor Standards Act ("FLSA"); (ii) all claims for meal period and rest break violations and premiums pursuant to California Labor Code sections 226.7, 512, 1198 and applicable IWC Wage Order(s); (iii) all claims for failure to timely pay wages upon termination pursuant to California Labor Code sections 201, 202, or 203; (iv) all claims for failure to timely pay wages during employment pursuant to California Labor Code section 204; (v) all claims for inaccurate or improper itemized wage statements, failure to maintain records concerning hours worked or wages paid pursuant to California Labor Code sections 226, 226.3, 1174, 1174.5 or 2810.5; (vi) all claims for failure to pay reporting time pay pursuant to California Labor Code section 1198 or California Code of Regulations, Title 8, section 11050(5); (vii) all claims for failure to pay split shift pay pursuant to California Labor Code section 1198 or California Code of Regulation, Title 8, section 11050(4)(C); a (vii) all incorporated or related claims arising out of the preceding alleged violations pursuant to California Business and Professions Code sections 17200, et seq.

See RFJN, Ex. 6. Hence, the *Gold* Action directly impacts and materially effects this action – Lie's claims for PAGA penalties are potentially barred by the *Gold* Action settlement, as discussed in further detail below.

Second, Plaintiff's PAGA claim for violation of Labor Code section 246 fails as a matter of law because a private litigant cannot recover civil penalties under PAGA for a violation of Labor Code Section 246. *Titus v. McLane Foodservice, Inc.*, 2016 WL 4797497, at *5 (E.D. Cal. Sept. 14, 2016) ("PAGA provides that '[n]o action shall be brought under this part for any violation of a posting, notice, agency, reporting, or filing requirement of [the Labor Code], except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.' "); *Ramirez v. C and J Well Service, Inc.*, 2020 WL 5846464, at *5 (C.D. Cal., Mar. 27, 2020) ("because section 246(i) requires an employer to provide written notice to an employee, and it does not require an employer to file or report payroll or workplace injury information with or to the government agency, Plaintiff cannot bring this claim under PAGA for civil penalties."); *Segal v. Aquent LLC*, 2018 WL 4599754, at *7 (S.D. Cal. Sept. 24, 2018) (striking a § 246(i) claim "because notice and

posting requirements are not bases for a PAGA action”). Section 246 requires a written notice to be provided to the employee – therefore, and because it does not require an employer to file, report payroll or workplace injury information with or to a government agency, Plaintiff’s claim cannot proceed under PAGA.

Third, as discussed in detail above, Lie has no plausible claim for violation of Labor Code section 246. Lie’s employment during the relevant PAGA period is from November 8, 2019 to December 4, 2019 (less than thirty days). During that time, Lie did not receive payments for any sick leave or utilize sick pay. *See* Greeson Decl., ¶16. As such, there is no plausible violation of Labor Code section 246, and Plaintiff lacks standing to assert such a claim, in addition to being barred by the *Gold* Action and relevant case law.

Plaintiff further alleges that Benihana, an international restaurant that staffs a multitude of chefs, waiters, and staff, failed to reimburse him for knives, which is implausible. Benihana asserts that any employees who purchased knives or pens did so voluntarily for their own preference or convenience. Moreover, Plaintiff never submitted a reimbursement request during his employment. *See* Greeson Decl., ¶17. Without a predicate violation, Plaintiff lacks standing to assert such a claim, in addition to being barred by the *Gold* Action. Plaintiff only worked two pay periods during the relevant PAGA period, and the \$200 offered in settlement fully covers the maximum permissible penalty, even if one could be asserted. *See* Greeson Decl., ¶17.

In sum, Plaintiff’s case is relatively weak and uncertain. Benihana’s defenses were discussed at length with Plaintiff’s counsel, and Plaintiff’s counsel agrees that Benihana’s arguments present a substantial risk to Plaintiff’s PAGA action, and that there is a likelihood that the penalties sought, either in whole or in part, would not be awarded. Because “legal uncertainty favors approval of the settlement,” this factor favors approval of the PAGA Settlement. *See Wanderer*, 2020 U.S. Dist. LEXIS 158189, *9.

2. Risk, Expense, Complexity, and Likely Duration of Further Litigation

The proposed PAGA Settlement was reached after extensive negotiations, and represents a fair, adequate, and reasonable resolution of the action, in light of Plaintiff’s desire not to pursue a PAGA claim on behalf of other individuals. Lucio Decl., ¶¶ 12; 28. The Parties arrived at this

1 PAGA Settlement as the result of arms' length negotiations, taking into account all relevant factors,
2 present and potential.

3 Similar to the reasons set forth above, Lie risks receiving nothing if this case moves forward.
4 Consider, for example, the impact of the *Gold Action* settlement. A court-approved settlement,
5 entered as a judgment, is considered final and on the merits for *res judicata* purposes. *See*
6 *Interinsurance Exch. Of the Auto. Club of Southern California*, 2019 Cal. App. 3d 177, 182 (1989)
7 (finding, “[i]f the matter was within the scope of the action, related to the subject matter and relevant
8 to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that
9 it was not in fact pleaded or otherwise urged.”); *See also Citizens for Open Access to San & Tile,*
10 *Inc. v. Seadrift Ass’n*, 60 Cal. App. 4th 1053, 1065-68 (1998) (explaining that under the California
11 *res judicata* doctrine, the causes of action need not identify the same facts or theories for recovery
12 or even allege the same wrongdoing for *res judicata* to apply; instead, the two actions need only
13 “affect the same primary right.”). The *Gold Action* settlement is a final decision on the merits for
14 the purposes of *res judicata* and contains an expansive settlement and release, referenced above,
15 absorbing Lie’s claims. If Lie’s claims are barred and absorbed through the legal principal of *res*
16 *judicata* via the *Gold Action*, then Lie receives nothing.

17 Notwithstanding, after almost a year of litigation, the parties reached the PAGA Settlement,
18 which they believe is both fair and reasonable. The PAGA Settlement was reached after an
19 investigation, informal discovery, and arms-length negotiations between two experienced and
20 informed counsel, taking into consideration the factors discussed in the Declarations of Chad
21 Greeson and Christina Lucio, filed with this Motion. Further, the Parties acknowledge that
22 discovery in Plaintiff’s PAGA claims could be stayed given the U.S. Supreme Court’s decision to
23 grant cert in *Viking River Cruises, Inc. v. Moriana*, No. B297328, 2020 WL 5584508 (Cal. Ct. App.
24 Sept. 18, 2020) (“*Viking River Cruises*”), United States Supreme Court Case No. 20-1573. *Viking*
25 *River Cruises* involves issues that bear directly upon the instant action. Specifically, the Supreme
26 Court has granted review of the threshold issue of whether The Federal Arbitration Act (“FAA”)
27 requires enforcement of a bilateral arbitration agreement, including under the Private Attorney
28 General Act. *See* RFJN, Ex. 10-11. Here, a valid and enforceable arbitration agreement exists

1 between Lie and Benihana, which directly impacted the Parties’ decision to settle. Without approval
2 of the PAGA Settlement, this litigation will be stayed and delayed for months until the *Viking River*
3 decision is published, necessitating further costs and expenses for both parties. Moreover, and
4 generally, “where a settlement ‘provides timely, certain, and meaningful recovery,’ it out to be
5 favored. *Wanderer*, 2020 U.S. Dist. LEXIS 158189 at *9. Accordingly, this factor favors approval
6 of the PAGA Settlement.

7 3. Amount Offered in Settlement

8 The PAGA Settlement proposed resolves and releases Plaintiff’s individual PAGA claims
9 and nothing more. Pursuant to the PAGA Settlement, Benihana will make a payment in the amount
10 of \$200 to settle and release Lie’s individual PAGA claims. Of the \$200 Benihana agrees to pay:
11 (1) \$150.00 (representing 75% of said \$200.00) will be paid to the LWDA; and (2) \$50.00
12 (representing 25% of said \$200.00) will be payable to “Justin Lie” and shall represent payment for
13 PAGA penalties.

14 The \$200 payment is reasonable, when considered in light of the fact that it is compensation
15 to settle Lie’s disputed PAGA claims—not the rights of any other allegedly aggrieved employees.
16 On November 5, 2020, Lie sent his PAGA Letter to the LWDA. He later filed the complaint on
17 January 12, 2021. PAGA claims are limited to one-year and 65 days prior to filing the complaint—
18 i.e., November 8, 2019 to present. Lie’s employment with Benihana ended on December 4, 2019.
19 From November 8, 2019 to December 9, 2019, Lie did not receive any sick leave pay. Therefore,
20 Lie has no grounds and lacks standing to recover a PAGA penalty for the alleged failure to properly
21 calculate sick pay under Labor Code section 246. *See* Greeson Decl., ¶¶ 21-23; Lucio Decl., ¶¶ 21-
22 23.

23 Moreover, Lie sought PAGA penalties for failure to reimburse him for the purchase of
24 knives, pens, and other items under Labor Code section 2802. Benihana contends that any knife
25 Lie purchases was not reimbursable under section 2802 because the Company provided knives to
26 chefs like Lie. Thus, any knife Lie allegedly purchased was for his own personal preference or
27 convenience based on his voluntary choice. Even if Benihana failed to properly reimburse Lie for
28 the purchase of a knife, which Benihana denies, this would result at most in a one-time PAGA

1 penalty of \$100. As discussed above, Lie's employment during the PAGA period is limited to
2 November 8, 2019 to December 4, 2019 (less than thirty days), which constitutes two pay periods.
3 See Greeson Decl., ¶17; 22. Based on Lie's pay periods, the maximum total awarded Lie can receive
4 through any PAGA action is \$200. Thus, the \$200 payment to settle and release Lie's individual
5 PAGA claims, with prejudice as to Lie but *without* prejudice as to the other alleged aggrieved
6 employee, is more than fair, assuming Lie can even prove his alleged purchase of a knife (while
7 employed by a multinational restaurant chain known for its cutlery-based show and for which no
8 claim for reimbursement was ever made by Lie) was actually necessary and reasonable. See
9 Greeson Decl., ¶ 23; Lucio Decl., ¶ 23.

10 Therefore, the proposed PAGA settlement is more than adequate as it relates to Plaintiff's
11 individual claims for alleged violation of Labor Code sections 246 and 2802 and the proposed
12 settlement is reasonable and fair. Additionally, the fact that Benihana agreed to provide additional
13 consideration to Lie to resolve his individual wage and hour claims, has no impact on this Court's
14 decision to approve the PAGA Settlement. Rather, it demonstrates the unique posture of an action
15 in which a putative class member, like Justin Lie, opts out of a class action settlement, and who
16 chooses to arbitrate his individual claims voluntarily. See RFJN Exh. 1-7.

17 As reiterated above, and discussed in detail below, the PAGA Settlement is fair and
18 reasonable, and addresses the unique procedural history of this Lawsuit, including the settlement
19 of a prior filed class action eliminating the grounds for many of the initial claims alleged.² Further,
20 it acknowledges Lie's desire not to pursue a PAGA claim on behalf of other individuals as well as
21 the inherent risks and uncertainties in PAGA actions. If this action were litigated, there is significant
22 risk that no PAGA penalties would be assessed based on all available data considered by Lie and
23

24 ² No case law or statute requires the Court to review the parties' Confidential Settlement Agreement
25 prior to approval of the PAGA Settlement. The Parties agreed to follow AAA rules in the
26 Arbitration Agreement, which requires the arbitrator to maintain confidentiality and to make
27 appropriate rulings to safeguard confidentiality unless the law states otherwise or the parties agree.
28 Greeson Decl., ¶ 20. And the Parties have agreed to a confidential settlement and release agreement,
which requires the Parties not to disclose publicly the terms or conditions of the agreement.
Nonetheless, counsel for both Lie and Defendant will disclose the terms of the confidential
settlement agreement upon request of the Court either during the hearing on this Motion or during
an in-camera review to safeguard the Parties' confidentiality agreement and obligations.

1 his counsel through the present.

2 As discussed above, Lie's PAGA claims for failure to properly calculate sick pay are barred
3 by the *Gold* Action and by law because a private litigant cannot recover civil penalties for a
4 violation of this section. As such, if the instant PAGA Settlement is not approved, Plaintiff would,
5 at most, be limited to penalties associated for a violation of Labor Code section 2802 for expense
6 reimbursement involving the alleged purchase of "knives, pens, and other items." (Plt.'s Second
7 Amended Compl. ¶ 37), and there is no evidence discovered to date of any such reimbursable
8 expenses.

9 Furthermore, Plaintiff is not required to receive any monies in the settlement of his PAGA
10 claims. In fact, "courts have previously approved settlements where parties mutually agree to
11 allocate zero dollars or another nominal amount to a PAGA claim." *Wanderer*, 2020 U.S. Dist.
12 LEXIS 158189 at *10 (citing *Nordstrom Comm'n Cases*, 186 Cal. App. 4th 576, 589 (2010)
13 ("holding that there was 'no abuse of discretion in the trial court's approval of the settlement
14 agreement' which allocated zero dollars for PAGA penalty claims as part of the overall settlement
15 of the case"); *Alcala v. Meyer Logistics, Inc.*, 2019 U.S. Dist. LEXIS 166879, *9 (C.D. Cal. June
16 17, 2019) ("observing that courts have approved PAGA claims which fall 'within the zero to two
17 percent range' "). Moreover, the proposed PAGA Settlement does not impair nor release any right
18 that the allegedly aggrieved employees may have against Benihana, similar to the settlement
19 agreement approved in *Wanderer*. Accordingly, this factor favors approval of the PAGA
20 Settlement. Consequently, the Court should conclude that the settlement is fair, reasonable, and
21 adequate and approve the PAGA settlement.³

22 4. Extent of Discovery Completed and Stage of the Proceedings

23 In conjunction with the negotiated PAGA Settlement, counsel for both Lie and Benihana
24 engaged in an informal exchange of information to place both parties on equal footing and to engage
25 in arms-length negotiations. Both parties developed an understanding of the risks and benefits in

26 _____
27 ³ Although PAGA requires that a court approve the proposed PAGA Settlement, Labor Code
28 section 2699(1) does not require that a court approve any other elements of the proposed PAGA
Settlement. Because Lie did not make any class allegations for which Defendant seeks approval,
the approval provisions applicable to class settlements under California Code of Civil Procedure
section 382 do not apply.

litigating this matter, as discussed in their accompanying Declarations, and negotiated a fair and reasonable PAGA Settlement, which is the subject matter of this Motion. Accordingly, this factor, too, favors approval of the PAGA Settlement.

5. Presence of a Government Participant

As discussed above, the LWDA has not directly intervened in this case or spoken on the proposed PAGA settlement. Therefore, this factor favors approving the Parties' PAGA settlement.

6. The Expertise and Views of Counsel

The Parties agreed to settle Lie's individual PAGA claims after extensive negotiations and an exchange of relevant information and data. The PAGA Settlement is intended to only resolve the PAGA claims as individually applicable to Lie and is not intended to nor does it release claims, if any, that may be applicable in any representative PAGA claim. However, the PAGA Settlement shall not be construed as an admission by Benihana whatsoever, or as an admission by Benihana of any violation of Plaintiff's (nor any allegedly aggrieved employee's) rights, violation of any order, law, statute, duty or contract whatsoever. Benihana specifically disclaims any liability to Plaintiff or any other aggrieved employee for any alleged violation of their rights, or for any alleged violation of any order, law, statute, duty or contract.

Both counsel for Lie and for Benihana have extensive experience in litigation, specifically employment litigation, and in litigating PAGA actions. As such, and based on their experience, they have proffered the instant PAGA Settlement as a fair and reasonable resolution of this matter, evidenced further by their cooperation in filing the instant Motion. Lie's counsel, with Lie, carefully considered and evaluated the strength of their arguments in conjunction with the risk of litigation – concluding that the PAGA Settlement appropriately accounts for any challenges and risks presented in litigation, agreeing that the PAGA Settlement was Lie's best chance of a speedy and full recovery. As such, Lie voluntarily entered into and executed the PAGA Settlement. Accordingly, this factor too favors approval of the PAGA Settlement.

For all of the reasons above, the proposed PAGA settlement is fair, adequate, reasonable, and should be approved and the case dismissed in accordance with the Parties stipulation.

1 **D. The Proposed Settlement Furthers PAGA’s Public Policy Objectives and**
2 **Does Not Impair the LWDA or Any Other Allegedly Aggrieved Employees**

3 In addition to the *Hanlon* factors, the Court must determine “whether the settlement would
4 be ‘unjust, arbitrary, and oppressive, or confiscatory’ with respect to defendant . . . and whether
5 ‘the settlement provisions are at least as effective as the protections or remedies provided by state
6 and federal law or regulation for the alleged violation.’ ” *Wanderer*, 2020 U.S. Dist. LEXIS 158189
7 at *7.

8 Similar to *Wanderer*, the instant PAGA Settlement should be approved, absent review of
9 Lie’s settlement agreement addressing his individual claims. In *Wanderer*, the parties agreed “to
10 allocate zero dollars to plaintiff’s individual PAGA claim”. *Id.* Indeed, in *Wanderer*, Plaintiff
11 voluntarily “entered into an agreement to accept a monetary benefit to settle his individual claims
12 and not pursue his PAGA claims.” *Id.* The *Wanderer* court approved the PAGA settlement because
13 there was “no indication that the settlement would be unjust, arbitrary and oppressive, or
14 confiscatory to the defendants” and “both sides . . . agreed that the settlement is fair and reasonable.”
15 *Id.* Specifically, “given that both sides have agreed to the settlement to avoid the further expense
16 of litigation, and the Settlement Agreement does not release any claim on behalf of any other
17 allegedly affected employee, the court concludes that a settlement would not be unjust, arbitrary
18 and oppressive, or confiscatory.” *Id.*

19 As in *Wanderer*, the instant PAGA Settlement resolves “only . . . [Lie’s] individual claims
20 for civil penalties; it is not a class settlement and therefore does not impair the rights or release the
21 claims of any other allegedly aggrieved employees.” *Id.* at p. *13. Because the statutory language
22 of PAGA requires a Plaintiff to prove a suffered violation on behalf of the individuals whom the
23 Plaintiff represents, the PAGA Settlement is sufficient and may be approved, as it only relates to
24 Lie. Accordingly, the PAGA Settlement satisfies the provisions of the California Labor Code, and
25 every relevant factor favors approval of the PAGA Settlement.

26 **E. Plaintiff Is Entitled to a Dismissal of the PAGA Action**

27 There is no case law which finds it inappropriate for a Plaintiff to settle his non-PAGA
28 individual claims, and, in fact, as discussed above, courts have often approved PAGA settlement

1 agreements settling an individual's PAGA claims. *Bernal v. Graham Packaging Pet Techs, Inc.*,
2 2021 U.S. Dist. LEXIS 86393, *4. (E.D. Cal. May 5, 2021). Further, no case law or statute requires
3 "an unwilling Plaintiff to continue to maintain a PAGA claim"—nor is there any "prohibition
4 against a party simply dismissing lawsuits that include PAGA claims . . . in the absence of a
5 settlement that substantially addresses a PAGA cause of action." *Id.* Accordingly, because
6 Benihana and Lie entered into a PAGA Settlement that substantially address his, and only his,
7 PAGA cause of action, and because Lie no longer desires to act as a PAGA representative, Lie is
8 entitled to the requested dismissal of his individual right to assert such a claim with prejudice.

9 **IV. CONCLUSION**

10 Based on the foregoing, the Parties jointly respectfully request that the Court approve the
11 PAGA Settlement, with prejudice as to Plaintiff Justin Lie, and without prejudice as to any
12 allegedly aggrieved employee.

13 DATED: May 26, 2022

LITTLER MENDELSON, P.C.

16 By: 
17 Constance E. Norton
18 Chad D. Greeson

19 Attorneys for Defendant BENIHANA
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(Additional Counsel on Following Page)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

JUSTIN LIE, individually and on behalf of
himself and all others similarly situated,

Plaintiff,

v.

BENIHANA INTERNATIONAL, INC., a
Delaware Corporation; and DOES 1-50,
inclusive,

Defendants.

Case No. 21-CIV-00153

**DECLARATION OF CHRISTINA
LUCIO IN SUPPORT OF JOINT
MOTION TO APPROVE PAGA
SETTLEMENT AND DISMISS PAGA
ACTION**

ASSIGNED FOR ALL PURPOSES TO
JUDGE NANCY FINEMAN, DEPT. 4

Hearing Date: July 5, 2022
Time: 2:00 p.m.
Dept.: 4 CR N

Complaint Filed: Jan. 12, 2021
First Amd. Compl. Filed: Dec. 5, 2021
Second Amd. Comp. Filed: Jan. 18, 2022

///

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7 Attorneys for Plaintiff JUSTIN LIE,
on behalf of himself and all other similarly situated
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1 I, CHRISTINA LUCIO, declare as follows:

2 1. I am Of Counsel to the law firm of JAMES HAWKINS APLC and am one of the
3 attorneys of record for Plaintiff Justin Lie (“Lie”). I make this declaration based on my own
4 personal knowledge and, if called to testify, could and would testify to the matters stated herein.

5 2. I am submitting this Declaration in support of the Joint Motion to Approve PAGA
6 Settlement and Dismissal of PAGA Action in the above-entitled action.

7 3. On about November 5, 2020, Lie filed a notice with the Labor and Workforce
8 Development Agency under the California Private Attorneys General Act (California Labor Code
9 section 2698 *et seq.*) (“PAGA”) asserting various alleged Labor Code and wage and hour violations,
10 which was also sent to Benihana (the “PAGA Letter”).

11 4. On January 12, 2021, Lie filed a PAGA representative action against Benihana in
12 the Superior Court of State of California, County of San Mateo, designated as Case No. 21-CIV-
13 00153 (“Complaint”). Plaintiff sought civil penalties pursuant to PAGA predicated on the
14 following alleged violations: (1) Labor Code [“Labor Code”] §§ 216, 225.5, 1182.12, 1194, 1197,
15 and 1198 and California’s Industrial Welfare Commission’s [“IWC”] Order No. 5-2001 (Unpaid
16 Minimum Wage); (2) Labor Code §§ 216, 225.5, 510, 515, 1194, 1197, 1198 and IWC Order No.
17 5-2001 (Unpaid Overtime); (3) Labor Code §§ 226.7, 512, and IWC Order No. 5-2001 (Unpaid
18 Meal Period Premiums); (4) Labor Code § 226.7 and IWC Order No. 5-2001 (Unpaid Rest Period
19 Premiums); (5) Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (6) Labor Code
20 § 351 (Unpaid Tips); (7) Labor Code § 246 (Unpaid Sick Leave); (8) Labor Code § 204 (Unpaid
21 Semi-monthly Wages and Meal/Rest Premiums); (9) Labor Code §§ 201-203 (Unpaid Wages upon
22 Separation); (10) Labor Code § 226 (Inaccurate Wage Statements); (11) Labor Code §§ 1174, 1175,
23 and IWC Order No. 5-2001; (12) Labor Code § 2802 (Unpaid Business Expenses). Through the
24 PAGA complaint, Lie sought to represent himself, the State of California, and current and former
25 employees of Benihana allegedly aggrieved.

26 5. On or about December 2, 2021, Lie filed a First Amended Complaint (“FAC”)
27 pursuant to the Court’s Minute Order dated November 16, 2021, dismissing all the previously
28 asserted PAGA claims except for the following: (a) Labor Code § 246 (Unpaid Sick Leave); (b)

1 Labor Code §§ 201-203 (Unpaid Wages upon Separation); and (c) Labor Code § 2802 (Unpaid
2 Business Expenses). Again, Lie sought civil penalties under PAGA in the FAC on behalf of himself,
3 the State of California, and current and former employees of Benihana in California.

4 6. On or about January 5, 2022, I met and conferred with counsel for Benihana, after
5 which, Lie and Benihana entered a stipulation whereby Lie agreed to dismiss the claim for PAGA
6 penalties for violation of Labor Code sections 201-203, leaving two claims for PAGA civil
7 penalties in a proposed Second Amended Complaint (“SAC”): (i) Labor Code § 246 (Unpaid Sick
8 Leave); and (ii) Labor Code § 2802 (Unpaid Business Expenses). Lie and Benihana agreed that a
9 PAGA plaintiff cannot recover waiting time penalties for unpaid wages for an alleged violation of
10 Labor Code section 2802 for business expense reimbursement, because an expense reimbursement
11 does not constitute a wage pursuant to Labor Code section 201-203. In addition, those claims were
12 expressly waived because of the earlier-filed and court-approved PAGA settlement and release in
13 *Ari Gold et al. v. Benihana National Corp. et al.* [“Gold Action” or “Gold Class and PAGA
14 Settlement”]. In the *Gold Action*, the court approved granted final approval of a Class and PAGA
15 Action Settlement and entered judgment on August 17, 2021.

16 7. On or about January 12, 2022, the Court granted Lie’s and Benihana’s stipulation to
17 file a Second Amended Complaint (“SAC”) based on the two claims for PAGA penalties for
18 violations of: (1) Labor Code § 246 (Unpaid Sick Leave); and (2) Labor Code § 2802 (Unpaid
19 Business Expenses).

20 8. On or about February 14, 2022, Lie submitted a demand for arbitration to AAA for
21 his individual wage and hour claims (“Arbitration Demand”). The PAGA letter, the Complaint, the
22 FAC, the SAC, and the Arbitration Demand are collectively referred to herein as the “Lawsuit”.

23 9. Before initiating arbitration, Lie and Benihana negotiated a confidential settlement
24 of Lie’s non-PAGA claims, including a general release of claims and a Civil Code section 1542
25 waiver, for which additional consideration is being provided and is memorialized in a separate
26 Confidential Settlement Agreement and Release. In conjunction with that Confidential Settlement
27 Agreement and Release, Lie and Benihana entered into a PAGA Settlement Agreement and
28 Stipulation, which has now been submitted to the Court for review and approval. The settlements

1 were reached after an investigation, informal discovery (which placed both Lie and Benihana on
2 equal footing), and arms-length negotiations. Notably, the PAGA Settlement and Stipulation is not
3 intended to nor does it release claims, if any, that may be applicable in any representative PAGA
4 claim.

5 10. On April 1, 2022, Benihana filed a Notice of Motion and Motion to Approve PAGA
6 Settlement and Dismissal of PAGA Action (the “Motion”). Lie did not oppose that Motion.

7 11. The unopposed Motion was heard on April 26, 2022. The Court denied the Motion
8 without prejudice and directed Lie or his counsel to file a declaration setting forth the facts relied
9 on for dismissal of the representative claims. In conjunction with the Court’s direction, I filed the
10 instant Declaration.

11 12. One of the considerations for the PAGA Settlement and Stipulation was Lie’s desire
12 to no longer pursue a PAGA action in light of the prior *Gold* release, and the potential issues of
13 proof. Lie has voluntarily decided to resolve his individual right to assert a PAGA claim in
14 exchange for the settlement payment outlined in the PAGA Settlement and Stipulation.
15 Notwithstanding, there were several other considerations, discussed in detail below.

16 **Strength of Lie’s Case**

17 13. A consideration was the strength, or lack thereof, of Lie’s case. First, in my review
18 of the *Gold* Action, and corresponding filings, specifically, the final order granting final approval
19 of settlement, filed on June 26, 2021, I determined that the *Gold* Action directly impacted and
20 materially affected Lie’s action. Moreover, Defendant argued that there is a strong probability that
21 PAGA penalties for sick pay are barred by the *Gold* Action. The relevant terms of the *Gold* Action
22 final order granting final approval of settlement, filed on June 26, 2021, are outlined in the
23 Memorandum of Points and Authorities filed concurrently herewith. In addition, the *Gold* Action
24 settlement is a final decision on the merits for the purposes of *res judicata* and contain an expansive
25 settlement and release, potentially absorbing all of Lie’s claims. If Lie’s claims are barred and
26 absorbed through the legal principal of *res judicata* via the *Gold* Action, then Lie will receive
27 nothing.

1 14. Second, Defendant asserted that Lie's claims for a violation of Labor Code section
2 246 potentially fail as a matter of law. Defendant pointed to case law specifically finding that a
3 private litigant cannot recover civil penalties under PAGA for a violation of Labor Code section
4 246, as outlined in the Memorandum of Points and Authorities filed concurrently herewith.

5 15. Third, Benihana has a viable claim that no violation of Labor Code Section 246
6 exists during the relevant period. Lie's employment during the relevant PAGA period is from
7 November 8, 2019 to December 4, 2019 (less than thirty days). During that time, Lie did not receive
8 payments for any sick leave or utilize sick pay. As such, Benihana argued that Lie lacks standing,
9 in addition to his claim being barred by the *Gold Action* and by prevailing case law. While Plaintiff
10 believed there were responses to such defenses, this issue factored into the analysis in determining
11 whether the settlement was viable.

12 16. Lastly, Benihana contended that Lie never submitted a reimbursement request
13 during his employment. Benihana argued that, without a predicate violation, Lie lacks standing to
14 assert a violation of Labor Code section 2802, in addition to that claim also being potentially barred
15 by the *Gold Action*. Notwithstanding, Lie only worked two pay periods during the relevant PAGA
16 period. Based on Lie's pay periods, the maximum total award Lie could receive through any PAGA
17 action for the violations directly applicable to him during the PAGA period is \$200. Thus, the \$200
18 payment to settle and release Lie's individual PAGA claims, with prejudice as to Lie but *without*
19 prejudice as to the other alleged aggrieved employee, is more than fair, assuming Lie can prove his
20 alleged purchase of a knife was actually necessary and reasonable. Defendant maintained that it
21 was not credible to assert that Lie was required to purchase a knife to perform his job duties, while
22 employed by a multi-national restaurant chain known for its cutlery-based show.

23 17. Defendant maintained that these defenses and issues of proof defeated all recovery
24 to Plaintiff. In sum, there were substantial issues of proof and uncertainty associated with Lie's
25 claims, and Benihana has viable defenses, which were discussed at length. Because there is a
26 likelihood that the penalties sought, either in whole or in part, would not be awarded, the PAGA
27 Settlement and Stipulation represents a fair, adequate, and reasonable resolution of this matter.

1 **Risk, Expense, Complexity, and Likely Duration of Further Litigation**

2 18. The PAGA Settlement and Stipulation was reached after extensive negotiations, and
3 represents a fair, adequate, and reasonable resolution of the action, in conjunction with Lie’s desire
4 to no longer pursue a PAGA claim on behalf of other individuals.

5 19. The PAGA Settlement was reached after an investigation, informal discovery, and
6 arms-length negotiations between two experienced and informed counsel, taking into consideration
7 the factors discussed herein and in the Memorandum of Points and Authorities filed concurrently
8 herewith.

9 20. Further, I acknowledge that the United States Supreme Court granting certiorari in
10 *Viking River Cruises, Inc. v. Moriana*, No. B297328, 2020 WL 5584508 (Cal. Ct. App. Sept. 18,
11 2020) (“*Viking River Cruises*”), United States Supreme Court Case No. 20-1573, directly impacts
12 and may materially affect this matter. Specifically, discovery in this matter would be stayed given
13 the U.S. Supreme Court’s decision to grant cert in *Viking River Cruises* as Defendant contended
14 there was a valid and enforceable arbitration agreement which exists between Lie and Benihana.
15 Without approval of the PAGA Settlement, this litigation will be stayed and delayed for months
16 until the *Viking River Cruises* decision is published, necessitating further costs and expenses for
17 both parties.

18 **Amount Offered in Settlement**

19 21. Pursuant to the PAGA Settlement and Stipulation, Benihana will make a payment
20 in the amount of \$200 to settle and release Lie’s individual PAGA claims. Of the \$200 Benihana
21 agrees to pay: (1) \$150.00 (representing 75% of said \$200.00) will be paid to the LWDA; and (2)
22 \$50.00 (representing 25% of said \$200.00) will be payable to “Justin Lie” and shall represent
23 payment for PAGA penalties.

24 22. The \$200 payment is reasonable, when considered in light of the fact that it is
25 compensation to settle Lie’s disputed PAGA claims—not the rights of any other allegedly
26 aggrieved employees. On November 5, 2020, Lie sent his PAGA Letter to the LWDA. He later
27 filed the complaint on January 12, 2021. PAGA claims are limited to one-year and 65 days prior to
28 filing the complaint—i.e., November 8, 2019 to present. Lie’s employment with Benihana ended

1 on December 4, 2019. From November 8, 2019 to December 9, 2019, Lie did not receive any sick
2 leave pay.

3 23. Assuming that (without acknowledging), as Defendant maintains, Lie is precluded
4 from receiving a PAGA penalty for the alleged failure to properly calculate sick pay under Labor
5 Code section 246, the \$200 payment is more than adequate as it relates to his remaining PAGA
6 claim for a violation of Labor Code section 2802. Based on Lie's pay periods, the maximum total
7 award Lie can receive through any PAGA action is \$200. Thus, the \$200 payment to settle and
8 release Lie's individual PAGA claims, with prejudice as to Lie but *without* prejudice as to the other
9 alleged aggrieved employee, is more than fair, assuming Lie can even prove his alleged purchase
10 of a knife was actually necessary and reasonable.

11 **Discovery Completed and Stage of the Proceeding**

12 24. As reiterated above, both Lie and Benihana engaged in an informal exchange of
13 information to place both parties on equal footing and to engage in arms-length negotiations. Both
14 parties developed an understanding of the risks and benefits in litigating this matter and negotiated
15 a fair and reasonable PAGA Settlement and Stipulation.

16 **Presence of a Government Participant**

17 25. The Labor and Workforce Development Agency has previously received notice of
18 the PAGA Settlement and Stipulation and has not directly intervened in this case and/or spoken on
19 the proffered PAGA Settlement and Stipulation. This is further evidence of the fairness, adequacy,
20 and reasonableness of the proffered PAGA Settlement and Stipulation.

21 **Expertise and Views of Counsel**

22 26. I have extensive experience in litigation, specifically employment litigation, and in
23 litigating PAGA actions. Based upon my experience, the proffered PAGA Settlement and
24 Stipulation is a fair and reasonable resolution of this matter, which I believe is further evidenced
25 by my filing of this Declaration. I carefully considered and evaluated the strength of Lie's claims
26 in conjunction with the risks of litigation and conclude that the PAGA Settlement and Stipulation
27 appropriately accounts for any challenges and risks presented in litigation and affords Lie the best
28

1 chance of a speedy and full recovery, and provides the State with a certain award under
2 circumstances which create substantial uncertainty.

3 **The PAGA Settlement and Stipulation Furthers PAGA's Public Policy Objectives and Does**
4 **Not Impair the LWDA or Any Other Allegedly Aggrieved Employees**

5 27. The PAGA Settlement and Stipulation is sufficient and may be approved, because
6 it only relates to Lie – it is not a class settlement and therefore does not impair the rights or release
7 the claims of any other allegedly aggrieved employees. Further, this is no case law or statute
8 requiring Lie to continue to maintain a PAGA claim unwillingly, and there is no prohibition against
9 a party simply dismissing lawsuits that include PAGA claims, in the absence of a settlement that
10 substantially addresses a PAGA cause of action (particularly under circumstances where the vast
11 majority of the initially asserted PAGA claim was resolved in the context of another action).

12 **Plaintiff Is Entitled to a Dismissal of the PAGA Action**

13 28. Lie no longer wishes to pursue a representative PAGA action and no longer wishes
14 to proceed in a representative capacity. Lie's decision is of his own volition. Whether there is any
15 individual right or element to a PAGA action is an open question; however, the fact remains that
16 Lie no longer wishes to proceed with the PAGA claim and Defendant seeks a release of his
17 individual right to proceed with the claim. Lie does not object. There is no case law which finds
18 it inappropriate for Lie to settle his non-PAGA individual claims. The PAGA Settlement and
19 Stipulation substantially addresses Lie's, and only Lie's, PAGA cause of action (to the extent any
20 exists in the first place), and, therefore, Lie is entitled to the requested dismissal of his individual
21 right to assert such a claim with prejudice. The rights of the State to proceed as to violations of
22 other employees and the rights of other employees to proceed with a PAGA action are not impaired
23 by anything in this Settlement.

24 ///

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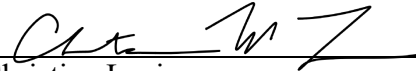
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1 I declare under penalty of perjury under the laws of the State of California that the foregoing
2 is true and correct.

3 Executed this 26th day of May 2022.

4
5 
6 Christina Lucio

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Attorneys for Defendant
BENIHANA INTERNATIONAL, INC.

(Additional Counsel on Following Page)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

JUSTIN LIE, individually and on behalf of
himself and all others similarly situated,

Plaintiff,

v.

BENIHANA INTERNATIONAL, INC., a
Delaware Corporation; and DOES 1-50,
inclusive,

Defendants.

Case No. 21-CIV-00153

**DECLARATION OF CHAD GREESON
IN SUPPORT OF JOINT MOTION TO
APPROVE PAGA SETTLEMENT AND
DISMISS PAGA ACTION**

ASSIGNED FOR ALL PURPOSES TO
JUDGE NANCY FINEMAN, DEPT. 4

Hearing Date: July 5, 2022
Time: 2:00 p.m.
Dept.: 4 CR N

Complaint Filed: Jan. 12, 2021
First Amd. Compl. Filed: Dec. 5, 2021
Second Amd. Comp. Filed: Jan. 18, 2022

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7 Attorneys for Plaintiff JUSTIN LIE,
on behalf of himself and all other similarly situated
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1 I, CHAD GREESON, declare as follows:

2 1. I am a shareholder with the law firm of Littler Mendelson P.C., and am counsel for
3 Defendant BENIHANA INTERNATIONAL, INC. (“Benihana”). I make this declaration based on
4 my own personal knowledge and, if called to testify, could and would testify to the matters stated
5 herein.

6 2. This Declaration is being submitted in support of the Parties’ Joint Motion for an
7 order approving the PAGA Settlement in the above-entitled Action.

8 3. On about November 5, 2020, Lie filed a notice with the Labor and Workforce
9 Development Agency under the California Private Attorneys General Act (California Labor Code
10 section 2698 *et seq.*) (“PAGA”) asserting various alleged Labor Code and wage and hour violations,
11 which was also sent to Benihana (the “PAGA Letter”).

12 4. On January 12, 2021, Lie filed a PAGA representative action against Benihana in
13 the Superior Court of State of California, County of San Mateo, designated as Case No. 21-CIV-
14 00153 (“Complaint”). Plaintiff sought civil penalties pursuant to PAGA predicated on the
15 following alleged violations: (1) Labor Code [“Labor Code”] §§ 216, 225.5, 1182.12, 1194, 1197,
16 and 1198 and California’s Industrial Welfare Commission’s [“IWC”] Order No. 5-2001 (Unpaid
17 Minimum Wage); (2) Labor Code §§ 216, 225.5, 510, 515, 1194, 1197, 1198 and IWC Order No.
18 5-2001 (Unpaid Overtime); (3) Labor Code §§ 226.7, 512, and IWC Order No. 5-2001 (Unpaid
19 Meal Period Premiums); (4) Labor Code § 226.7 and IWC Order No. 5-2001 (Unpaid Rest Period
20 Premiums); (5) Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (6) Labor Code
21 § 351 (Unpaid Tips); (7) Labor Code § 246 (Unpaid Sick Leave); (8) Labor Code § 204 (Unpaid
22 Semi-monthly Wages and Meal/Rest Premiums); (9) Labor Code §§ 201-203 (Unpaid Wages upon
23 Separation); (10) Labor Code § 226 (Inaccurate Wage Statements); (11) Labor Code §§ 1174, 1175,
24 and IWC Order No. 5-2001; (12) Labor Code § 2802 (Unpaid Business Expenses). Through the
25 PAGA complaint, Lie sought to represent himself, the State of California, and current and former
26 employees of Benihana allegedly aggrieved.

27 5. On or about December 2, 2021, Lie filed a First Amended Complaint (“FAC”)
28 pursuant to the Court’s Minute Order dated November 16, 2021, dismissing all the previously

1 asserted PAGA claims except for the following: (a) Labor Code § 246 (Unpaid Sick Leave); (b)
2 Labor Code §§ 201-203 (Unpaid Wages upon Separation); and (c) Labor Code § 2802 (Unpaid
3 Business Expenses). Again, Lie sought civil penalties under PAGA in the FAC on behalf of himself,
4 the State of California, and current and former employees of Benihana in California.

5 6. On or about January 5, 2022, Lie and Benihana entered a stipulation where Lie
6 agreed to dismiss the claim for PAGA penalties for violation of Labor Code sections 201-203,
7 leaving two claims for PAGA civil penalties in a proposed Second Amended Complaint (“SAC”)
8 based upon the following predicate violations: (i) Labor Code § 246 (Unpaid Sick Leave); and (ii)
9 Labor Code § 2802 (Unpaid Business Expenses). Lie and Benihana agreed that a PAGA plaintiff
10 cannot recover waiting time penalties for unpaid wages for an alleged violation of Labor Code
11 section 2802 for business expense reimbursement, because an expense reimbursement does not
12 constitute a wage pursuant to Labor Code section 201-203. In addition, those claims were expressly
13 waived because of the earlier-filed and court-approved PAGA settlement and release in *Ari Gold*
14 *et al. v. Benihana National Corp. et al.* [“Gold Action” or “Gold Class and PAGA Settlement”]. In
15 the *Gold Action*, the court approved granted final approval of a Class and PAGA Action Settlement
16 and entered judgment on August 17, 2021.

17 7. On or about January 12, 2022, the Court granted Lie’s and Benihana’s stipulation to
18 file a Second Amended Complaint (“SAC”) based on the two claims for PAGA penalties for
19 violations of: (1) Labor Code § 246 (Unpaid Sick Leave); and (2) Labor Code § 2802 (Unpaid
20 Business Expenses).

21 8. On or about February 14, 2022, Lie submitted a demand for arbitration to AAA for
22 his individual wage and hour claims (“Arbitration Demand”). The PAGA letter, the Complaint, the
23 FAC, the SAC, and the Arbitration Demand are collectively referred to herein as the “Lawsuit”.

24 9. Before initiating arbitration, Lie and Benihana negotiated a confidential settlement
25 of Lie’s non-PAGA claims, including a general release of claims and a Civil Code section 1542
26 waiver, for which additional consideration is being provided and is memorialized in a separate
27 Confidential Settlement Agreement and Release. In conjunction with that Confidential Settlement
28 Agreement and Release, Lie and Benihana entered into a PAGA Settlement Agreement and

1 Stipulation, which has now been submitted to the Court for review and approval. The settlements
2 were reached after an investigation, informal discovery (which placed both Lie and Benihana on
3 equal footing), and arms-length negotiations. Notably, the PAGA Settlement and Stipulation is not
4 intended to nor does it release claims, if any, that may be applicable in any representative PAGA
5 claim.

6 10. On April 1, 2022, I filed a Notice of Motion and Motion to Approve PAGA
7 Settlement and Dismissal of PAGA Action (the “Motion”). Lie unopposed that Motion. The
8 unopposed Motion was heard on April 26, 2022. The Court denied the Motion without prejudice
9 and directed Lie or his counsel to file a declaration setting forth the facts relied on for dismissal of
10 the representative claims. Both Lie and his counsel filed a declaration concurrently herewith.

11 11. One of the considerations for the PAGA Settlement and Stipulation was Lie’s desire
12 to no longer pursue a PAGA action. Lie has voluntarily decided to resolve his individual right to
13 assert a PAGA claim in exchange for the settlement payment outlined in the PAGA Settlement and
14 Stipulation. Notwithstanding, there were several other considerations, discussed in detail below.

15 **Strength of Lie’s Case**

16 12. A consideration was the strength, or lack thereof, of Lie’s case. First, the settlement
17 in *Gold Action*, which also involved PAGA, directly impacts and materially affects this action
18 because Lie’s claims for PAGA penalties for sick pay are barred by the *Gold Action*.

19 13. Following the issuance of class notice, the Court in the *Gold Action* entered an order
20 granting final approve of the settlement on August 21, 2021, stating “all claims by the Class
21 Members alleged in the initial and Amended Complaints and PAGA letters, or that could have been
22 alleged based on the facts asserted therein, including but not limited to claims under the Fair Labor
23 Standards Act based on the facts asserted. This release expressly includes: Any and all claims,
24 debts, rights, demands, obligations or liabilities of every nature and description, whether known or
25 unknown, for damages, penalties, liquidated damages, punitive damages, interest, attorneys' fees,
26 litigation costs, restitution, or equitable relief pled in the initial and Amended Complaints and
27 PAGA Letters or claims that could have been pled related to or arising out of the allegations set
28 forth in the initial and Amended Complaints and PAGA Letters or arising from the same or similar

1 facts, including but not limited to: (i) all claims for the failure to pay wages, the failure to calculate
2 and pay overtime and minimum wages, including claims pursuant to California Labor Code
3 sections 210, 221, 223, 224, 225.5, 351, 510, 558, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198 or
4 1199 and claims under the Fair Labor Standards Act (“FLSA”); (ii) all claims for meal period and
5 rest break violations and premiums pursuant to California Labor Code sections 226.7, 512, 1198
6 and applicable IWC Wage Order(s); (iii) all claims for failure to timely pay wages upon termination
7 pursuant to California Labor Code sections 201, 202, or 203; (iv) all claims for failure to timely
8 pay wages during employment pursuant to California Labor Code section 204; (v) all claims for
9 inaccurate or improper itemized wage statements, failure to maintain records concerning hours
10 worked or wages paid pursuant to California Labor Code sections 226, 226.3, 1174, 1174.5 or
11 2810.5; (vi) all claims for failure to pay reporting time pay pursuant to California Labor Code
12 section 1198 or California Code of Regulations, Title 8, section 11050(5); (vii) all claims for failure
13 to pay split shift pay pursuant to California Labor Code section 1198 or California Code of
14 Regulation, Title 8, section 11050(4)(C); a (vii) all incorporated or related claims arising out of the
15 preceding alleged violations pursuant to California Business and Professions Code sections 17200,
16 et seq.

17 14. Further, the *Gold* Action settlement is a final decision on the merits for the purposes
18 of *res judicata* and contains an expansive settlement and release, that potentially absorbs all of Lie’s
19 claims. If Lie’s claims are barred and absorbed through the legal principal of *res judicata* via the
20 *Gold* Action, then Lie will receive nothing.

21 15. Second, Lie’s claim for a violation of Labor Code section 246 fails as a matter of
22 law. There is case law specifically finding that a private litigant cannot recover civil penalties under
23 PAGA for a violation of Labor Code section 246, as outlined in the Memorandum of Points and
24 Authorities filed concurrently herewith.

25 16. Third, Benihana has a viable defense that no violation of Labor Code Section 246
26 exists. Lie’s employment during the relevant PAGA period is from November 8, 2019 to December
27 4, 2019 (less than thirty days). During that time, Lie did not receive payments for any sick leave or
28

utilize sick pay. As such, Benihana will argue that Lie lacks standing, in addition to his claim being barred by the *Gold Action* and by prevailing case law.

17. Fourth, and lastly, Lie never submitted a reimbursement request during his employment. Without a predicate violation, Lie potentially lacks standing to assert a violation of Labor Code section 2802, in addition to that claim also being potentially barred by the *Gold Action*. Notwithstanding, Lie only worked two pay periods during the relevant PAGA period. Based on Lie's pay periods, the maximum total award Lie can receive through any PAGA action is \$200. Thus, the \$200 payment to settle and release Lie's individual PAGA claims, with prejudice as to Lie but *without* prejudice as to the other alleged aggrieved employee, is more than fair, assuming Lie can prove his alleged purchase of a knife (while employed by a multinational restaurant chain known for its cutlery-based show) was actually necessary and reasonable.

18. In sum, Lie's claims are weak and uncertain, and Benihana has viable defenses, which were discussed at length. Because there is a likelihood that the penalties sought, either in whole or in part, would not be awarded, the PAGA Settlement and Stipulation represents a fair, adequate, and reasonable resolution of this matter.

Risk, Expense, Complexity, and Likely Duration of Further Litigation

19. The PAGA Settlement and Stipulation was reached after extensive negotiations, and represents a fair, adequate, and reasonable resolution of the action, in conjunction with Lie's desire to no longer pursue a PAGA claim on behalf of other individuals. The PAGA Settlement was reached after an investigation, informal discovery, and arms-length negotiations between two experienced and informed counsel, taking into consideration the factors discussed herein and in the Memorandum of Points and Authorities filed concurrently herewith.

20. Another consideration was the United States Supreme Court granting certiorari in *Viking River Cruises, Inc. v. Moriana*, No. B297328, 2020 WL 5584508 (Cal. Ct. App. Sept. 18, 2020) ("*Viking River Cruises*"), United States Supreme Court Case No. 20-1573. *Viking River* directly impacts and materially affects this matter because discovery in this matter will be stayed given the U.S. Supreme Court's decision to grant cert because a valid and enforceable arbitration agreement exists between Lie and Benihana. Without approval of the PAGA Settlement, this

litigation will be stayed and delayed for months until the *Viking River Cruises* decision is published, necessitating further costs and expenses for both parties.

Amount Offered in Settlement

21. Pursuant to the PAGA Settlement and Stipulation, Benihana will make a payment in the amount of \$200 to settle and release Lie's individual PAGA claims. Of the \$200 Benihana agrees to pay: (1) \$150.00 (representing 75% of said \$200.00) will be paid to the LWDA; and (2) \$50.00 (representing 25% of said \$200.00) will be payable to "Justin Lie" and shall represent payment for PAGA penalties.

22. The \$200 payment is reasonable, when considered in light of the fact that it is compensation to settle Lie's disputed PAGA claims—not the rights of any other allegedly aggrieved employees. On November 5, 2020, Lie sent his PAGA Letter to the LWDA. He later filed the complaint on January 12, 2021. PAGA claims are limited to one-year and 65 days prior to filing the complaint—i.e., November 8, 2019 to present. Lie's employment with Benihana ended on December 4, 2019. From November 8, 2019 to December 9, 2019 (which equates to two pay periods), Lie did not receive any sick leave pay.

23. Because Lie has no grounds and lacks standing to receive a PAGA penalty for the alleged failure to properly calculate sick pay under Labor Code section 246, the \$200 payment is more than adequate as it relates to his remaining PAGA claim for a violation of Labor Code section 2802. Based on Lie's pay periods, the maximum total award Lie can receive through any PAGA action is \$200. Thus, the \$200 payment to settle and release Lie's individual PAGA claims, with prejudice as to Lie but *without* prejudice as to the other alleged aggrieved employee, is more than fair, assuming Lie can even prove his alleged purchase of a knife (while employed by a multinational restaurant chain known for its cutlery-based show and for which no claim for reimbursement was ever made by Lie) was actually necessary and reasonable.

Discovery Completed and Stage of Proceeding

24. As stated above and echoed by the Declaration of Christina Lucio concurrently filed herewith, both Lie and Benihana engaged in an informal exchange of information to place both parties on equal footing and to engage in arms-length negotiations. Both parties developed an

1 understanding of the risks and benefits in litigating this matter and negotiated a fair and reasonable
2 PAGA Settlement and Stipulation.

3 **Presence of a Government Participant**

4 25. The Labor and Workforce Development Agency has previously received notice of
5 the PAGA Settlement and Stipulation and has not directly intervened in this case and/or spoken on
6 the proffered PAGA Settlement and Stipulation. This is further evidence of the fairness, adequacy,
7 and reasonableness of the proffered PAGA Settlement and Stipulation.

8 **Expertise and Views of Counsel**

9 26. I have extensive experience in litigation, specifically employment litigation, and in
10 litigating PAGA actions. Based upon my experience, the proffered PAGA Settlement and
11 Stipulation is a fair and reasonable resolution of this matter.

12 **The PAGA Settlement and Stipulation Furthers PAGA's Public Policy Objectives and Does**
13 **Not Impair the LWDA or Any Other Allegedly Aggrieved Employees**

14 27. The PAGA Settlement and Stipulation is sufficient and may be approved, because
15 it only relates to Lie – it is not a class settlement and therefore does not impair the rights or release
16 the claims of any other allegedly aggrieved employees. Further, this is no case law or statute
17 requiring Lie to continue to maintain a PAGA claim unwillingly, and there is no prohibition against
18 a party simply dismissing lawsuits that include PAGA claims, in the absence of a settlement that
19 substantially addresses a PAGA cause of action.

20 **Plaintiff Is Entitled to a Dismissal of the PAGA Action**

21 28. Lie has expressed his desire to no longer to pursue a representative PAGA action
22 and no longer proceed in a representative capacity. Further, there is no case law which finds it
23 inappropriate for Lie to settle his non-PAGA individual claims. The PAGA Settlement and
24 Stipulation substantially addresses Lie's, and only Lie's, PAGA cause of action, and, therefore, Lie
25 is entitled to the requested dismissal of his individual right to assert such a claim with prejudice.

26 29. A true and correct copy of the fully executed PAGA Settlement and Stipulation is
27 again attached as **Exhibit A**. A proposed order approving the PAGA Settlement and Stipulation is
28 submitted herewith.

30. Benihana is serving copies of this notice of motion and motion for approval of PAGA Settlement, and all corresponding documents, to the Labor Workforce Development Agency as reflected in the proof of service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 26th day of May 2022.

Chad D. Gruen

Chad Greeson

4883-8203-2930.2 / 062447-1174

Exhibit A

PRIVATE ATTORNEYS GENERAL ACT SETTLEMENT AGREEMENT AND RELEASE

This Private Attorneys General Act Settlement and Release Agreement (“Agreement”) is made and entered into by Plaintiff Justin Lie (“Lie” or “Plaintiff”) and Defendant Benihana International, Inc. (“Defendant”).

RECITALS

A. WHEREAS, Lie worked as a non-exempt employee for Defendant from approximately September 17, 2017 to December 9, 2019.

B. WHEREAS, on about November 5, 2020, Lie filed a notice with the Labor and Workforce Development Agency under the California Private Attorneys General Act of 2004 (California Labor Code section 2698, *et seq.*) (“PAGA”) asserting various alleged Labor Code and wage and hour violations, which was also sent to Defendant (the “PAGA Letter”).

C. WHEREAS, on January 12, 2021, Lie filed a PAGA representative action against Defendant in the Superior Court of the State of California, County of San Mateo, designated as Civil Case No. 21-CIV-00153 (“Complaint”). Plaintiff sought civil penalties on his behalf and on behalf of others allegedly aggrieved pursuant to PAGA based on the following predicate violations: (1) California Labor Code [“Labor Code”] §§ 216, 225.5, 1182.12, 1194, 1197, and 1198 and California’s Industrial Welfare Commission’s [“IWC”] Order No. 5-2001 (Unpaid Minimum Wage); (2) Labor Code §§ 216, 225.5, 510, 515, 1194, 1197, 1198 and IWC Order No. 5-2001 (Unpaid Overtime); (3) Labor Code §§ 226.7, 512, and IWC Order No. 5-2001 (Unpaid Meal Period Premiums); (4) Labor Code § 226.7 and IWC Order No. 5-2001 (Unpaid Rest Period Premiums); (5) Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (6) Labor Code § 351 (Unpaid Tips); (7) Labor Code § 246 (Unpaid Sick Leave); (8) Labor Code § 204 (Unpaid Semi-monthly Wages and Meal/Rest Premiums); (9) Labor Code §§ 201-203 (Unpaid Wages upon Separation); (10) Labor Code § 226 (Inaccurate Wage Statements); (11) Labor Code §§ 1174, 1175, and IWC Order No. 5-2001; and (12) Labor Code § 2802 (Unpaid Business Expenses). Lie sought to represent himself, the State of California, and other allegedly aggrieved employees who worked for Defendant in the California as hourly, non-exempt employees regardless of title or position.

D. WHEREAS, on or about December 2, 2021, Lie filed a First Amended Complaint (“FAC”) pursuant to the Court’s Minute Order dated November 16, 2021, dismissing all of the previously asserted PAGA claims except for the following predicate violations: (a) Labor Code § 246 (Unpaid Sick Leave); (b) Labor Code §§ 201-203 (Unpaid Wages upon Separation); and (c) Labor Code § 2802 (Unpaid Business Expenses). Again, Lie sought civil penalties under PAGA in the FAC on behalf of himself, the State of California, and current and former non-exempt employees of Defendant in California.

E. WHEREAS, on or about January 5, 2022, Lie and Defendant entered a stipulation, where Lie agreed to dismiss the claim for PAGA penalties for violation of Labor Code sections 201-203, leaving two PAGA claims for civil penalties in a proposed Second Amended Complaint (“SAC”) based upon the following predicate violations: (i) Labor Code § 246 (Unpaid Sick Leave); and (ii) Labor Code § 2802 (Unpaid Business Expense Reimbursements). Lie also sought civil penalties under PAGA in the SAC on behalf of himself, the State of California, and current and former non-exempt employees of Defendant in California.

F. WHEREAS, on or about February 14, 2022, Lie submitted a demand for arbitration to AAA for his individual wage and hour claims (“Arbitration Demand”). The PAGA letter, the Complaint, the FAC, the SAC, and the Arbitration Demand are collectively referred to herein as the “Lawsuit”.

G. WHEREAS, Defendant contends it has satisfied all of its obligations to Lie, and Defendant has paid all wages, expense reimbursements reasonably incurred and all benefits including overtime, minimum wages, and meal and rest period premiums due and owing to Lie, and Defendant denies all of Lie's allegations in the PAGA Letter, the Complaint, the FAC, the SAC, and the Arbitration Demand.

H. WHEREAS, a *bona fide* good faith dispute exists between Lie and Defendant (sometimes referred to collectively as "Parties") as to the merits of Lie's asserted and threatened claims, including those claims asserted in the PAGA Letter, the Complaint, the FAC, the SAC, and the Arbitration Demand.

I. WHEREAS, the Parties now desire to resolve and settle Plaintiff's individual PAGA claim arising out of Plaintiff's employment with and separation from Defendant and association with Defendant.

J. WHEREAS, Plaintiff is not pursuing a representative PAGA claim on behalf of other individuals.

NOW THEREFORE IN CONSIDERATION of the promises and covenants contained in this Agreement, Lie and Defendant agree to the following:

1. **Definition of Releasees:** References in this Agreement to "Releasees" shall include Defendant Benihana International, Inc., and all of its current and former direct and indirect parents, subsidiaries, affiliated and related companies and entities, and all of its current and former officers, directors, employees, insurers, reinsurers, attorneys, and agents.

2. **Approval of PAGA Settlement and Dismissal of Action as Condition Precedent:** In conjunction with this Agreement, the Parties are entering into a separate PAGA Settlement Agreement and Stipulation for Approval of PAGA Settlement and Dismissal of PAGA Action ("PAGA Settlement and Stipulation") by which the Parties resolve, settle, and discharge the PAGA Complaint by dismissing Plaintiff Lie's individual PAGA claims in the SAC *with* prejudice and dismissing the representative PAGA claims in the SAC *without* prejudice and subject to the Court's approval. This Agreement is contingent upon execution by the Parties and approval by the Court of the PAGA Settlement and Stipulation. The Court's unconditional approval of the PAGA Settlement and Stipulation approving the PAGA settlement and dismissing the PAGA Action as set forth herein is an express condition precedent to Defendant's and Plaintiff's obligations under this Agreement (including, but not limited to, all payment obligations). If the PAGA Settlement and Stipulation is not unconditionally approved by the Court as outlined herein, then: (1) this Agreement shall be null and void; (2) neither the Settlement nor any of the related negotiations or proceedings shall be of any force or effect; and (3) all Parties to the Settlement shall stand in the same position, without prejudice, as if the Agreement had been neither entered into nor filed with the Court.

3. **Settlement Payment/Consideration:** In consideration for Plaintiff's agreement to settle and release his individual claim under the PAGA, Defendant agrees to pay two hundred dollars and zero cents (\$200.00) to settle and release Plaintiff's individual PAGA claim, of which: (1) \$150.00 (representing 75% of said \$200.00) will be paid to the Labor & Workforce Development Agency ("LWDA"); and (2) \$50.00 (representing 25% of said \$200.00) will be payable to "Justin Lie", and shall represent payment for PAGA penalties and for which a form 1099 shall issue. Counsel for Defendant shall distribute said amounts to the LWDA and to Plaintiff no later than fourteen (14) business days of the Court's (1) approval of the PAGA settlement and dismissing the PAGA Complaint, and (2) rejecting Plaintiff's demand for arbitration without any administrative fees being charged to Defendant and

dismissing it without prejudice prior to AAA initiating any action on the complaint. Plaintiff agrees that Defendant's designation of settlement funds in the manner set forth in this paragraph is fully acceptable. Plaintiff further acknowledges that the foregoing constitutes an accord and satisfaction and a full and complete settlement of Plaintiff's individual PAGA claims. Defendant's payment set forth in this paragraph shall constitute the entire consideration to be provided to Plaintiff pursuant to this PAGA Settlement Agreement and for resolution of his individual PAGA claims. Plaintiff agrees not to seek any further compensation for any other claimed damage, costs or attorneys' fees in connection with the matters encompassed in this PAGA Settlement Agreement.

4. **Effective Date:** The Effective Date of this PAGA Settlement Agreement is the date that the Court approves the PAGA Settlement and Stipulation or the date that the Plaintiff rejects or dismisses the individual claims in arbitration with prejudice, whichever is later. Plaintiff represents that he does not seek to pursue a PAGA claim on behalf of other aggrieved employees and therefore a dismissal with prejudice on behalf of other alleged "aggrieved employees" is not warranted. To the extent the Court does not approve the PAGA Settlement and Stipulation, the Parties and their counsel agree that they will cooperate with each other and use their best efforts to effect the PAGA Settlement to obtain Court approval for same.

5. **LWDA Notification:** Plaintiff will timely provide the notifications and submission to the LWDA as required by Labor Code section 2699(l), with copies to Defendant.

6. **Taxes; Indemnification:** Plaintiff acknowledges and agrees that Defendant has not made any representations regarding the tax consequences of any payment made pursuant to this Agreement. Lie agrees that he is responsible for payment of any and all taxes on the payments made pursuant to this Agreement. Lie further agrees to indemnify, hold harmless and defend Defendant against any and all claims, demands, or liabilities that may be asserted by any governmental agency (including but not limited to any local, state or federal taxing authority or agency) against Defendant for any federal, state or local taxes or penalties that may be payable as a result of any payment made pursuant to this Agreement. In addition, Lie agrees to pay any and all interest or penalties charged to or assessed against Defendant based on any payment made pursuant to this Agreement.

7. **Release of PAGA Claims:** To the greatest extent permitted by law, Plaintiff individually and on behalf of himself only freely, knowingly and voluntarily releases and forever discharges Defendant and the Releasees of and from all manner of actions, suits, claims, damages, liabilities, penalties, arbitrations, charges, claims for attorneys' fees, interest, expenses and costs, judgments, awards, orders, executions or demands of any nature whatsoever, whether known or unknown, suspected or unsuspected, against Releasees or any of them, which Plaintiff ever had, now has, or which Plaintiff or Plaintiff's heirs, assigns, executors or administrators hereafter can, shall or may have arising under the California Private Attorneys General Act (California Labor Code section 2698, *et seq.*) which includes claims brought under the PAGA predicated upon California Labor Code sections 201, 202, 203, 204, 216, 225.5, 226, 226.7, 246, 351, 510, 512, 515, 1182.12, 1194, 1197, 1197.1, 1198, 2802; IWC Order No. 5-2001; and/or any other California Labor Code provisions that could have been asserted under the PAGA in connection with the PAGA Letter, the Complaint, the FAC, the SAC, or the Arbitration Demand ("Released Claims"), including but not limited to any claims for penalties, wages, interest and/or attorneys' fees and costs thereon arising from any and all of the Released Claims. All such Released Claims (including, without

limitation, claims for related attorneys' fees and costs) are forever barred by this Agreement regardless of the forum in which they may be brought.

Nothing in this Agreement shall affect any state or federal government agencies' rights and responsibilities to enforce the California Labor Code or any other applicable law, nor shall anything in this Agreement be construed as a basis for interfering with Plaintiff's protected right to file a timely charge with, or participate in an investigation or proceeding with a state, federal or local government entity; provided, however, if the state, federal or local government entity commences an investigation on Plaintiff's behalf pertaining to the claims asserted in the PAGA Complaint and/or PAGA Letter, Plaintiff specifically waives and releases his right, if any, to recover any monetary or non-monetary benefits of any sort whatsoever arising from any such investigation or otherwise and from any such administrative charge or complaint filed with any government agency other than the NLRB.

8. **No Admission of Liability:** This PAGA Settlement Agreement shall not be construed as an admission by Defendant or the Releasees of liability or of any violation of the rights of Lie or any person, or of any violation of any law, statute, duty or order whatsoever. Defendant and the Releasees do not admit that they ever violated any provision of the California Labor Code, including, but not limited to, those sections for which Plaintiff seeks relief, including under the PAGA, or of any other law. Defendant and the Releasees specifically disclaim any liability to Lie or any other person, including any allegedly aggrieved employees, for any violation of any contract, law, statute, duty, order, or any other basis. This PAGA Settlement shall not be used or offered as evidence to establish liability against Defendant or the Releasees in any subsequent action or proceeding; provided, however, this shall not prevent the PAGA Settlement from being used, offered, or received in evidence in any proceeding to enforce, construe, or finalize the PAGA Settlement.

9. **Severance:** If any provision of this Agreement is held to be invalid by a court of competent jurisdiction, that provision shall be deemed severed and deleted from this Agreement, and neither that provision nor its severance and deletion shall affect the validity of the remaining provisions. Notwithstanding the foregoing, no portion of any release contained herein may be deemed severed or deleted from this Agreement, except upon waiver in writing by the applicable all Releasees. If such release is found to be invalid, this entire Agreement shall be deemed null and void.

10. **Choice of Law:** This PAGA Settlement Agreement is to be interpreted pursuant to the laws of California, except where the application of federal law applies.

11. **Counterparts/Facsimile Signatures:** This PAGA Settlement Agreement may be executed in counterparts, and signatures exchanged by facsimile or other electronic means (e.g., PDF) shall be effective for all purposes hereunder to the same extent as original signatures, all of which when taken together shall constitute the Agreement. Any Party who delivers a facsimile or PDF signature page agrees to later deliver an original signature page to any Party who requests it.

Having read, understood, and agreed to the foregoing terms and conditions, the Parties hereby voluntarily execute this PAGA Settlement Agreement by placing their signatures below.

Mar 16, 2022

Date



Justin Lie (Mar 16, 2022 12:32 PDT)

JUSTIN LIE

Date

By:

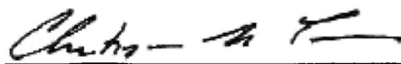
[NAME]

Benihana International, inc.

Approved as to form:

March 16, 2022

Date



Christina Lucio

Counsel for Plaintiff Justin Lie

Date

Chad D. Greeson

Counsel for Defendant Benihana International, Inc.

4870-6227-0480.1 / 062447-1174

Having read, understood, and agreed to the foregoing terms and conditions, the Parties hereby voluntarily execute this PAGA Settlement Agreement by placing their signatures below.

Date

3/14/2028
Date

JUSTIN LIE

By: Cristina Mendoza
Cristina Mendoza
Benihana International, Inc.

Approved as to form:

Date

March 24, 2022

Date

Christina Lucio
Counsel for Plaintiff Justin Lie

Chad D. Greeson
Chad D. Greeson
Counsel for Defendant Benihana International, Inc.

4870-6227-0480.1 / 062447-1174

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Attorneys for Defendant
BENIHANA INTERNATIONAL, INC.

(Additional Counsel on Following Page)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

JUSTIN LIE, individually and on behalf of
himself and all others similarly situated,

Plaintiff,

v.

BENIHANA INTERNATIONAL, INC., a
Delaware Corporation; and DOES 1-50,
inclusive,

Defendants.

Case No. 21-CIV-00153

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF JOINT MOTION TO
APPROVE PAGA SETTLEMENT AND
DISMISS PAGA ACTION**

ASSIGNED FOR ALL PURPOSES TO
JUDGE NANCY FINEMAN, DEPT. 4

Hearing Date: July 5, 2022
Time: 2:00 p.m.
Dept.: 4 CR N

Complaint Filed: Jan. 12, 2021
First Amd. Compl. Filed: Dec. 5, 2021
Second Amd. Comp. Filed: Jan. 18, 2022

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2 Christina M. Lucio (SBN 253677)
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12 Attorneys for Plaintiff JUSTIN LIE,
13 on behalf of himself and all other similarly situated
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Pursuant to California Rules of Court, Rules 3.1113(1) and 3.1306(c), and Evidence Code sections 452 and 453, Plaintiff Justin Lie (“Plaintiff”) and Defendant Benihana International Inc. (“Defendant”) (collectively, the “Parties”) hereby request that the Court take notice of the following and verifiable documents and records submitted in support of the Parties’ Joint Motion to Approve PAGA Settlement and Dismissal of PAGA Action.

Request for Judicial Notice (“RFJN”) No. 1: Attached as Exhibit 1 is a true and correct copy of the Complaint filed on June 30, 2016, in the matter of *Ari Gold, et al., v. Benihana National Corp., et al.*, filed in the Superior Court of California for the County of San Diego, and assigned case number 37-2016-0002230.

RFJN No. 2: Attached as Exhibit 2 is a true and correct copy of the First Amended Complaint filed on May 18, 2017, in the matter of *Ari Gold, et al., v. Benihana National Corp., et al.*, filed in the Superior Court of California for the County of San Diego, case number 37-2016-0002230.

RFJN No. 3: Attached as Exhibit 3 is a true and correct copy of the Second Amended Complaint filed on March 5, 2021, in the matter of *Ari Gold, et al., v. Benihana National Corp., et al.*, filed in the Superior Court of California for the County of San Diego, case number 37-2016-0002230.

RFJN No. 4: Attached as Exhibit 4 is a true and correct copy of the Declaration of Raul Perez filed on February 24, 2021, in the matter of *Ari Gold, et al., v. Benihana National Corp., et al.*, filed in the Superior Court of California for the County of San Diego, case number 37-2016-00022320. The Settlement Agreement in the Ari Gold matter is attached as Exhibit 1 thereto.

RFJN No. 5: Attached as Exhibit 5 is a true and correct copy of the Order Granting Motion for Preliminary Approval of Class Action and PAGA filed on March 19, 2021 in the matter of *Ari Gold, et al., v. Benihana National Corp., et al.*, in the Superior Court of California for the County of San Diego, case number 37-2016- 00022320.

RFJN No. 6: Attached as Exhibit 6 is a true and correct copy of the Order Granting Motion for Final Approval of Class Action Settlement filed on August 17, 2021, in the matter of *Ari Gold, et al., v. Benihana National Corp., et al.*, filed in the Superior Court of California for the County

1 of San Diego, case number 37-2016-00022320.

2 **RFJN No. 7:** Attached as Exhibit 7 is a true and correct copy of the Judgment filed on
3 August 17, 2021, in the matter of *Ari Gold, et al., v. Benihana National Corp., et al.*, filed in the
4 Superior Court of California for the County of San Diego, case number 37-2016-00022320.

5 **RFJN No. 8:** Attached as Exhibit 8 is a true and correct copy of Plaintiff's Complaint filed
6 on January 12, 2021, in the in the matter of *Justin Lie v. Benihana International, Inc.*, filed in the
7 Superior Court of California for the Country of San Mateo, case number 21-CIV000153.

8 **RFJN No. 9:** Attached as Exhibit 9 is a true and correct copy of Plaintiff's First Amended
9 Complaint filed on December 2, 2021, in the in the matter of *Justin Lie v. Benihana International,*
10 *Inc.*, filed in the Superior Court of California for the Country of San Mateo, case number 21-
11 CIV000153.

12 **RFJN No 10:** Attached as Exhibit 10 is a true and correct copy of Plaintiff's Second
13 Amended Complaint filed on January 18, 2022, in the in the matter of *Justin Lie v. Benihana*
14 *International, Inc.*, filed in the Superior Court of California for the Country of San Mateo, case
15 number 21-CIV000153.

16 **RFJN No. 11:** Attached as Exhibit 11 is a true and correct copy of Defendant's Motion to
17 Approve PAGA Settlement and Dismissal of PAGA Action filed on April 1, 2022, in the matter of
18 *Justin Lie v. Benihana International, Inc.*, filed in the Superior Court of California for the Country
19 of San Mateo, case number 21-CIV000153.

20 **RFJN No. 12:** Attached as Exhibit 12 is a true and correct copy *Viking River Cruises*
21 Petition for Writ of Certiorari filed in the United States Supreme Court.

22 **RFJN No. 13:** Attached as Exhibit 13 is a true and correct copy of the Order of the United
23 States Supreme Court granting review in *Viking River Cruises*.

24 Judicial notice of Exhibits 1 through 13 is required because the documents are any court of
25 this state or any court of record of the United States. Cal. Evid. Code § 452(d); *Day v. Sharp*, 50
26 Cal. App. 3d 904, 914 (1975) ("A trial court may properly take judicial notice of the records of any
27 court of record of any state of the United States"). Additionally, California Evidence Code section
28 452 provides that it is appropriate for a court to take judicial notice of "[t]he decisional,

1 constitutional, and statutory law of any state of the United States . . .”, an “[o]fficial act of the . . .
2 judicial departments of the United States . . .”, and “[f]acts and propositions that are not reasonably
3 subject to dispute and are capable of immediate and accurate determination by resort to sources of
4 reasonably indisputable accuracy.” Evid. Code § 452 (a), (c), (h).

5 California Evidence Code section 453 requires that “the trial court shall take judicial notice
6 of any matter specified in Section 452 if a party requests it and: (a) [g]ives each adverse party
7 sufficient notice of the request . . . to enable such adverse party to prepare to meet the request; and
8 (b) furnishes the court with sufficient information to enable it to take judicial notice of the matter.”
9 *See O’Keefe v. Atascadero County Sanitation District*, 21 Cal. App. 3d 719, 728 (1971) (court
10 required to take judicial notice “because respondents requested it, gave appellant sufficient notice
11 of the request and furnished the court with sufficient information to enable it to take judicial
12 notice.”).

13 By this Request for Judicial Notice. the Parties have satisfied the requirements of
14 California Evidence Code section 453.

15 DATED: May 26, 2022

LITTLER MENDELSON, P.C.

18 By: 
19 _____
20 Constance E. Norton
Chad D. Greeson

21 Attorneys for Defendant BENIHANA
22 INTERNATIONAL, INC.

23 4866-7865-8849.1 / 062447-1174
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10 Attorneys for Defendant
BENIHANA INTERNATIONAL, INC.

11 *(Additional Counsel on Following Page)*
12

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SAN MATEO

15
16 JUSTIN LIE, individually and on behalf of
himself and all others similarly situated,

17 Plaintiff,

18 v.

19 BENIHANA INTERNATIONAL, INC., a
20 Delaware Corporation; and DOES 1-50,
inclusive,

21 Defendants.
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Case No. 21-CIV-00153

**APPENDIX OF FEDERAL CASES
CITED IN SUPPORT OF JOINT
NOTICE OF MOTION AND MOTION
TO APPROVE PAGA SETTLEMENT
AND DISMISSAL OF PAGA ACTION**

ASSIGNED FOR ALL PURPOSES TO
JUDGE NANCY FINEMAN, DEPT. 4

Hearing Date: July 5, 2022
Time: 2:00 p.m.
Dept.: 4 CR N

Complaint Filed: Jan. 12, 2021
First Amd. Compl. Filed: Dec. 5, 2021
Second Amd. Comp. Filed: Jan. 18, 2022

27 ///

28 ///

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7 Attorneys for Plaintiff JUSTIN LIE,
on behalf of himself and all other similarly situated
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Pursuant to California Rules of Court, Rule 3.1113(i), Plaintiff Justin Lie ("Plaintiff") and Defendant Benihana International, Inc. ("Defendant" or "Benihana") (collectively, the "Parties") respectfully submit the following Appendix of Federal Authorities in support of their Joint Motion to Approve PAGA Settlement and Dismissal of PAGA action.

Case	Exhibit
<i>Wanderer v. Kiewit Infrastructure West Co.</i> , 2020 U.S. Dist. LEXIS 158189 (E.D. Cal. Aug. 31, 2020)	1
<i>Chamberlain v. Baker Hughes, a GE Co., LLC</i> , 2020 WL 4350207 (E.D. Cal. July 29, 2020)	2
<i>Rincon v. W. Coast Tomato Growers, LLC</i> , 2018 U.S. Dist. LEXIS 22886 6 (S.D. Cal. Feb. 12, 2018)	3
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	4
<i>Patel v. Nike Retail Servs.</i> , 2019 U.S. Dist. LEXIS 77988 (N.D. Cal. May 8, 2019)	5
<i>O'Connor v. Uber Techs., Inc.</i> , 201 F. Supp. 3d 1110 (N.D. Cal. 2016)	6
<i>Titus v. McLane Foodservice, Inc.</i> , 2016 WL 4797497 (E.D. Cal. Sept. 14, 2016)	7
<i>Ramirez v. C and J Well Service, Inc.</i> , 2020 WL 5846464 (C.D. Cal., Mar. 27, 2020)	8
<i>Segal v. Aquent LLC</i> , 2018 WL 4599754 (S.D. Cal. Sept. 24, 2018)	9
<i>Alcala v. Meyer Logistics, Inc.</i> , 2019 U.S. Dist. LEXIS 166879 (C.D. Cal. June 17, 2019)	10
<i>Bernal v. Graham Packaging Pet Techs, Inc.</i> , 2021 U.S. Dist. LEXIS 86393 (E.D. Cal. May 5, 2021)	11

DATED: May 26, 2022

LITTLER MENDELSON, P.C.

By: 
Constance E. Norton
Chad D. Greeson

Attorneys for Defendant BENIHANA
INTERNATIONAL, INC.

4862-2420-8416.1 / 062447-1174

Exhibit 1



Cited

As of: May 18, 2022 12:05 AM Z

Wanderer v. Kiewit Infrastructure West Co.

United States District Court for the Eastern District of California

August 28, 2020, Decided; August 31, 2020, Filed

Case No. 2:18-cv-02898 WBS-DB

Reporter

2020 U.S. Dist. LEXIS 158189 *; 2020 WL 5107618

STEPHEN WANDERER, as an individual and in his representative capacity, Plaintiff, v. KIEWIT INFRASTRUCTURE WEST CO.; and DOES 1 through 25, inclusive, Defendants.

LexisNexis® Headnotes

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits

HN1 [↓] **Remedies, Private Suits**

A Private Attorneys' General Act (PAGA) action is a statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer. The employees bringing the action do so as agents or proxies of the state's labor law enforcement agencies. Any agreement to waive PAGA claims is an agreement to limit the penalties plaintiff-employees may recover on behalf of the State. Because a settlement of PAGA claims settles claims that could otherwise be brought by the State, the trial court must review and approve any settlement of PAGA claims. Lab. Code, § 2699(l)(2). Before the trial court can review and approve of any settlement of PAGA claims, the proposed settlement shall be submitted to the California Labor Workforce Development Agency (LWDA) at the same time that it is submitted to the court.

Business & Corporate Compliance > ... > Wage & Hour Laws > Administrative Proceedings > Rulemaking Authority

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits

HN2 [↓] **Administrative Proceedings, Rulemaking Authority**

The trial court, in reviewing the award of civil penalties under the Private Attorneys' General Act (PAGA), may exercise its discretion to lower the amount of penalties awarded if to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory. Lab. Code, § 2699(e)(2). Because State law enforcement agencies are the real parties in interest, the court's task is to ensure that the State's interest in enforcing the law is upheld.

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

HN3 [↓] **Class Actions, Compromise & Settlement**

Other than the provisions previously discussed, Private Attorneys' General Act (PAGA) does not establish a standard for evaluating PAGA

settlements. The California Labor Workforce Development Agency (LWDA) itself has stated that it is not aware of any existing case law definitively establishing a standard to review PAGA settlements. At least a few district courts have applied the factors in the case of *Hanlon v. Chrysler Corp.* to evaluate a PAGA settlement. The factors in the case of *Hanlon v. Chrysler Corp.*, which are traditionally used to evaluate class action settlements, include: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed; (6) the expertise and views of counsel; (7) the presence of government participation; and (8) the reaction of class members to the proposed settlement. Many of these factors are not unique to class action lawsuits and bear on whether a settlement is fair and has been reached through an adequate adversarial process.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Labor & Employment Law > Wage & Hour Laws > Remedies > Class Actions

Civil Procedure > Special Proceedings > Class Actions > Compromise & Settlement

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits

[HN4](#) [📄] **Standards of Review, Arbitrary & Capricious Standard of Review**

The third, seventh, and eighth factors in the case of *Hanlon v. Chrysler Corp.*, however, are inapplicable in a Private Attorneys' General Act (PAGA) settlement that was not a class action, which resolved only the plaintiff's individual PAGA claims, and where the California Labor Workforce Development Agency (LWDA) had

filed no submission reflecting a position on the settlement. In addition to analyzing the settlement under the five remaining factors in the case of *Hanlon v. Chrysler Corp.*, the court must determine whether the settlement would be unjust, arbitrary and oppressive, or confiscatory with respect to defendant, Lab. Code, § 2699(e)(2), and whether the settlement provisions are at least as effective as the protections or remedies provided by state and federal law or regulation for the alleged violation. Lab. Code, § 2699.3(b)(4).

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

[HN5](#) [📄] **Settlement Agreements, Validity of Agreements**

Courts have noted that legal uncertainty favors approval of a settlement.

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

[HN6](#) [📄] **Settlement Agreements, Validity of Agreements**

Where a settlement provides timely, certain, and meaningful recovery, it ought to be favored.

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits

[HN7](#) [📄] **Remedies, Private Suits**

Given the statutory language of Private Attorneys' General Act (PAGA), a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant.

Civil Procedure > ... > Attorney Fees &

Expenses > Basis of Recovery > Statutory Awards

Labor & Employment Law > Wage & Hour Laws > Remedies > Costs & Attorney Fees

[HN8](#) **Basis of Recovery, Statutory Awards**

Private Attorneys' General Act (PAGA) provides for the recovery of attorneys' fees and costs in any successful action. Lab. Code, § 2699(g)(1). Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs.

Counsel: [*1] For Stephen Wanderer, Plaintiff: Rachel Renno, LEAD ATTORNEY, Foos Gavin Law Firm, P.C., Sacramento, CA.

For Kiewit Infrastructure West Co., Defendant: Billie Desiree Wenter, Michael E. Brewer, LEAD ATTORNEYS, Baker & McKenzie LLP, San Francisco, CA.

Judges: WILLIAM B. SHUBB, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM B. SHUBB

Opinion

MEMORANDUM AND ORDER RE: JOINT MOTION TO APPROVE SETTLEMENT OF AND DISMISS CLAIM UNDER THE PRIVATE ATTORNEYS' GENERAL ACT

Plaintiff Stephen Wanderer ("Plaintiff"), individually and in a representative capacity, brought this lawsuit against Defendant Kiewit Infrastructure West Co. ("Defendant") alleging wrongful termination, retaliation in violation of [California Labor Code §§ 1102.5](#) and [98.6](#), violations of wage and hour laws, and seeking civil penalties under the [Private Attorneys' General Act \("PAGA"\)](#) based on the alleged misclassification of plaintiff and other employees as exempt from

overtime. (First Am. Compl. "FAC") (Docket No. 10).) Before the court is the parties' Joint Motion to Approve of Settlement and to Dismiss Plaintiff's Claim under the PAGA. ("Joint Mot. for Settlement") (Docket No. 28.)

I. Factual and Procedural Background

Defendant Kiewit is a construction company incorporated under the laws of the [*2] State of Delaware and with its "nerve center" located in the State of Nebraska. (Notice of Removal ("NOR") (Docket No. 1 at ¶¶ 12-13).) Defendant employed plaintiff as a Site Safety and Health Officer ("SSHO") at various locations within California, including the Oroville Dam, the Folsom Dam, and Kiewit's Fairfield Office, from on or around September 15, 2013 until May 12, 2018. (FAC at ¶¶ 6-12.)

On July 5, 2018, plaintiff sent defendant a letter stating that he intended to pursue a PAGA claim based on defendant allegedly misclassifying him as exempt from overtime. (See Mem. of Points and Authorities in Supp. of Joint Mot. to Approve Settlement and to Dismiss Claim under the PAGA ("Settlement Mem.") at 1 (Docket No. 29).) Plaintiff submitted the same letter ("PAGA Letter") to the California Labor Workforce Development Agency ("LWDA"). (See Settlement Mem. at 1.) The LWDA did not respond to the PAGA Letter. (Id.)

The operative complaint asserts eight causes of action: (1) wrongful termination in violation of public policy; (2) retaliation in violation of [California Labor Code §§ 1102.5](#) and [98.6](#); (3) violation of [California Labor Code § 201](#); (4) failure to pay overtime wages in violation of [California Labor Code § 510](#); (5) violation of [California Labor Code § 1174](#); (6) violation of [California Labor Code § 226\(a\)](#); (7) civil penalties [*3] under PAGA for violations of the above Labor Code provisions; and (8) unfair competition in violation of [Business and Professions Code § 17200](#). (See FAC at 4-13.)

After exchanging extensive discovery, the parties reached a settlement through the court's Voluntary Dispute Resolution Program with Douglas Robert Thorn of Thorn Law Firm. (See Settlement Mem. at 2.) Mr. Thorn has practiced law for over thirty years, had extensive trial experience, and has served as a neutral in over 200 cases, including employment cases. (See *id.* at 3.)

Pursuant to the settlement agreement, the parties agreed to settle plaintiff's individual claims, without admission of fault or liability, for a general release and dismissal upon the Court's approval of the parties' settlement as to the PAGA claim. (See *id.* at 2.) The parties entered into a separate confidential settlement related to plaintiff's other claims. (See *id.*) The parties settled plaintiff's individual claims only,¹ and the PAGA Settlement Agreement does not release any claim on behalf of any other allegedly affected employee. (See *id.*) The settlement of plaintiff's claims is contingent on the court issuing a final Order which approves the settlement agreement, dismisses the action [*4] (including plaintiff's PAGA Claim) with prejudice as to the plaintiff and without prejudice as to other allegedly affected employees, and denies an award of civil penalties to the plaintiff. (See *id.*)

II. Discussion

A. PAGA Settlement

HN1[↑] "[A] PAGA action is a statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer." *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 435 (9th Cir. 2015). The employees bringing the action do so as agents or proxies of the state's labor law enforcement agencies. See *id.* Any agreement to waive PAGA claims is an agreement to limit the penalties plaintiff-employees may recover on behalf of the State. See *id.* at 436. Because a settlement of PAGA claims settles claims that could otherwise be brought by the State,

the trial court must "review and approve" any settlement of PAGA claims. See *Cal. Lab. Code. § 2699(l)(2)*. Before the trial court can review and approve of any settlement of PAGA claims, "[t]he proposed settlement shall be submitted to the [LWDA] at the same time that it is submitted to the court." *Id.* Plaintiff provided a copy of the proposed settlement agreement to the LWDA on July 15, 2020, concurrently with the filing of the Joint Mot. for Settlement.² (Decl. of Rachel Renno in Supp. of [*5] Joint Mot. for Settlement at ¶ 2 ("Renno Decl.") (Docket No. 30)).

HN2[↑] The trial court, in reviewing the award of civil penalties under the PAGA, may exercise its discretion to lower the amount of penalties awarded if "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." See *Cal. Lab. Code § 2699(e)(2)*. Because State law enforcement agencies are the real parties in interest, the court's task is to ensure that the State's interest in enforcing the law is upheld. See *Rodriguez v. RCO Reforesting Inc., No. 2019, 2019 U.S. Dist. LEXIS 12597* (citing *Sakkab*, 803 F.3d at 435).

HN3[↑] Other than the provisions previously discussed, "PAGA does not establish a standard for evaluating PAGA settlements." See *Rodriguez*, 2019 U.S. Dist. LEXIS 12597, 2019 WL 331159 at *4 (citing *Smith v. H.F.D. No. 55, Inc., No. 2:15-CV-01293 KJM KJN*, 2018 U.S. Dist. LEXIS 67192, 2018 WL 1899912, at *2 (E.D. Cal. Apr. 20, 2018)). The LWDA itself has stated that it is not aware of any existing case law definitively establishing a standard to review PAGA settlements. *Id.* (citing *Ramirez v. Benito Valley Farms, LLC, No. 16-CV-04708-LHK*, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794, at *3 (N.D. Cal. Aug. 25, 2017)). At least a few district courts have applied the factors in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), to evaluate a PAGA settlement. See, e.g.,

¹The parties have not given any indication as to the amount that plaintiff and plaintiff's counsel will receive in the settlement of the individual claims.

²The LWDA has not appeared in this case and has not filed any objection to the proposed joint settlement.

[Smith, 2018 U.S. Dist. LEXIS 67192, 2018 WL 1899912, at *2](#); [Ramirez, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794, at *3](#); [O'Connor v. Uber Techs., 201 F. Supp. 3d 1110, 1134 \(N.D. Cal. 2016\)](#). The [Hanlon](#) factors, which are traditionally used to evaluate class action settlements, include (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and [*6] likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed; (6) the expertise and views of counsel; (7) the presence of government participation; and (8) the reaction of class members to the proposed settlement. See [Hanlon, 150 F.3d at 1026](#). "Many of these factors are not unique to class action lawsuits and bear on whether a settlement is fair and has been reached through an adequate adversarial process." See [Ramirez, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794, at *3](#). Thus, the court finds these factors useful in evaluating a settlement of PAGA claims.

[HN4](#)^[↑] The third, seventh, and eighth factors, however, are not relevant to this settlement because it is not a class action and the LWDA has not participated. See [Smith, 2018 U.S. Dist. LEXIS 67192, 2018 WL 1899912, at *2](#) (holding that these factors were inapplicable in a PAGA settlement that was not a class action, which resolved only the plaintiff's individual PAGA claims, and where the LWDA had filed no submission reflecting a position on the settlement.) In addition to analyzing the settlement under the five remaining [Hanlon](#) factors, the court must determine whether the settlement would be "unjust, arbitrary and oppressive, or confiscatory" with respect [*7] to defendant, see [Cal. Lab. Code § 2699\(e\)\(2\)](#), and whether "the settlement provisions are at least as effective as the protections or remedies provided by state and federal law or regulation for the alleged violation." See [Cal. Lab. Code § 2699.3\(b\)\(4\)](#).

First, there is no indication that the settlement would be unjust, arbitrary and oppressive, or confiscatory as to defendants. Both sides have

agreed that the settlement is fair and reasonable. (See Settlement Mem. at 4.) Defendant has given no indication that the settlement would be unduly burdensome or unjust. Based on the exchange of substantial information and Mr. Thorn's recommendation, both sides have agreed to allocate zero dollars to plaintiff's individual PAGA claim. (See [id.](#) at 3.) Plaintiff voluntarily entered into an agreement to accept a monetary benefit to settle his individual claims and not pursue his PAGA claim. (See [id.](#) at 4.) Given that both sides have agreed to the settlement and to avoid the further expense of litigation, and the Settlement Agreement does not release any claim on behalf of any other allegedly affected employee, the court concludes that a settlement would not be "unjust, arbitrary and oppressive, or confiscatory." See [Rodriguez, 2019 U.S. Dist. LEXIS 12597, 2019 WL 331159, at *4](#).

Second, the "strength of plaintiff's case" factor [*8] also favors approval of settlement. The parties exchanged substantial information at mediation, and the parties' mediator, Mr. Thorn, concluded that the defendant presented compelling evidence and arguments that it properly classified plaintiff as exempt under California's administrative exemption. (See Settlement Mem. at 3.) Mr. Thorn likewise concluded that defendant raised a convincing argument that plaintiff did not comply with PAGA's administrative requirement because his PAGA letter referred only to plaintiff and did not place the LWDA or defendant on notice of his intention to pursue a representative claim. (See [id.](#) at 3.); see [Khan v. Dunn-Edwards Corp., 19 Cal. App. 5th 804, 809, 228 Cal. Rptr. 3d 90 \(2nd Dist. 2018\)](#) (affirming summary judgment for defendant where notice "expressly applied only to [plaintiff]" and failed to give the LWDA an adequate opportunity to decide whether to investigate a representative action or provide the company an adequate opportunity to respond to the agency.).) These defenses present a substantial risk to plaintiff's PAGA Claim and the likelihood that the penalties sought by the plaintiff, either in whole or in part, will not be awarded. [HN5](#)^[↑] Courts have noted that legal uncertainty favors approval of a

settlement. See [Smith, 2018 U.S. Dist. LEXIS 67192, 2018 WL 1899912, at *3](#).

Third, "the risk, expense, [*9] complexity, and likely duration of further litigation" factor strongly favors approval of the settlement. The parties reached this settlement after nearly two years of litigation. The parties have conducted extensive investigation, discovery, and arms-length negotiation between experienced and informed counsel and with the assistance of a seasoned and well-respected mediator. (See Settlement Mem. at 3.) Further litigation would necessitate further expenses and costs for both parties. [HN6](#)[↑] Where a settlement "provides timely, certain, and meaningful recovery," it ought to be favored. See [Ramirez, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794, at *5](#).

Fourth, the settlement reflects the parties' mutual agreement to allocate zero dollars to plaintiff's individual PAGA claim. (See Settlement Mem. at 3.) The parties arrived at this claim based on the exchange of substantial information, Defendant's anticipated defenses and Mr. Thorn's recommendation. (*Id.*) Plaintiff voluntarily entered into an agreement to accept a monetary benefit to settle his individual claims and not pursue his PAGA claim. (*Id.* at 4.) Courts have previously approved settlements where parties mutually agree to allocate zero dollars or another nominal amount to a PAGA claim. See [Nordstrom Comm'n Cases, 186 Cal. App. 4th 576, 589, 112 Cal. Rptr. 3d 27 \(4th Dist. 2010\)](#) (holding that [*10] there was "no abuse of discretion in the trial court's approval of the settlement agreement" which allocated zero dollars for PAGA penalty claims as part of the overall settlement of the case.); see also [Alcala v. Meyer Logistics, Inc., No. CV 17-7211 PSG\(AGRx\), 2019 U.S. Dist. LEXIS 166879, 2019 WL 4452961, at *9 \(C.D. Cal. June 17, 2019\)](#) (observing that courts have approved PAGA claims which fall "within the zero to two percent range.") Moreover, plaintiff's settlement does not impair the rights or release the claims of other allegedly aggrieved employees. (See Settlement Mem. at 4.)

Accordingly, "the amount offered in settlement" factor favors approval.

Fifth, regarding the extent of discovery completed and the stage of the proceedings, the parties conducted informal and formal investigation and discovery into plaintiff's claims. (See *id.* at 3.) The parties engaged in written discovery, including requests for production, requests for admission, and interrogatories. (Decl. of Billie D. Wenter in Supp. of Joint Mot. for Settlement at ¶ 2 ("Wenter Decl.") (Docket No. 31).). Defendant produced over 12,000 pages in response to requests for production. *Id.* In addition, defendant deposed plaintiff on February 11, 2020. *Id.* Moreover, on June 30, 2020, the parties mediated the action through [*11] the court's Voluntary Dispute Resolution Program with Mr. Thorn. (See Settlement Mem. at 2.) Both sides thereby developed a good sense of the risks and benefits of continuing litigation. See [Ontiveros v. Zamora, 303 F.R.D. 356, 371 \(E.D. Cal. 2014\)](#) (Shubb, J.) (observing that the parties use of mediation, which took place after significant discovery, and their reliance on the mediator's proposal demonstrated that they had carefully considered and evaluated the strength of their arguments.) Accordingly, this factor weighs in favor of approval.

Sixth, with respect to the experience and views of counsel, plaintiff was represented by experienced counsel who arrived at this Settlement Agreement through arms-length negotiations and by participating in mediation through the court's Voluntary Dispute Resolution Program with the assistance of Mr. Thorn. (See Settlement Mem. at 1.) Plaintiff's counsel believes that the dismissal of the PAGA claim appropriately accounts for the challenges and potential risks of continuing litigation. (See *id.*) Thus, counsel's conclusion that this settlement is plaintiffs' best chance at recovery is given considerable weight. See [Rodriguez, 2019 U.S. Dist. LEXIS 12597, 2019 WL 331159 at *5](#). Accordingly, this factor weighs in favor of approval.

Seventh, and finally, this settlement [*12] is "at least as effective as the protections or remedies provided by state and federal law or regulation for the alleged violation." See Cal. Lab. Code § 2699.3(b)(4). As mentioned previously, this settlement resolves only plaintiff's individual claims for civil penalties; it is not a class settlement and therefore does not impair the rights or release the claims of any other allegedly aggrieved employees. (See Settlement Mem. at 1.) Here, Mr. Thorn concluded that plaintiff was properly classified as an employee exempt from overtime under California's administrative exemption. (Id. at 3); See 8 Cal. Code Regs. § 11040(1)(A)(2). [HN7\[↑\]](#) "Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant." [Cardenas v. McLane Foodservice, Inc., No. SACV 10-473 DOC \(FFMx\), 2011 U.S. Dist. LEXIS 13126, 2011 WL 379413 at *3 \(C.D. Cal. 2011\)](#). The plaintiff has not demonstrated the violation of the Labor Code by defendant for any additional employees and may not even be able to demonstrate a violation of the Labor Code by defendant in his own case. The court, therefore, finds that the settlement satisfies this provision of the California Labor Code.

Accordingly, because every relevant factor favors final approval of the settlement, the [*13] court will approve the parties' settlement of plaintiff's PAGA claims.

B. Attorneys' Fees

[HN8\[↑\]](#) PAGA provides for the recovery of attorneys' fees and costs in any successful action. See Cal. Lab. Code § 2699(g)(1) ("Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs."). Here, the parties have agreed to bear their own attorneys' fees and costs related to this action, and plaintiff's counsel waives any and all rights to further attorneys' fees and costs in connection with this action, except as separately agreed upon between plaintiff and plaintiff's counsel. See

Stipulated Settlement Agreement (Docket No. 31-1 at 4.) The parties have also agreed to a mutual waiver of any right to pursue recovery of costs. (See Settlement Mem. at 4.) As plaintiff has not prevailed on any PAGA claim, he is not entitled to any attorney's fees under PAGA. Accordingly, the court approves of the joint decision by the parties to bear their own attorney's fees and waive their rights to pursue recovery of costs.

IT IS THEREFORE ORDERED that the parties' Joint Mot. for Settlement (Docket No. 28) be, and the same hereby is, GRANTED. Plaintiff is not entitled to any civil penalties under [*14] PAGA. This action, including plaintiff's PAGA Claim, is DISMISSED WITH PREJUDICE as to plaintiff, and DISMISSED WITHOUT PREJUDICE as to any individual or representative claims, including any PAGA claim, that may be brought by any other employees that may have been affected by defendant's alleged conduct.

The Clerk of Court is instructed to enter judgment accordingly.

Dated: August 28, 2020

/s/ William B. Shubb

WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

Exhibit 2

2020 WL 4350207

Only the Westlaw citation is currently available.
United States District Court, E.D. California.

Michael CHAMBERLAIN, Plaintiff,
v.
BAKER HUGHES, A GE COMPANY,
LLC, Defendant.

No. 1:19-cv-00831-DAD-JLT

|
Signed 07/29/2020

Attorneys and Law Firms

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ORDER GRANTING MOTION FOR APPROVAL OF PAGA SETTLEMENT AGREEMENT

Dale A. Drozd, UNITED STATES DISTRICT JUDGE

*1 This matter is before the court on plaintiff's unopposed motion for approval of a settlement agreement and dismissal with prejudice of plaintiff's sixth cause of action against defendant pursuant to the Private Attorneys General Act ("PAGA"). (Doc. No. 19.) Pursuant to General Order No. 617 addressing the public health emergency posed by the coronavirus outbreak, on April 22, 2020, the court took the motion under submission to be decided on the papers. (Doc. No. 24.) Having considered the unopposed motion and despite some reservation, the court will approve the settlement agreement.

BACKGROUND

On May 14, 2019, plaintiff Michael Chamberlain filed this action in Kern County Superior Court asserting five causes of action. (Doc. No. 4-1.) Defendant Baker Hughes, a GE Company, LLC ("Baker Hughes") removed the action to this federal court on June 13, 2019. (*See generally* Doc. No. 1.) On July 13, 2019, the parties filed a joint stipulation allowing plaintiff to file a first amended complaint to add a PAGA claim. (Doc. No. 10 at 2.) In that stipulation, the parties agreed that plaintiff's non-PAGA claims should proceed under an arbitration agreement without the need for a motion to enforce the arbitration agreement. (*Id.*) The parties also agreed that they would proceed to submit the non-PAGA claims to arbitration if the action was not resolved by private mediation by December 31, 2019. (*Id.*) Pursuant to the stipulation, the court was to retain jurisdiction as to plaintiff's PAGA claim, lifting the stay at such time that the parties submit a motion to approve settlement and/or the arbitration came to a final resolution. (*Id.* at 3.) On August 1, 2019, the court gave effect to the stipulation and stayed this action. (Doc. No. 11.)

Plaintiff's first amended complaint alleges that on or about March 26, 2017, plaintiff returned to work as a directional driller at Baker Hughes after being laid off. (Doc. No. 12 at ¶ 4.) As it pertains to his PAGA claim, plaintiff alleges that PAGA penalties are owed for the following California Labor Code § 226 violations:

1) the paystubs do not state an hourly rate for the daily rate, or the car allowance; 2) The paystubs do not state how many hours of work the daily rate or car allowance is for; 3) The paystubs fail to specify the correct overtime, double time, or regular rates of pay; 4) Defendant has failed to preserve the actual paystubs for each pay period in their electronic system. They have changed paystubs insofar as rates of pay, total compensation, why the compensation was paid, and how many hours the pay was for; 5) in approximately May of 2019 Defendant created a series of bi-weekly paystubs from on or about December 21, 2018 to 5-10-19 which make it virtually impossible to determine what hourly rates are paid, how many hours the sums are paid for, why there are substations of hours and gross sums, the same issues described in 1-4 above but even worse because these stubs show zero hours at regular pay, zero hours for an overtime bonus but gross sums are listed. The same has been done for other members of the PAGA group at other dates; 6) The paystubs state OT Bonus but fail to specify the number of hours or hourly rate for that itemization. Because the employer failed to properly provide employee wage deduction statements for each pay

period during the statutory time a total of \$600 is due per pay period per employee. The employees were paid biweekly; 7) Meal Break penalties do not appear and the general number of regular, overtime, and double time hours worked are incorrect.

*2 (*Id.* at ¶ 26.) Additionally, plaintiff asserts that defendant violated § 226 by failing to pay overtime and double time, and because not all wages were paid as required by statute. (*Id.* at ¶ 27.) Plaintiff alleges that the total PAGA violations are worth \$1,600.00 in PAGA penalties per employee per weekly pay period, go back a year before this action was filed, and relate to defendant's nonexempt directional drillers and measurement well drillers who were paid daily bonuses and travel time. (*Id.*) Plaintiff estimates that there are thirty to fifty of these employees in the statutory period. (*Id.*)

On January 9, 2020, the parties engaged in private mediation with employment law mediator Steve Cerveris (Doc. No. 20 at ¶ 6), which resulted in the finalizing of the terms of a PAGA settlement agreement (Doc. No. 20-3 ("the Agreement")) on February 5, 2020 (*id.* at ¶ 4). On April 6, 2020, plaintiff filed this unopposed motion for settlement approval.¹ (Doc. No. 19.) On April 16, 2020, the court directed the parties to submit supplemental briefing providing additional information regarding litigation costs accrued, the reasonableness of the attorneys' fees provision, and the fundamental fairness, reasonableness, and adequacy of the Agreement. (Doc. No. 23.) On April 24, 2020, plaintiff's counsel, attorney Karl Gerber, submitted a supplemental declaration ("the supplemental Gerber declaration") and exhibits. (Doc. No. 25.) Defendant submitted a supplemental brief on April 27, 2020. (Doc. No. 27.)

THE PROPOSED SETTLEMENT

According to the Agreement, defendant will pay a gross settlement payment of \$25,000.00. (The Agreement at ¶ 38.) The gross settlement payment will include (1) claims administration costs of up to \$1,000.00 to Phoenix Settlement Administrators; plaintiff's litigation costs of up to \$1,000.00, subject to court approval; (3) plaintiff's attorneys' fees of 40 percent of the gross settlement payment, subject to court approval; and (4) the PAGA fund comprising the remaining funds, to be divided 75 percent to the Labor and Workforce Development Agency (LWDA) and 25 percent to the aggrieved employees. (*Id.* at ¶¶ 25, 38.) If the actual amount of claims administration, litigation costs, and/or attorneys' fees are less or more than the amounts set forth above, those funds shall be added to or subtracted from the PAGA fund. (*Id.*

at ¶ 39.) The total amount of the gross settlement payment shall not exceed \$25,000.00. (*Id.*)

The Agreement defines "aggrieved employee(s)" as "Plaintiff and all persons who are or were employed by defendant working in California as non-exempt directional drillers and/or measurement well drillers who were paid daily bonuses and/or travel time from May 10, 2018 through January 9, 2020." (*Id.* at ¶ 1.) The 25 percent that is allocated to the aggrieved employees will be divided by the total number of eligible pay periods for all aggrieved employees, which will yield a pay period amount. (*Id.* at ¶ 42.) The gross amount of each individual PAGA payment shall be calculated by multiplying the number of eligible pay periods worked by the individual aggrieved employee by the pay period amount. (*Id.*) "Eligible pay periods" are the total number of pay periods worked by each aggrieved employee during the covered period—May 10, 2018 to January 9, 2020—in California as a non-exempt directional drillers and/or measurement well drillers. (*Id.* at ¶¶ 6, 9.) The covered claims are as follows:

*3 all claims, causes of action, and legal theories of relief alleged or which could have been alleged or otherwise raised based on the facts in the FAC...or the LWDA Letter for PAGA penalties, including: (1) failure to provide meal and rest breaks or premium payments in lieu thereof (including Labor Code 226.7., 512, Wage Order 16); (2) failure to pay all wages and the regular rate, overtime rate or double time rate (including Labor Code 558, 204, 210, 215, and 216); (3) failure to timely pay all wages, including upon termination, and waiting time penalties; (4) failure to provide complete and accurate wage statements; (5) failure to indemnify for business expenses; (6) unlawful deductions from wages; (7) unfair business practices (California Business & Professions Code section 17200 et seq.) that could have been premised on the facts, claims causes of action or legal theories described above or on any of the claims, causes of action or legal theories of relief pleaded in the FAC for restitution claims premised on the above-referenced violations; (8) all claims under PAGA that could have been premised on the facts, claims, causes of action or legal theories described above or on any of the claims, causes of action or legal theories of relief pleaded in the FAC; and (9) all damages, penalties, interest, costs (including attorney's fees) and other amounts recoverable under said claims or causes of action as to the facts and/or legal theories alleged or which could have been alleged in the FAC.

(*Id.* at ¶ 5.)

The Agreement provides that, as of the effective date,

each aggrieved employee shall fully release and forever discharge defendant from any and all claims, causes of action, demands, rights, liabilities, penalties, attorneys' fees, costs, damages, interest, restitution, and/or liability that were or could have been asserted against defendant in the PAGA lawsuit and/or the PAGA letter to LWDA based on the covered claims. (*Id.* at ¶ 49.) This release extends to all PAGA claims arising from or relating to any and all acts, events and omissions that occurred and/or accrued during the covered period. (*Id.*) Upon the court's approval of the Agreement, aggrieved employees will have no standing to appeal, object or request exclusion from the settlement. (*Id.*)

LEGAL STANDARD

In 2003, the California Legislature enacted the Private Attorney General Act, [California Labor Code §§ 2698 et seq.](#), after declaring: (i) that adequate financing of labor law enforcement was necessary to achieve maximum compliance; (ii) that staffing levels for state labor law enforcement agencies have declined and were unable to keep up with a growing labor market; (iii) that vigorous assessment and collection of civil penalties provides a meaningful deterrent to unlawful conduct; and (iv) that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to seek and recover civil penalties for Labor Code violations. 2003 Cal. Stat. 6629. Under PAGA, an "aggrieved employee" may bring an action for civil penalties for labor code violations on behalf of herself and other current or former employees. [Cal. Lab. Code § 2699\(a\)](#).² A plaintiff suing under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies." [Arias v. Superior Court](#), 46 Cal. 4th 969, 986 (2009). Accordingly, a judgment in a PAGA action "binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government." *Id.* (emphasis added); see also [Iskanian v. CLS Transp. L.A., LLC](#), 59 Cal. 4th 348, 381 (2014) ("When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party.").

The PAGA statute imposes a number of limits on litigants. First, because a PAGA action functions as a "substitute" for an action brought by the state government, a plaintiff suing under PAGA is limited to recovery of civil penalties only, rather than damages

available privately through direct or class action claims. *Id.* Second, to bring an action under PAGA, an aggrieved employee must first provide written notice to the LWDA as well as to the employer. [Cal. Lab. Code § 2699.3\(a\)\(1\)](#). Third, any civil penalties recovered must be distributed as follows: 75 percent to the LWDA, and the remaining 25 percent to the aggrieved employees. *Id.* § 2699(i).

*4 Finally, a trial court must "review and approve" any settlement of PAGA claims. *Id.* § 2699(l)(2).³ There is no binding authority identifying the proper standard of review of PAGA settlements to be employed by the court. In the class action context, where PAGA claims often also appear, a district court must independently determine that a proposed settlement agreement is "fundamentally fair, adequate and reasonable" before granting approval. See [Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco](#), 688 F.2d 615, 625 (9th Cir. 1982); [In re Heritage Bond Litig.](#), 546 F.3d 667, 674–75 (9th Cir. 2008). However, this is not a class action, and PAGA claims are intended to serve a decidedly different purpose—namely to protect the public rather than for the benefit of private parties. See [Arias](#), 46 Cal. 4th at 986. The LWDA has provided some guidance regarding court approval of PAGA settlements. See California Labor and Workforce Development Agency's Comments on Proposed PAGA Settlement ("LWDA Comments"), [O'Connor v. Uber Techs., Inc.](#), No. 3:13-cv-03826-EMC (N.D. Cal. Jul. 29, 2016) (Doc. No. 736 at 2–3).⁴ In that case, where both class action and PAGA claims were covered by a proposed settlement, the LWDA stressed that

when a PAGA claim is settled, the relief provided for under the PAGA [must] 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 [must] evaluate whether the settlement meets the standards of being "fundamentally fair, reasonable, and adequate" with reference to the public policies underlying the PAGA.

Id.; see also [O'Connor v. Uber Techs., Inc.](#), 201 F. Supp. 3d 1110, 1133 (N.D. Cal. 2016) (citing the same with approval).

Recognizing the distinct issues presented by class actions, this court is nevertheless persuaded by the LWDA's reasoning in *O'Connor* and therefore adopts its proposed standard in evaluating the PAGA-only settlement agreement now before the court. Accordingly, the court will approve a settlement of PAGA claims upon a showing that the settlement terms (1) meet the statutory requirements set forth by PAGA, and (2) are fundamentally fair, reasonable, and adequate⁵ in view of PAGA's public policy goals. See [Tenorio v. Gallardo](#),

No. 1:16-cv-00283-DAD-JLT, 2019 WL 4747949, at *3 (E.D. Cal. Sept. 30, 2019).

ANALYSIS

A. The PAGA Settlement

PAGA's statutory requirements require that 75 percent of the civil penalties recovered by aggrieved employees must be allocated to the LWDA and 25 percent allocated to aggrieved employees.⁶ Cal. Lab. Code § 2699(i). As stated above, the Agreement in this case allocates the PAGA fund accordingly. (See the Agreement at ¶ 42.) Although the Agreement does not specify the dollar amounts for the PAGA fund's allocations, according to the motion, the PAGA fund will total \$13,363.29. (Doc. No. 19 at 7.) The claims administrator will pay 75 percent of the PAGA fund, or \$10,022.46, to the LWDA, with the remaining 25 percent, or \$3,340.83, to be distributed among the aggrieved employees on a pro-rata basis. (*Id.*; the Agreement at ¶ 42.) As stated above, the Agreement lists Phoenix Settlement Administrators as the settlement administrator. (The Agreement at ¶ 25; see also Doc. No. 20-6.) According to plaintiff's motion, attorney Gerber has used Phoenix Settlement Administrators for multiple PAGA settlements, and they have delivered timely and economical services. (Doc. Nos. 19 at 7; 20 at ¶ 6.) Attorney Gerber also attaches to his declaration the form by which he submitted the proposed settlement to the LWDA. (Doc. No. 20-4.)

*5 Plaintiff's counsel ultimately concludes, albeit by a somewhat circuitous route, that a \$200,000.00 PAGA verdict would be a success in this case. (Doc. No. 19 at 5.) If the court accepts the \$200,000.00 valuation, the \$25,000.00 settlement represents a 12 percent of the likely verdict in this case. (*Id.* at 6.) In his supplemental declaration, attorney Gerber states that he proposed the settlement amount "based upon the size of the group, the total potential, the defenses, and [his] experience in this area of the law." (Doc. No. 25 at ¶ 26.) In its supplemental brief, defendant maintains that it does not concede any liability whatsoever under PAGA in this case and that in its view the settlement amount "is still grossly over-valued" in light of its valid defenses to the underlying claims. (Doc. No. 27 at 22–23.)

Plaintiff's counsel anticipates encountering the following difficulties should this matter proceed. Counsel states that defendant, who is in the oil business, is at risk of filing for

bankruptcy and being unable to pay this settlement given the current state of the oil market. (Doc. No. 25 at ¶ 26.) Counsel also explains that very few potential litigants were willing to participate in this action. (*Id.* at ¶ 24.) He represents that most employees involved in this PAGA group are short-term employees, and adds "that a large part of this group are not California residents who [he] cannot get to come to court in Fresno." (*Id.*) In his motion for final approval, plaintiff notes that the Agreement will provide LWDA with penalties while paying a number of affected employees who are not motivated to participate in this suit. (Doc. No. 19 at 8.) Plaintiff also observes that the affected employees can still bring individual actions to recover their actual damages because the Agreement only releases PAGA liability. (*Id.* at 6.)

With this understanding, the court will approve the Agreement as it pertains to the award of PAGA penalties. Because of the concrete risk attendant with the pursuit of further litigation in this action and, most critically, the lack of objection from the LWDA despite being provided timely notice of the terms of this proposed settlement, the court finds that the amount offered in settlement of the PAGA claims here weighs in favor of approval. Having reviewed the parties' submissions and the terms of the proposed settlement, the court finds that the settlement amount related to plaintiffs' PAGA claims is fair, reasonable, and adequate in light of the public policy goals of PAGA. See *O'Connor*, 201 F. Supp. 3d at 1132–33 (defining PAGA's goals as including "benefit[ing] the public by augmenting the state's enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance") (emphasis added).

B. Attorneys' Fees

The court now turns to the attorneys' fees provision of the Agreement. The relevant provision of PAGA provides that "[a]ny employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs." Cal. Lab. Code § 2699(g). Calculating attorneys' fees under this provision requires application of the lodestar. See *Steenhuysen v. UBS Fin. Servs., Inc.*, 317 F. Supp. 3d 1062, 1072 (N.D. Cal. 2018); *PLCM Grp. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000) (noting that "the fee setting inquiry in California ordinarily begins with the 'lodestar' "); *Margolin v. Reg'l Planning Comm'n*, 134 Cal. App. 3d 999, 1004 (1982) ("California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorneys' fee

award.”). “In determining reasonable hours, counsel bears the burden of submitting detailed time records justifying the hours claimed to have been expended.” *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986). “Where the documentation of hours is inadequate, the district court may reduce the award accordingly.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A district court should also exclude from the lodestar fee calculation any hours that were not “reasonably expended,” such as hours that are excessive, redundant, or otherwise unnecessary. *See id.* at 434; *J & J Sports Prods., Inc. v. Napuri*, No. C 10-04171 SBA, 2013 WL 4428573, at *1 (N.D. Cal. Aug. 15, 2013).

*6 In assessing fee applications, the reasonable hourly rates are calculated according to the prevailing market rates in the relevant legal community. *Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013); *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011) (“We have held that ‘[i]n determining a reasonable hourly rate, the district court should be guided by the rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation.’”) (quoting *Chalmers*, 796 F.2d at 1210–11); *Van Skike v. Dir., Office of Workers’ Comp. Programs*, 557 F.3d 1041, 1046 (9th Cir. 2009); *Carson v. Billings Police Dep’t*, 470 F.3d 889, 891 (9th Cir. 2006). Typically, the “relevant legal community” is the forum district⁷ and the local hourly rates for similar work should normally be employed. *Gonzalez*, 729 F.3d at 1205; *Prison Legal News*, 608 F.3d at 454; *Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994); *Deukmejian*, 987 F.2d at 1405.

The fee applicant bears the burden of producing satisfactory evidence “that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Blum*, 465 U.S. at 895 n.11. “Affidavits of the plaintiff[s] attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiff[s] attorney, are satisfactory evidence of the prevailing market rate.” *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990); *see also Napuri*, 2013 WL 4428573, at *2.

*7 Here, 40 percent of the gross settlement payment, or \$10,000.00, is allocated for an attorneys’ fee award to attorney Gerber under the parties’ Agreement. (The Agreement at ¶ 43.) Turning first to the hours expended, the court reiterates that “counsel bears the burden of submitting detailed time records justifying the hours claimed to have been expended.” *Chalmers*, 796 F.2d at

1210. Thus, the court cannot overlook that attorney Gerber failed to submit detailed time records justifying the hours he claimed to have been expended in litigating this case. Attorney Gerber represents that he has spent “well over 110 hours” of his time on the PGA portion of this case. (The Agreement at ¶ 19.) Because the only record of attorney Gerber’s hours expended was his declaration, which provided a narrative and loosely quantified breakdown of expended hours, (*see id.*), the court requested supplemental briefing detailing those hours in order to perform a lodestar calculation. (Doc. No. 23 at 2.) In response, attorney Gerber submitted only partial billing records from his firm. (Doc. No. 26.) Moreover, attorney Gerber concedes that he “did not keep studious billing records on this case,” and the list he submitted represents the hours he did track. (Doc. No. 25 at ¶ 17.) He states that his data analysis was “mostly not recorded,” and he “cannot find the records of the certified paralegal who assisted in those calculations,” leaving the paralegal billings incomplete as well. (*Id.*)

Courts in this circuit “have expressed a ‘preference’ for contemporaneous records, [but] we have never held that they are absolutely necessary.” *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (citing *United States v. 12,248 U.S. Currency*, 957 F.2d 1513, 1521 (9th Cir. 1991)). “[F]ee requests can be based on ‘reconstructed records developed by reference to litigation files.’” *Id.* (quoting *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir. 1983)). Therefore, an attorney is “not required to record in great detail how each minute of his time was expended...[and] can meet his burden—although just barely—by simply listing his hours and identifying the general subject matter of his time expenditures.” *Id.* (finding that a fee application met this “basic requirement” when it “provided a summary of the time spent on a broad category of tasks such as pleadings and pretrial motions (16.5 hours), settlement (4.2 hours), and court appearances (1.5 hours).”). However, it is most certainly the case that “parties are subject to a reduction in the hours awarded when they fail to provide adequate documentation, notably contemporaneous time records.” *Apple, Inc. v. Samsung Elecs. Co.*, No. C 11-1846 LHK PSG, 2012 WL 5451411, at *3 (N.D. Cal. Nov. 7, 2012); *see also, e.g., Hensley*, 461 U.S. at 438 n.13 (noting with approval the district court’s 30% reduction in an attorneys’ fee award in part due to counsel’s failure to keep contemporaneous time records); *Frank Music Corp. v. Metro–Goldwyn–Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989) (“The lack of contemporaneous records does not justify an automatic reduction in the hours claimed, but such hours should be credited only if reasonable under the circumstances and supported by other evidence such as testimony or secondary documentation.”); *Ackerman v.*

W. Elec. Co., 643 F. Supp. 836, 865 (N.D. Cal. 1986), *aff'd*, 860 F.2d 1514 (9th Cir. 1988) (“The percentage reduction method used by defendant to determine the number of hours reasonably expended has been employed by a number of courts, especially when contemporaneous records are seriously deficient or nonexistent.”).

Here, the court concludes that the billing records provided by attorney Gerber are not sufficiently specific to allow for a determination that 110 attorney hours were reasonably expended in prosecuting this matter. Because the records presented by plaintiff’s counsel are not sufficiently specific to allow the court to determine if the attorney time allegedly spent was reasonable, the time for which counsel seeks to be compensated will be subject to a reduction. *See Young v. Wolfe*, CV 07-03190 RSWL-AJWx, 2017 WL 3184167, at *5 (C.D. Cal. July 26, 2017) (A 30% reduction in the number of attorney hours reasonably expended found to be appropriate in light of insufficient billing records); *Lehr v. City of Sacramento*, No. 2:07-CV-01565-MCE, 2013 WL 1326546, at *11 (E.D. Cal. Apr. 2, 2013) (finding that a twenty percent reduction in the number of hours would be reasonable, given insufficient detail in the submitted billing documentation). Tallying the numbers reflected on attorney Gerber’s billing records, the court calculates a total of 59.17 billable attorney hours. (*See* Doc. No. 26.) The court will therefore use 59.17 hours to calculate the lodestar.

*8 Next, the court must determine the hourly rates to use for the lodestar calculation. According to his declaration, attorney Gerber has been representing employees in labor disputes since November 1993 and wage and hour claims since 1997. (Doc. No. 20 at ¶ 11.) Attorney Gerber avers that he has considerable experience in litigating PAGA claims, and he believes the Agreement is fair to the claimants and the best possible result in the situation presented by this action. (*Id.* at ¶¶ 11, 13.) He contends that he took this case on a contingency basis and has not received any money towards attorney’s fees or costs to date. (*Id.* at ¶ 19.)

By dividing the \$10,000.00 award by 110 hours, attorney Gerber avers that a 40 percent award of attorneys’ fees constitutes an hourly rate of \$90.90. (*Id.*) He further contends that his regular overhead is \$300.00 per hour, and in several instances, he has been awarded \$600.00 per hour when litigating cases in Kern County. (*Id.*) Attorney Gerber has attached several orders to his supplemental declaration, most of which are approvals of class actions settlements or PAGA settlements by judges of the Los Angeles County Superior Court. (*See* Doc. Nos. 25-1, 25-2, 25-4, 25-5.) Many of these orders have awarded

attorney Gerber attorneys’ fees equaling 40 percent of the settlement amount in the particular case, but only one even mentions an hourly rate for his time. (*See* Doc. No. 25-2 at 11.) Additionally, attorney Gerber has submitted an order regarding a PAGA settlement issued by another judge of this court, but that order also does not address attorney Gerber’s appropriate hourly rate. (*See* Doc. No. 25-3.)

In short, none of the attorneys’ fee awards and rates applied therein and relied upon by attorney Gerber assist the undersigned in making a lodestar calculation in this case. This is frustrating to the court because, as stated above, the court must determine reasonable hourly rates according to the prevailing market rates in the Eastern District of California. Without anything else to draw upon, the court will rely on rates awarded in other cases in this district and employ an hourly rate of \$400 to calculate the lodestar. *See, e.g., In re Taco Bell Wage & Hour Actions*, 222 F. Supp. 3d 813, 839 (E.D. Cal. 2016) (concluding that appropriate rates in this community are \$350 to \$400 per hour for attorneys with twenty or more years of experience, \$250 to \$350 per hour for attorneys with less than fifteen years of experience, and \$125 to \$200 per hour for attorneys with less than two years of experience); *Sanchez v. Frito-Lay, Inc.*, No. 1:14-cv-00797 AWI, 2015 WL 4662636, at *18 (E.D. Cal. Aug. 5, 2015), *report and recommendation adopted*, No. 1:14-cv-797-AWI-MJS, 2015 WL 5138101 (E.D. Cal. Aug. 26, 2015) (awarding rates of \$275 to \$350 for attorneys with between fourteen and twenty years of experience).

Thus, the lodestar fee calculation in this case is \$23,668.00. Plaintiff seeks an award of only \$10,000.00, which is significantly below the lodestar amount. While the seemingly haphazard manner in which the attorneys’ fee award application was prepared is not excused, the court nonetheless finds it sufficient to justify the award anticipated by the parties’ Agreement. Accordingly, the court will approve the \$10,000.00 in attorneys’ fees as requested.

C. Costs

Finally, plaintiff also asks the court to approve the proposed reimbursement to attorney Gerber of already-incurred litigation costs of up to \$1,000.00. The Agreement specifies that “[a]ny attorneys’ fees and costs awarded to PAGA Counsel shall fully compensate and reimburse PAGA Counsel for any and all work already performed in connection with the PAGA Lawsuit and all

work remaining to be performed in fully and finally resolving the PAGA Lawsuit.” (The Agreement at ¶ 43.) The submitted litigation costs include the PAGA filing fee, postage, copies, filing fee for this action, certified mail service of PAGA charges on defendant, mandatory electronic filing fees, service of defendant with lawsuit, travel expenses incurred for the mediation held on January 9, 2020, a large meeting room rental, and toll calls. (Doc. No. 20-5.) The supplemental Gerber declaration expands on some of these costs, clarifying that the “TRAVEL EXPENSES (1-13-20)” were food and mileage costs incurred for the January 9, 2020 mediation, which took place over twelve hours and was conducted fourteen miles away from attorney Gerber’s office. (Doc. No. 25 at ¶ 4.) The large meeting room rental listed was the room rented for attorney Gerber to meet with a group, which the court will assume was made up of members of the group of aggrieved employees. (*Id.* at ¶ 3.) Attorney Gerber’s declaration also states that the costs for toll calls were incurred by him in contacting other aggrieved employees. (*Id.* at ¶ 8.)

*9 Having review attorney Gerber’s submitted costs and supplemental declaration, the court approves the Agreement’s award of reimbursing litigation costs up to \$1,000.00.

CONCLUSION

Footnotes

- 1 The parties also filed a stipulation for approval of the Agreement on February 14, 2020. (Doc. No. 15.) The court will not give effect to that stipulation, which has been rendered moot by way of this order granting the motion for settlement approval.
- 2 An “aggrieved employee” is defined as “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.” [Cal. Lab. Code § 2699\(c\)](#).
- 3 The proposed settlement must also be submitted to the LWDA at the same time it is submitted to the court. *Id.*
- 4 *See also id.* at 3 (“The LWDA is not aware any existing case law establishing a specific benchmark for PAGA settlements, either on their own terms or in relation to the recovery on other claims in the action.”).
- 5 The court’s determination as to fairness, reasonableness, and adequacy may involve a balancing of several factors including but not limited to the following: the strength of plaintiffs’ claims; the risk, expense, complexity, and likely duration of further litigation; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; and the experience and

For the reasons stated above,

1. Plaintiff’s unopposed motion for approval of the PAGA settlement agreement (Doc. No. 19) is granted, and plaintiff’s counsel shall receive \$10,000.00 in attorneys’ fees and a reimbursement of up to \$1,000.00 for litigation costs;
2. Plaintiff’s sixth cause of action against defendant is dismissed with prejudice;
3. The parties are directed to effectuate all terms of the PAGA settlement agreement (Doc. No. 20-3) and any deadlines or procedures for distribution therein;
4. The stay entered on August 1, 2019 (Doc. No. 11) is hereby lifted; and
5. The parties are directed to submit a joint status report within seven (7) days indicating whether plaintiff’s remaining causes of action have been resolved through arbitration.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 4350207

views of counsel. See *Officers for Justice*, 688 F.2d at 625.

- 6 As plaintiff notes in his motion, following the filing of the first amended complaint, a decision of the California Court of Appeal clarified that [California Labor Code § 558](#) does not entitle employees to their underlying wages in a PAGA-only action. (Doc. No. 19 at 4.) Accordingly, the Agreement states that all individual PAGA payments will be characterized as entirely comprising penalties, and payments made to plaintiff or the aggrieved employees are not intended to count as wages earned by plaintiff or the aggrieved employees. (Doc. No. 20-3 at ¶¶ 44, 45.)
- 7 The court recognizes that judges in the Eastern District of California frequently distinguish between the Fresno and Sacramento communities in determining hourly rates. The general rule for awarding attorneys' fee rates, however, is that "the rates of attorneys practicing in the forum *district*" are used. *Gates v. Deukmejian*, 987 F.2d 1392, 1405 (9th Cir. 1992) (emphasis added). The ultimate task of the court is to discern the "prevailing market rates in the relevant community." See *Gonzalez*, 729 F.3d at 1205 (quoting *Dang v. Cross*, 422 F.3d 800, 813 (9th Cir. 2005)). This court has located no authority indicating that hourly rates for attorneys in Sacramento may not be used to guide the court's award of such fees in cases originating in Fresno, particularly in specialized fields of litigation. Again, the typical approach looks to the *district* in which the court sits. See *id.* at 1206 (noting the appropriate rate was "the market rate prevailing in the Central District of California"); *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (using the "Northern District of California" as the relevant legal community); *Camacho*, 523 F.3d at 979 (same); *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991) (using the Western District of Washington as the relevant local community), *overruled on other grounds as recognized in Davis v. City & County of San Francisco*, 976 F.2d 1536, 1556 (9th Cir. 1992). But see *Vega v. Eatherford U.S. LP*, No. 1:14-cv-01790-JLT, 2016 WL 7116731, at *16 (E.D. Cal. Dec. 7, 2016) (concluding that within the Eastern District of California, the appropriate forum for determining the lodestar rate is the division of the district in which the case is filed) (quoting *Jadwin v. County of Kern*, 767 F. Supp. 2d 1069, 1129 (E.D. Cal. 2011)). Finally, the undersigned would note that according to the Local Rules of this court, this is not a district court with separate divisions, as many are, but rather is a single district sitting in designated locations for venue purposes. See [Eastern District of California Local Rule 120](#).

Exhibit 3



Positive

As of: May 18, 2022 12:05 AM Z

Rincon v. West Coast Tomato Growers, LLC

United States District Court for the Southern District of California

February 12, 2018, Decided; February 12, 2018, Filed

Case No.: 13-CV-2473-JLS (KSC); Related Case: 14-CV-2984-JLS (KSC)

Reporter

2018 U.S. Dist. LEXIS 22886 *; 2018 WL 828104

SERAFIN RINCON, et al., Plaintiffs, v. WEST COAST TOMATO GROWERS, LLC, et al., Defendants. ELISA VALERIO ESPINOZA, et al., Plaintiffs, v. WEST COAST TOMATO GROWERS, LLC, et al., Defendants.

Prior History: [*Rincon v. W. Coast Tomato Growers*, 2015 U.S. Dist. LEXIS 195027 \(S.D. Cal., Apr. 30, 2015\)](#)

Counsel: **[*1]** For Serafin Rincon, Plaintiff (3:13-cv-02473-JLS-KSC): Cynthia L Rice, LEAD ATTORNEY, California Rural Legal Assistance, Oakland, CA; Jennifer C. Bonilla, Prairie A. Bly, LEAD ATTORNEYS, California Rural Legal Assistance, Inc., Vista, CA; Michael Meuter, California Rural Legal Assistance, Salinas, CA.

For Santiago Bautista, Plaintiff (3:13-cv-02473-JLS-KSC): Cynthia L Rice, LEAD ATTORNEY, California Rural Legal Assistance, Oakland, CA; Jennifer C. Bonilla, Prairie A. Bly, LEAD ATTORNEYS, California Rural Legal Assistance, Inc., Vista, CA.

For Rufino Zafra, Plaintiff (3:13-cv-02473-JLS-KSC): Jennifer C. Bonilla, California Rural Legal Assistance, Inc., Vista, CA.

For West Coast Tomato Growers, LLC, a California Limited Liability Company, Defendant (3:13-cv-02473-JLS-KSC): Julie A Vogelzang, Lisa Marie Hird Chung, LEAD ATTORNEYS, Schor Vogelzang LLP, San Diego, CA; Renee S. Schor, LEAD ATTORNEY, Schor Vogelzang LLP, San Diego, CA.

For Harry Singh & Sons, LLC, a California Limited Liability Company, Harry Singh and Sons Farming Partnership, L.P., Defendants (3:13-cv-02473-JLS-KSC): William Mitchell Moore, LEAD ATTORNEY, Law Office, San Diego, CA United Sta.

For Elisa Valerio Espinoza, Plaintiff **[*2]** (3:14-cv-02984-JLS-KSC): Jennifer C. Bonilla, Prairie A. Bly, LEAD ATTORNEYS, California Rural Legal Assistance, Inc., Vista, CA; Cynthia L Rice, California Rural Legal Assistance, Oakland, CA; Michael Meuter, California Rural Legal Assistance, Salinas, CA.

For Guillermina Bermudez, Felix Gomez Diaz, Maria Martinez, Lorenzo Lopez Pastrana, Lorenzo Lopez Pastrana, Cipriano Capistran, Plaintiffs (3:14-cv-02984-JLS-KSC): Jennifer C. Bonilla, Prairie A. Bly, LEAD ATTORNEYS, California Rural Legal Assistance, Inc., Vista, CA; Cynthia L Rice, LEAD ATTORNEY, California Rural Legal Assistance, Oakland, CA.

For West Coast Tomato Growers, LLC, a California Limited Liability Company, Defendant (3:14-cv-02984-JLS-KSC): Julie A Vogelzang, Lisa Marie Hird Chung, LEAD ATTORNEYS, Schor Vogelzang LLP, San Diego, CA; Renee S. Schor, LEAD ATTORNEY, Schor Vogelzang LLP, San Diego, CA.

Judges: Hon. Janis L. Sammartino, United States District Judge.

Opinion by: Janis L. Sammartino

Opinion

ORDER GRANTING JOINT MOTIONS FOR SETTLEMENT

(13-CV-2473, ECF No. 118)

(14-CV-2984, ECF No. 57)

Presently before the Court are two Joint Motions for Settlement of PAGA Action. The two Motions were filed in *Rincon v. West Coast Tomato Growers*, 13-CV-2473, [*3] (ECF No. 57); and *Espinoza v. West Coast Tomato Growers*, 14-CV-2984, (ECF No. 118).¹ The Parties seek the Court's approval of the settlement. Given that both cases are to be resolved under one settlement, this Order **APPLIES** to both Joint Motions.

BACKGROUND

Plaintiffs were seasonal agricultural workers directly employed by the Defendants. In 2013 and 2014, Plaintiffs mailed letters to the Labor and Workforce Development Agency ("LWDA"), the California Division of Occupational Safety & Health ("DOSH") and Defendants "giving notice of their intent to pursue a representative action pursuant to the [Private Attorney General Act] on behalf of themselves and fellow aggrieved field worker employees." ("*Espinoza P&A*," ECF No. 118-1, at 5).² Plaintiffs then filed complaints in

both matters. Plaintiffs alleged they did not receive compensation for time worked off-the-clock while employed by Defendants, and raised various other allegations related to Plaintiffs' expenses, meal periods, and working conditions. (*Id.* at 3-4.) Plaintiffs also alleged they improperly were required to bring their own tools and equipment, [*4] were not permitted legally-required meal periods, and worked in unsafe working conditions. (*Id.* at 4.) Some Plaintiffs also alleged they were wrongfully discharged. (*Id.*; "*Rincon P&A*," ECF No. 57-1, at 4.) Defendants deny any liability and assert the actions are not appropriate "for PAGA representation for any purpose other than settling the" two actions. (*Espinoza P&A* 4.)

"Extensive discovery and pre-trial motion work" took place in both matters, and the Parties engaged in several attempts to settle the case with the magistrate judge and a mediator. (*Id.* at 5) The Parties then reached an agreement to settle both actions.

LEGAL STANDARD

In 2003, the [*California Legislature enacted the Private Attorney General Act \("PAGA"\), Cal. Lab. Code § 2698 et seq.*](#), after declaring (i) that adequate financing of labor law enforcement was necessary to achieve maximum compliance; (ii) that staffing levels for state labor law enforcement agencies had declined and were unable to keep up with a growing labor market; (iii) that vigorous assessment and collection of civil penalties provides a meaningful deterrent to unlawful conduct; and (iv) that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, [*5] to seek and recover civil penalties for Labor Code violations. [*Gutilla v. Aerotek, Inc., No. 15-cv-191-DAD-BAM, 2017 U.S. Dist. LEXIS 41655, 2017 WL 2729864, at *2 \(E.D. Cal. Mar. 22, 2017\)*](#) (citing 2003 Cal. Stat. 6629). Under PAGA, an "aggrieved employee" may bring

¹ Plaintiffs in *Rincon v. West Coast Tomato Growers* ("*Rincon*") are Serafin Rincon, Santiago Bautista, and Rufino Zafra. Defendants in *Rincon* are West Coast Tomato Growers, LLC ("*West Coast*"); Harry Singh & Sons, Farming Partnership, L.P.; and Harry Singh & Sons, LLC. Plaintiffs in *Espinoza v. West Coast Tomato Growers* ("*Espinoza*") are Elisa Varerio Espinoza, Guillermina Bermudez, Felix Gomez Diaz, Maria Martinez, Lorenzo Lopez Pastrana, Arturo Salgado Manzano, and Cipriano Capistran. Defendant in *Espinoza* is West Coast. Plaintiffs in both cases will be collectively referred to as "Plaintiffs" and Defendants in both cases will be collectively referred to as "Defendants." The Parties filed near-identical Joint Motions and related documents in both actions.

² Pin citations refer to the CM/ECF page numbers electronically

stamped at the top of each page.

an action for civil penalties for labor code violations on behalf of herself and other current or former employees. [*Cal. Lab. Code § 2699\(a\)*](#). A plaintiff suing under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies." [*Arias v. Superior Court*, 46 Cal. 4th 969, 95 Cal. Rptr. 3d 588, 209 P.3d 923, 933 \(Cal. 2009\)](#). Accordingly, a judgment in a PAGA action "binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government." *Id.*; see also [*Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 173 Cal. Rptr. 3d 289, 327 P.3d 129, 147 \(Cal. 2014\)](#) ("When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party."). A trial court must "review and approve" any settlement of PAGA claims. [*Cal. Lab. Code § 2699\(l\)\(2\)*](#).

The PAGA does not establish a standard for evaluating PAGA settlements. Indeed, the LWDA has stated that "[t]he LWDA is not aware of any existing case law establishing a specific benchmark for PAGA settlements, either on their [*6] own terms or in relation to the recovery on other claims in the action." [*Ramirez v. Benito Valley Farms, LLC*, No. 16-CV-04708-LHK, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794, at *3 \(N.D. Cal. Aug. 25, 2017\)](#) (quoting from the LWDA response in [*O'Connor v. Uber Technologies Inc.*, 201 F. Supp. 3d 1110 \(N.D. Cal. 2016\)](#)). Courts have evaluated PAGA settlements "in light of the PAGA requirement that the award not be 'unjust, arbitrary and oppressive, or confiscatory.'" *Id.* (quoting [*Cal. Labor Code § 2699\(e\)\(2\)*](#)). The Court agrees this is a proper evaluation of PAGA settlements, and will approve the settlement if the settlement terms (1) meet the statutory requirements set forth by PAGA, and (2) are fundamentally fair, reasonable, and adequate in view of PAGA's public policy goals. See [*Gutilla*, 2017 U.S. Dist. LEXIS 41655, 2017 WL 2729864, at *3](#) (holding the same).

In addition, the Parties state the Court should apply the factors from [*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 \(9th Cir. 1998\)](#), to evaluate the settlement. (*Rincon P&A* 10-11.) The *Hanlon* factors, which are used to evaluate class action settlements, include (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed; (6) the expertise and views of counsel; (7) the presence of government participation; and (8) the reaction of [*7] class members to the proposed settlement. See [*Hanlon*, 150 F.3d at 1026](#). Many of these factors bear on whether a settlement is fair, and thus, the Court finds they are useful in evaluating the present settlement. See [*Ramirez*, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794, at *3](#) (finding the same). The Court will evaluate the relevant *Hanlon* factors in its analysis.

DISCUSSION

I. Settlement Terms

Under the terms of the settlement, Defendants will pay Plaintiffs a total amount of \$1,000,000. The settlement resolves, in both actions, Plaintiffs' claims and the PAGA claims Plaintiffs have alleged for themselves and on behalf of the PAGA Members who 4630 Page 4 of 11 5 13-CV-2473-JLS (KSC) Related Case: 14-CV-2984-JLS (KSC)

participate in the settlement. (*Rincon P&A* 6.) Of the fund, Plaintiffs will receive varying degrees of money, totaling \$255,000, in settlement of their individual claims. (*Id.*)³ \$30,000 of the fund will be

³ Under the settlement, Plaintiffs are to receive the following funds: Serafin Rincon (\$56,300); Santiago Bautista (\$29,100); Rufino Zafra (\$9,400); Felix Gomez Diaz (\$31,600); Maria Martinez (\$7,200); Lorenzo Lopez Pastrana (\$19,700); Cipriano Capistran (\$18,800); Elisa Valerio Espinoza (\$31,600); Guillermina Bermudez (\$31,600); and Arturo Salgado Manzano (\$19,700). (See *Rincon P&A* 6.)

used to pay Settlement Administration Costs and \$20,000 will be attributed to civil penalties. (*Id.* at 6-7.)

Plaintiffs' Counsel request up to \$150,000 in fees and costs, as approved by the Court. (*Id.* at 6.) Of this amount for Counsel, \$50,000 "would be distributed only in the event that there are funds left in the PAGA Members fund after all Participating PAGA Members [*8] have been fully paid 100% of the PAGA Penalties and Wage Penalties according to the formulas set forth in the Settlement Stipulation." (*Id.* at 7-8.)

The remainder of the settlement (\$615,000) will be allocated to settle the PAGA claims. (*Id.* at 6-7.) Current and former employees of Defendants will be provided with a notice and claim form, which they may return within one year if they wish to participate in the PAGA settlement (hereinafter, a "Participating PAGA Member"). (*Id.*) Participating PAGA Members will receive 100% of their underpaid wages, but if the remainder of the settlement amount is not sufficient to pay all underpaid wages, the funds will be distributed pro rata to Participating PAGA Members. (*Id.* at 7.)

As to nonmonetary relief, Defendant West Coast has agreed to make certain changes in its workplace practices and policies. (*Id.* at 8; ECF No. 118-6 ("New Practices at West Coast Tomato Growers").)

II. PAGA Statutory Requirements

The PAGA statute imposes limits on litigants. First, to bring an action under PAGA, an aggrieved employee must first provide written notice to the LWDA as well as to the employer. *Cal. Lab. Code* § 2699.3(a)(1). Further, as to monetary relief, a plaintiff suing under PAGA is limited to recovery of civil penalties [*9] only, rather than damages available privately through direct or class action claims. [Gutilla, 2017 U.S. Dist. LEXIS 41655, 2017 WL 2729864 at *2](#). Because "an aggrieved employee's action under . . . [PAGA] functions as a substitute for an action brought by the government

itself, PAGA is limited to the recovery of civil penalties; statutory penalties cannot be recovered. [Iskanian, 327 P.3d at 147 \(Cal. 2014\)](#). Any civil penalties recovered must be distributed as follows: 75% to the LWDA, and the remaining 25% to the aggrieved employees. [Cal. Lab. Code § 2699\(i\)](#).

As to the first requirement, Plaintiffs assert before filing both suits, they mailed at least one letter to the LWDA and to Defendants giving notice of their intent to file a PAGA action on behalf of themselves and other employees. (*Rincon P&A* 5.) The statutory requirement is met.

As to monetary relief, Plaintiffs are seeking civil penalties and underpaid wages. Under PAGA, "underpaid wages go[] entirely to the affected employee or employees as an express exception to the general rule that civil penalties recovered in a PAGA action are distributed 75 percent to the Labor and Workforce Development Agency (LWDA) and 25 percent to the aggrieved employees." [Thurman v. Bayshore Transit Mgmt., Inc., 203 Cal. App. 4th 1112, 1145, 138 Cal. Rptr. 3d 130 \(2012\)](#). Here, 100% of the underpaid wages will be paid to Participating PAGA Members. (*Rincon P&A* 7.) [*10] And, 75% of the civil penalties will be payable to the LWDA and 25% of the penalties will be distributed to the Participating PAGA Members. (*Id.*) The settlement distributes these funds properly; this statutory requirement is met.

III. Fairness of the Settlement

The Court will apply the [Hanlon](#) factors to determine whether the settlement is fair and reasonable in light of PAGA's policy goals. PAGA's public policy goals include "benefit[ing] the public by augmenting the state's enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance." [O'Connor, 201 F. Supp. 3d at 1132-33](#).

A. Strength of Plaintiffs' Case

Plaintiffs state that although they believe in the strength of their case, they do face difficulties in proving claims that would rely on Plaintiffs' testimony. (*Rincon P&A* 13.) Plaintiffs face difficulty in proving they and the other workers "were similarly aggrieved for purposes of the PAGA." (*Id.*) Plaintiffs also state they would produce expert witnesses to prove the alleged health and safety violations, to which Defendants have already raised challenges. (*Id.*) There are risks and uncertainty facing both Parties going forward. Courts have noted that legal uncertainty favors [*11] approval of a settlement. *See, e.g., Browning v. Yahoo! Inc., Nos. 13-cv-3826-EMC, 15-cv-262-EMC, 2007 U.S. Dist. LEXIS 86266, 2007 WL 4105971, at *10 (N.D. Cal. Nov. 16, 2007)* ("[L]egal uncertainties at the time of settlement—particularly those which go to fundamental legal issues—favor approval."). The Parties have acknowledged the inherent strengths (and potential weaknesses) in the two cases and have reached a settlement that will afford all potential PAGA members recovery. This factor weighs in favor of finding the settlement fair and reasonable.

B. Risk, Expense, Complexity, and Likely Duration of Further Litigation

The Parties have diligently investigated the individual and PAGA claims brought by Plaintiffs. (*Rincon P&A* 13-14.) Plaintiffs assert they and Potential PAGA Members "face the risk of being bound by an adverse judgment that awards no penalties on the many claimed violations, particularly should other field workers, packers, and sorters, be found not to be aggrieved employees." (*Id.* at 14.) Plaintiffs also assert that they, as field workers or packing shed workers, "have undertaken risks in bringing this lawsuit as low-wage and immigrant workers." ("Bonilla Decl.," ECF No. 118-2, ¶ 8.) Defendants assert they face risk in this lawsuit, for liability may occur [*12] if the violations are proved and the members of its workforce are found to be aggrieved

employees. (*Rincon P&A* 14.) Therefore, there is a risk of success for both sides, and both sides would face complex issues going forward should this case proceed. This factor weighs in favor of finding the settlement fair and reasonable.

C. Amount Offered in Settlement

As described above, Defendants are offering \$1,000,000 in settlement, and \$615,000 of this is the PAGA allocation. (*Rincon P&A* 14.) This large recovery is significant for the Participating PAGA Members.⁴ Also as part of the settlement, Defendant West Coast will institute workplace practices to ensure it is complying with California wage and hour laws. (*Id.*) This factor weighs in favor of finding the settlement fair and reasonable.

D. Extent of Discovery Completed and Stage of the Proceedings

The Parties state they "engaged in extensive investigation, discovery and motion practice that spanned several years" before settling the two cases. (*Id.* at 15.) The Parties traded written discovery responses, engaged in over three dozen depositions, spoke to expert witnesses, and filed various motions and oppositions. (*Id.*) Defendants have provided "thousands [*13] of documents" to Plaintiffs, including the applicable policies and the payroll and timekeeping data for almost all PAGA Members. (*Id.*) All Parties have analyzed the data. (*Id.*) Because the Parties have engaged in extensive discovery and worked on this case for several years, this factor weighs in favor of finding the settlement fair and reasonable.

⁴ As to the \$255,000 from the settlement fund that is allocated to resolving individual claims, the Court is not required to approve this settlement provision. *See Ramirez, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794, at *1* (holding the court is not required to approve settlement provisions resolving individual claims, but must approve the settlement provisions related to the PAGA claims (citing *Cal. Lab. Code § 2699(l)(2)*)).

E. Experience and Views of Counsel

Plaintiffs' counsel Ms. Bonilla declares she and her co-counsel have extensive experience in employment litigation. (Bonilla Decl. ¶ 16.) Ms. Bonilla declares in her experience, she has "observed the significantly diminished likelihood that these low-wage workers overcome barriers and power-imbalances to bring independent lawsuits and claims." (*Id.*) Ms. Bonilla and her co-counsel believe the settlement is fair and reasonable in this case, given the risks to Plaintiffs, the case law in the PAGA field, and potential trial and appellate issues. (*Id.*) Given these opinions, this factor weighs in favor of finding the settlement fair and reasonable.

F. The Presence of a Government Participant

As noted, Plaintiffs mailed at least one letter to the LWDA, the DOSH, and Defendants giving notice of their intent to pursue [*14] a PAGA action. (Bonilla Decl. ¶ 12.) Plaintiffs did not receive a letter from the LWDA in response. (*Id.*) Thus, the LWDA has not chosen to be a part of this lawsuit.

G. Conclusion

After evaluating the *Hanlon* factors, the Court finds the settlement is fair and reasonable in light of PAGA's policy goals of "benefit[ing] the public by augmenting the state's enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance." *O'Connor*, 201 F. Supp. 3d at 1132-33. Further, the Court does not find the award to be "unjust, arbitrary and oppressive, or confiscatory" under *California Labor Code § 2699(e)(2)*. The Parties have engaged in discussions and negotiation and have agreed to a fair and reasonable resulting settlement.

PAGA provides for reasonable attorney's fees and costs. *Cal. Lab. Code § 2699(g)*. "The PAGA does not provide a specific standard for evaluating attorney's fees in connection with a settlement of PAGA claims." *Ramirez*, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794 at *6. "The 'case law construing what is a 'reasonable' fee applies uniformly' to all federal fee-shifting statutes." *Haworth v. State of Nevada*, 56 F.3d 1048, 1051 (9th Cir. 1995) (quoting *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992)). "Under Ninth Circuit law, the district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method" to determine a reasonable attorney's [*15] fee. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002).

Plaintiffs' Counsel requests a maximum of \$150,000 in fees and costs, which is comprised of "costs in the amount of \$39,485.99⁵ and a guaranteed amount of \$60,504.01 with an additional fees amount of up to \$50,000 that will only be distributed by the settlement administrator to Plaintiffs' counsel" if there are funds left after all members have been paid 100% of the penalties. (*Rincon P&A* 16.) \$100,000 represents 10% of the total settlement proceeds and \$150,000 represents 15% of the total settlement proceeds. (*Id.*)

Under the percentage of the fund method, the typical "benchmark" for a reasonable fee award is 25% of the fund. See *Selk v. Pioneers Mem. Healthcare Dist.*, 159 F. Supp. 3d 1164, 1180 (S.D. Cal. 2016) (citing *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015)). Under this approach, the Court finds the requested attorney's fees comprising of 10 to 15% of the settlement fund to be reasonable.

Under the lodestar method, the amount of fees is determined by multiplying the number of hours reasonably expended in the litigation by a

⁵Counsel declares it incurred costs of this amount "for deposition transcripts, interpreters, mediation, and expert expense." (Bonilla Decl. ¶ 20.) The Court finds these requested costs reasonable.

IV. Attorney's Fees

reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). Here, "more than 1853.5 hours were billed" in the two matters. (Bonilla Decl. ¶ 19.) The lodestar for Ms. Bonilla, who works at an hourly rate of \$300/hour, exceeds \$323,000 (after a 25% reduction). (*Id.*) The lodestar for co-counsel Ms. Rice and Mr. Meuter, [*16] with hourly rates of \$500/hour and \$450/hour, also with 25% reductions, exceeds \$72,500. Finally, the lodestar for Ms. Bly, a former attorney at Ms. Bonilla's firm, with an hourly rate of \$350/hour, also with a 25% downward adjustment, exceeds \$56,000. In sum, the calculated lodestar amount is more than three times greater than the requested maximum of \$150,000 in fees and costs.

Given the above, Counsel requests \$100,000 in fees and costs, with a maximum amount of \$150,000. The Court finds the requested fees to be reasonable and appropriate, and **AWARDS** the amount requested. The Court allows Counsel to recover:

costs in the amount of \$39,485.99 and a guaranteed amount of \$60,504.01 with an additional fees amount of up to \$50,000 that will only be distributed by the settlement administrator to Plaintiffs' counsel only in the event that there are funds left in the PAGA Members fund after all Participating PAGA Members have been fully paid 100% of the PAGA Penalties and Wages Penalties according to the formulas in the Settlement Stipulation.

(*Rincon P&A* 16.)

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiffs' Motions for Settlement Approval and Plaintiffs' Counsel's request [*17] for attorney's fees. The Clerk **SHALL** close the files for both 13-CV-2473 and 14-CV-2984.

IT IS SO ORDERED.

Dated: February 12, 2018

/s/ Janis L. Sammartino

Hon. Janis L. Sammartino

United States District Judge

End of Document

Exhibit 4

150 F.3d 1011

United States Court of Appeals,
Ninth Circuit.

Stuart HANLON, Plaintiff,
and

Kenneth Edwards; **Nancy Edwards**;
Kathy Hancock; Michael Hancock; Lori
Tuttle; Paul Alan Levy; Nancy
Huvendick; **Center For Auto Safety**,
Intervenors–Appellants,

v.

CHRYSLER CORPORATION, a Delaware
corporation, Defendant–Appellee.

Stuart HANLON, Plaintiff,
and

Robert Kempton, Plaintiff–Appellant,
and

George Van Buskirk, Objector; Diane
Cheatham, Objector, Appellants,

v.

CHRYSLER CORPORATION, a Delaware
corporation, Defendant–Appellee.

Stuart HANLON; Billy Macables; Lewis
Amonette; June Amrhein; **Richard Bales**;
Ray Baranowski; Lynette Barrera; **Larry
Beasley**; Steven Bell; Sue & Stanley Bell;
Angie Blain; Robert Bowman; Gail

Broadway; Elizabeth Callais; Ann Caples;

Steve Cathey; Allison Clay; **George**

Clifford; Max Colvin; Karen & Ryan

Courtade; George Cowsar; William

Dalrymple; Greg Davis; Linda De Muro;

Dennis Dean; Cheryl Deegan; James

Deming; Bill Dippel; Chris Dixon; Jerry

Donelson; Allen Douglass; **Mary**

Douglass; Sandra Edwards; E.W. Ellison,

Jr.; Al Fairley; Jerry Ferguson; Noah

Ferrell; Benjamin Ferrydene; **Jeanette**

Fisher; **Steve Fontenot**; **Steven Franks**;

Thomas Gonda; Joseph & Jeanne

Graham; Tammy Grantham; James

Haffey; Della Hamilton; Michelle & Jay

Hare; Cheryl Hensley; Sherman Hyatt;

Carl Jackson; Diann James; Isaac Jarrett;
Kamal Kabshura; James Kaigler; **Paul L.
Kennedy**; Sandra King; Judith Koinm;
John Langford; Laura Leathers; Walter
Legers; **Linda Lewandowski**; Joseph
Lewandowski; Thomas Look; Margaret
Maddox; Roosevelt March; **Debra Mason**;

Zandra McBride; Nancy Mcmanus;

Adrian Millwood; Wendy & John

Minerowicz; D. Mitchell; Starkey

Morgan; Ana Nadim; Tim Nolan; Katie

Nuttall; Carey O’neal; Harry & Becky

Pepper; David Ramsey; Teresa Ruiz; J.R.

Sanders; Wilton Sanders; George

Shackleford; **A.J. Sims**; **Elaine Sims**;

Eileen Siss; William Spell; Dewey Stancil;

Robert Stengl; **Kevin Stevens**; Denise

Storey; Donna Strichter; **Melanie**

Tichenor; Ed Turnage; Ralph Ulery; Sally

Ulery; Robert Ware; Christine White;

Darrell Whitten; Terrell Williams;

Ramona Williams; Sidney Wilson; **Stacy**

Wilson, Plaintiffs–Appellees,

and

C. Stuart McPherson, Objector; Robert

Mendoza, Objector; Gloria Mendoza,

Objector; Michael Rubin, Objector;

Roderick Thornton, Objector; Peter Von

Savoye, Objector, Appellants,

v.

CHRYSLER CORPORATION, a Delaware
corporation, Defendant–Appellee.

Stuart HANLON, Plaintiff–Appellee,

and

George Van Buskirk, Objector; Diane

Cheatham, Objector; Robert Kempton,

Appellants,

v.

CHRYSLER CORPORATION, a Delaware
corporation, Defendant.

Nos. 96–15043, 96–15044, 96–16027, 96–16076.

Submitted Aug. 13, 1997.

Decided June 9, 1998.

|
Amended July 24, 1998.

Synopsis

Minivan owners brought class action against minivan manufacturer, alleging defectively designed rear liftgate latch. The United States District Court for the Northern District of California, Charles A. Legge, J., approved settlement. Objectors appealed. The Court of Appeals, [Thomas](#), Circuit Judge, held that: (1) settlement class satisfied class action prerequisites; (2) class could be certified as common question class; (3) class representative in Georgia class action could not opt out of national class action on behalf of all Georgia members; (4) settlement requiring manufacturer to make minivans safe was fair; (5) rejection of settlement was not warranted by inclusion of paragraph regarding government action affecting settlement; and (6) award of \$5 million in attorney fees for class counsel was not abuse of discretion.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***1017** [Colette G. Matzzie](#), Washington, DC, for objectors-intervenors-appellants.

[James E. Carter](#), Madison, GA, for objectors-appellants.

[Charles A. Newman](#), Bryan Cave, St. Louis, MO, for defendant-appellee.

[Elizabeth J. Cabraser](#), [Michael F. Ram](#), Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA, for plaintiffs-appellees.

[William M. Rubenstein](#), Asst. Atty. Gen. of Connecticut, Hartford, CT, for Amicus Curiae States of Connecticut, Arizona, Iowa, Kansas, New York, Nevada, Oklahoma, Pennsylvania, Rhode Island and Vermont.

Appeals from the United States District Court for the Northern District of California; Charles A. Legge, District Judge, Presiding. D.C. No. CV-95-02010-CAL.

Before: [GOODWIN](#) and [THOMAS](#), Circuit Judges, [SEDWICK](#),¹U.S. District Judge.

Opinion

[THOMAS](#), Circuit Judge:

We are presented in this appeal with procedural and substantive objections to the settlement of a nationwide class action against Chrysler Corporation. After examining the settlement in accordance with the guidelines established in [Amchem Products, Inc. v. Windsor](#), 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), we affirm the district court.

I.

In September 1993, the National Highway Traffic Safety Administration (“NHTSA”) Office of Defect Investigation learned of a rear liftgate latch problem in 1992 Chrysler minivans. NHTSA opened a preliminary investigation, which was expanded to an “engineering analysis” of all 1984–1994 Chrysler minivans. The Engineering Analysis included a technical evaluation of the rear latches, testing of the latches in different scenarios, and analyzing accidents, fatalities, injuries and consumer complaints. Despite NHTSA’s investigation, Chrysler publicly denied any problem with its rear liftgate latches.

The NHTSA investigation proceeded throughout 1994. On November 17, 1994, Chrysler and NHTSA representatives met to discuss the engineering analysis and the ***1018** growing evidence that the latches presented a serious safety threat. Following that meeting, NHTSA and Chrysler negotiated a voluntary resolution to the investigation wherein Chrysler announced a “Service Action” to replace the rear liftgate latches on all 1984–1994 minivans. The Service Action was extended one month later to include 1995 minivans.

The details of the Service Action are found in the correspondence exchanged between Chrysler and NHTSA; Chrysler understood its campaign to include:

- a redesigned improved replacement latch to be installed free of charge;
- a series of letters to minivan owners advising them the new latches were available;
- an advertising campaign;
- monitoring the response rate of owners and taking all necessary steps to ensure an appropriate response

rate; and

- quarterly reports to NHTSA.

NHTSA kept its investigation open after Chrysler initiated the Service Action to ensure the company's compliance. The investigation was finally closed on October 25, 1995. At that time, NHTSA was satisfied that the voluntary action taken by Chrysler had been as effective as a formal recall. However, NHTSA reserved the right to reopen the proceedings and initiate a recall if Chrysler's Service Action proved inadequate or if Chrysler abandoned the plan.

Prior to the agreement between NHTSA and Chrysler, plaintiffs lawyers in several states filed class actions in various state courts seeking latch replacement, as well as damages under various state-law warranties and theories of recovery.² The plaintiffs' counsel in the state actions met with engineering experts, conducted and defended depositions, and were proceeding through the normal course of document-intensive discovery. Class counsel in the two California cases and the Texas case moved for class certification; however, the hearings were continued at Chrysler's request.

Approximately two weeks before it announced the NHTSA-approved Service Action, Chrysler and counsel from the various state actions began serious settlement discussions, which continued throughout April, May and June 1995. As a result of the settlement discussions, all of the state class actions were consolidated in one large national class action (the *Hanlon* class) in federal court in the Northern District of California under Judge Legge on June 16, 1995. In their complaint the *Hanlon* plaintiffs asserted various claims against Chrysler with regard to an alleged defect in the rear liftgate latches of the minivans. Three days after filing the case, the parties submitted a settlement agreement to the court for approval. The district court held a preliminary hearing on the settlement agreement on August 18, 1994, and issued an Order granting preliminary approval of the settlement and certifying the nationwide class of Minivan owners for settlement purposes only. All personal injury and death cases are excluded from this settlement.

The Order also provided at Paragraph 19:

Pending final determination of whether the settlement embodied in the Settlement Agreement is to be approved, no member of the Settlement Class, either directly, representatively, derivatively, or in any other capacity, shall commence or prosecute any action or proceeding in any court or tribunal asserting any of the claims described in paragraph 17 of the Settlement

Agreement.

Pursuant to the August 18 Order, the Court-approved notice of the proposed settlement was mailed directly to over 3.3 million Minivan owners. The order granting preliminary approval of the settlement set an objection and opt-out date of October 20, 1995, and all activity on the state actions ceased.

A few weeks after the *Hanlon* action was filed, Robert Kempton, a resident of Georgia and Chrysler minivan owner, filed a similar class action in a Georgia state court. Kempton sought to represent himself and all Georgia *1019 residents and entities who purchased or leased a Chrysler minivan in the relevant product years. In direct contravention of the federal district court's August 18 order, Kempton filed a motion to certify the Georgia class on October 17, 1995. Kempton specifically stated that his goal was either to opt out all Georgia residents from the *Hanlon* action or object on their behalf. The *Hanlon* plaintiffs and Chrysler filed a motion to enjoin Kempton from proceeding, and the California district court issued such an order on October 19, 1995.

Kempton expressly ignored the injunction and proceeded with the Georgia class certification, arguing that he had opted out of the *Hanlon* class and therefore was not subject to that court's jurisdiction or bound by its orders. The Georgia state judge entered an order conditionally granting Kempton's motion and certifying the class.

Following notification of the proposed settlement, the district court in California conducted two fairness hearings on the adequacy of the settlement in November 1995. The court made several findings at the second hearing on November 30, 1995, indicating its approval of the settlement. Prior to entering the order, the court gave objectors an opportunity to present arguments on the pending settlement. The objections centered around one primary issue: the adequacy and fairness of the settlement in light of Chrysler's prior agreement with NHTSA to replace all of the defective latches. At the conclusion of the hearing, the court entered a final order of settlement and award of attorneys fees.

In early 1996, Chrysler acknowledged that approximately one million class members never received the notice of settlement and opportunity to opt-out of the settlement class because it had inadvertently failed to include them in the initial mailing. As a result, Chrysler moved to set aside the final order of settlement and reopen the proceedings to allow additional notice to these class members. The court agreed and granted Chrysler's Rule 60(b) Motion to Partially Reopen the Judgment on

February 23, 1996.

A third and final fairness hearing was held on April 29, 1996. At the close of that hearing, the court issued a new order that was substantially similar to the November 30 order. The objectors timely appealed to this court.

II.

In recent years, the difficulties attendant to consummating settlement of mass tort and consumer lawsuits have caused litigants to instigate lawsuits for the limited purpose of obtaining court approval of a certified class settlement. Although there is nothing inherently wrong with this practice, we must pay “undiluted, even heightened, attention” to class certification requirements in a settlement context. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689 (1997) (“*Amchem*”).

A.

Our threshold task is to ascertain whether the proposed settlement class satisfies the requirements of Rule 23(a) of the Federal Rules of Civil Procedure applicable to all class actions, namely: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Id.* 117 S.Ct. at 2245. The prerequisite of numerosity is discharged if “the class is so large that joinder of all members is impracticable.” Fed.R.Civ.P. 23(a)(1). None of the objectors contest certification for failure to meet this condition, and as a nationwide class with millions of class members residing in fifty states, this requirement is clearly satisfied.

A class has sufficient commonality “if there are questions of fact and law which are common to the class.” Fed.R.Civ.P. 23(a)(2). The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3). Indeed, Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class. Although members of the proposed class in this instance may

possess different avenues of redress, their claims stem from the same *1020 source: the allegedly defective designed rear liftgate latch installed in minivans manufactured by Chrysler between 1984 and 1995. Thus, the proposed class shares sufficient factual commonality to satisfy the minimal requirements of Rule 23(a)(2).

The typicality prerequisite of Rule 23(a) is fulfilled if “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed.R.Civ.P. 23(a)(3). Under the rule’s permissive standards, representative claims are “typical” if they are reasonably co-extensive with those of absent class members; they need not be substantially identical. In this instance, the broad composition of the representative parties vitiates any challenge founded on atypicality. The representative parties comprise persons from every state, representing all models of Chrysler minivans and include minivan owners whose latches remain operable. The narrow focus of the proposed class was to obtain a defect-free rear liftgate latch in Chrysler minivans owned by class members, or receive adequate non-personal injury compensatory damages. Given these limited objectives and the broad composition of the representative parties, the representative claims were sufficiently typical to pass muster under Rule 23(a)(3).

The final hurdle interposed by Rule 23(a) is that “the representative parties will fairly and adequately protect the interests of the class.” Fed.R.Civ.P. 23(a)(4). To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them. *See Hansberry v. Lee*, 311 U.S. 32, 42–43, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.1978).

Examination of potential conflicts of interest has long been an important prerequisite to class certification. That inquiry is especially critical when the a class settlement is tendered along with a motion for class certification. *Amchem* instructs us to give heightened scrutiny to cases in which class members may have claims of different strength.

Amchem was a settlement class action which attempted to settle all pending and future asbestos litigation. The asbestos manufacturers wished to resolve all claims, including those not yet filed or even in existence at the

time of the settlement. The class was never divided into sub-classes and additional counsel was never appointed to represent the interests of plaintiffs with as yet undeveloped or undiagnosed injuries. Despite these problems, the class was conditionally certified and the settlement approved.

The Third Circuit vacated the certification because the requirements of Rule 23 were not met independent of the settlement agreement. *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 617–618 (3d Cir.1996). The Supreme Court affirmed. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). The Court found that the clashing interests of present and future claimants presented insurmountable conflicts for class counsel who could not possibly provide adequate representation to both groups as required by Rule 23(a)(4). *Id.* 117 S.Ct. at 2251. The Court also held that all of the Rule 23 standards for class actions must be met without regard to the presence or terms of a pending settlement agreement. *Id.* at 2249.

At the heart of *Amchem* was concern over settlement allocation decisions; asbestos manufacturers had a designated amount of money that was not fairly distributed between present and future claimants. The *Amchem* settlement eliminated all present and future claims against asbestos manufacturers, with class counsel attempting to represent both groups of plaintiffs. The Supreme Court found this dual representation to be particularly troubling, given that present plaintiffs had a clear interest in a settlement that maximized current funds, while future plaintiffs had a strong interest in preserving *1021 funds for their future needs and protecting the total fund against inflation.

Unlike the class in *Amchem*, this class of minivan owners does not present an allocation dilemma. Potential plaintiffs are not divided into conflicting discrete categories, such as those with present health problems and those who may develop symptoms in the future. Rather, each potential plaintiff has the same problem: an allegedly defective rear latchgate which requires repair or commensurate compensation. The differences in severity of personal injury present in *Amchem* are avoided here by excluding personal injury and wrongful death claims. Similarly, there is no structural conflict of interest based on variations in state law, for the named representatives include individuals from each state, and the differences in state remedies are not sufficiently substantial so as to warrant the creation of subclasses. Representatives of other potential subclasses are included among the named representatives, including owners of every minivan model. However, even if the named representatives did

not include a broad cross-section of claimants, the prospects for irreparable conflict of interest are minimal in this case because of the relatively small differences in damages and potential remedies.

To further forend problems caused by potential subclass differences, the actions and tendered settlement were narrowly circumscribed. No personal injury or wrongful death claims were included, and any class member who wished to do so could opt out of the settlement class. To fulfill this limited purpose, the proposed settlement does not propose different terms for different class members; on the contrary, treatment of each class member is identical. Given these careful precautions and safeguards, no improper conflict of interest existed which would deny absent class members adequate representation.

Our second adequacy inquiry is directed to the vigor with which the named representatives and their counsel will pursue the common claims. Although there are no fixed standards by which “vigor” can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation.

The objectors do not seriously challenge the competence of class counsel, and the record dispels any cause for concern. Affidavits submitted to the district court show experience prosecuting dozens of high profile class action cases and products liability litigation. If these attorneys are not equal to the task of prosecuting this case, it is not clear to us who would be. The objectors presented no evidence, and we could find none in the record, to indicate any deficiencies or conflicts of interest on the part of class counsel.

The *Amchem* Court also noted the problem of counsel “not prepared to try a case.” Such counsel is, almost by definition, inadequate because an inability or unwillingness to try a case means the class loses all of the benefits of adversarial litigation. “Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer.” *Amchem*, 117 S.Ct. at 2248–2249. District courts must be skeptical of some settlement agreements put before them because they are presented with a “bargain proffered for ... approval without benefit of an adversarial investigation.” *Id.* at 2249.

These concerns warrant special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded. *See*,

e.g., *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir.), cert. denied, 516 U.S. 824, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995).

These circumstances are not present in this case. Class counsel prosecuted several state class actions in strategic states prior to the filing of the federal consolidated action. They conducted the initial factual investigation, even prior to learning of the NHTSA investigation. They consulted and retained automotive and engineering experts to assess the design specifications, blueprints, *1022 and other Chrysler documentation relating to the minivans. They assessed the failure mode commonly experienced and corroborated that the reported failures were due to defective latch design. They reviewed Chrysler's history of advertising the minivan as a "safe family vehicle" in order to assess any implied or express warranties and possible misrepresentation claims. They engaged in the traditional discovery of products liability litigation, including document request and production, interrogatories, and the taking and defending of depositions. They fought Chrysler's requests for protective orders, successfully resisted Chrysler's attempts to remove the various actions to federal court, and its attempt to transfer all of the cases to an MDL proceeding. Plaintiffs' counsel spoke and conferred regularly to coordinate their litigation strategy and to apply as much pressure as possible to Chrysler. We find counsel's prosecution of the case sufficiently vigorous to satisfy any Rule 23(a)(4) concerns.

In sum, the named representatives have fulfilled the threshold requirements of Fed.R.Civ.P. 23(a) by satisfying the preconditions of numerosity, commonality, typicality, and adequacy of representation. The named plaintiffs have also satisfied the heightened scrutiny we must give to Rule 23(a) requirements when considering certification of a settlement-only class.

B.

In addition to meeting the conditions imposed by Rule 23(a), the parties seeking class certification must also show that the action is maintainable under Fed.R.Civ.P. 23(b)(1), (2) or (3). *Amchem*, 117 S.Ct. at 2245. In the instant case, the parties propose certification pursuant to Rule 23(b)(3), which is appropriate "whenever the actual interests of the parties can be served best by settling their differences in a single action." 7A Charles Alan Wright,

Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1777 (2d ed.1986). To qualify for certification under this subsection, a class must satisfy two conditions in addition to the Rule 23(a) prerequisites: common questions must "predominate over any questions affecting only individual members," and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 117 S.Ct. at 2249. This analysis presumes that the existence of common issues of fact or law have been established pursuant to Rule 23(a)(2); thus, the presence of commonality alone is not sufficient to fulfill Rule 23(b)(3). In contrast to Rule 23(a)(2), Rule 23(b)(3) focuses on the relationship between the common and individual issues. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." Wright, Miller & Kane, *supra*, § 1778. Settlement benefits cannot form part of a Rule 23(b)(3) analysis; rather the examination must rest on "legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem*, 117 S.Ct. at 2249.

A common nucleus of facts and potential legal remedies dominates this litigation. Variations in state law do not necessarily preclude a 23(b)(3) action, but class counsel should be prepared to demonstrate the commonality of substantive law applicable to all class members. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–23, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In this case, although some class members may possess slightly differing remedies based on state statute or common law, the actions asserted by the class representatives are not sufficiently anomalous to deny class certification. On the contrary, to the extent distinct remedies exist, they are local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, and "lemon laws." Individual claims based on personal injury or wrongful death were excluded from the class. Thus, the idiosyncratic differences between *1023 state consumer protection laws are not sufficiently substantive to predominate over the shared claims. Indeed, at the November 30, 1995 fairness hearing, the objectors acknowledged that independent of any variations in state law, there were still sufficient common issues to warrant a class action, particularly questions of

Chrysler's prior knowledge of the latch deficiency, the design defect, and a damages remedy.

Rule 23(b)(3) also requires that class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case. Wright, Miller & Kane, *supra* § 1779. This determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution. In this instance, the alternative methods of resolution are individual claims for a small amount of consequential damages or latch replacement. Further, the statute of limitations has run for owners of older vehicles under many state laws, and state lemon laws almost universally require that the vehicle be defective beyond repair—a condition which is impossible for many owners to demonstrate. Thus, many claims could not be successfully asserted individually. Even if efficacious, these claims would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs. In most cases, litigation costs would dwarf potential recovery. In this sense, the proposed class action is paradigmatic. A fair examination of alternatives can only result in the apodictic conclusion that a class action is the clearly preferred procedure in this case.

Assessment of the non-exclusive factors listed in Rule 23(b)(3) which potentially apply to both the predominance and superiority inquiries yields the same result. From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery. With a few exceptions, the pre-existing lawsuits were cooperatively managed and can be effectively merged into the instant action. No particular forum stands out as a logical venue for concentration of claims. Thus, consideration of the factors enumerated in Rule 23(b)(3) does not alter the conclusion.

Thus, given the limited focus of the action, the shared factual predicate and the reasonably inconsequential differences in state law remedies, the proposed class was sufficiently cohesive to survive Rule 23(b)(3) scrutiny. A comparative examination of alternatives underscores the wisdom of a class action in this instance. Consideration of the specific, non-exclusive factors identified in Rule 23(b)(3) produces the same result. Thus, the requisite predominance and superiority tests are satisfied, and the conditions of Rule 23(b)(3) have been met.

C.

The objectors claim error in the brevity of the district court findings, and the district court was, to say the least, restrained and succinct in explaining its reasoning. However, as the Supreme Court has stated, "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim...." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). This is just such a case. The record is fully developed, the issues are plain and the analytical framework clear. All the parties, including the objectors, have been represented on appeal by skilled advocates who have exhaustively briefed and argued the salient questions. Although the district court's findings are almost conclusory, the record provides more than adequate foundation upon which to reach our conclusions. There is no value to be served in remanding this case for the entry of further self-evident findings. The parties seeking certification have quite clearly satisfied the requirements of Rule 23(a) and Rule 23(b)(3), and the district court did not abuse its discretion in certifying the class. *Hilao v. Estate of Marcos*, 103 F.3d 767, 774 (9th Cir.1996). *Amchem* cautioned against conflating the class certification requirements *1024 of Fed.R.Civ.P. 23(a) and (b) into the "fair, adequate and reasonable" preconditions for class settlement pursuant to Fed.R.Civ.P. 23(e), and mandated heightened scrutiny of proposed settlement-only class certifications. We have independently analyzed the proposed class with these admonitions in mind, and find no fault with district court's class certification even under these rigorous standards.

III.

After the federal consolidated class action was filed, but before the settlement agreement was presented to the district court for preliminary approval, Robert Kempton filed a state class action in Georgia. Kempton's theory of recovery was very similar to that of the federal action, but he claimed relief under Georgia state law. He sought to represent himself and all other Georgia consumers who owned or leased a minivan from the relevant model years,

and asserted the right to opt-out all Georgia customers from the federal class action.

The district court expressly held that Kempton's actions in proceeding with his state class action, in direct contravention of the district court's injunction against such a proceeding, operated to exclude him from the nationwide class, but his opt-out had no effect on the remaining Georgia class members. Kempton argues on appeal that the district court erred, that his actions were taken on behalf of all Georgia class members, and that the state court's certification of the Georgia action operates to opt-out all Georgia class members from the plaintiff class.

The district court was entirely correct. All class members in a Rule 23(b)(3) action are entitled to due process, including notice. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 810–813, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). The procedural due process rights of these members include an opportunity to be excluded from the action. The right to participate, or to opt-out, is an individual one and should not be made by the class representative or the class counsel. See *Newberg and Conte, Newberg on Class Actions*, § 16.16 at 90 (3d ed. 1992) (“The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an individual decision of each class member and may not be usurped by the class representative or class counsel.”) There is no class action rule, statute, or case that allows a putative class plaintiff or counsel to exercise class rights en masse, either by making a class-wide objection or by attempting to effect a group-wide exclusion from an existing class. Indeed, to do so would infringe on the due process rights of the individual class members, who have the right to intelligently and individually choose whether to continue in a suit as class members. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–77, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Additionally, to allow representatives in variously asserted class actions to opt a class out without the permission of individual class members “would lead to chaos in the management of class actions.” *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 412 (2d Cir.1975). In this case, all members of the purported Georgia class were notified of this class action and the proposed settlement, and all but twenty-eight elected to remain in the class. By contrast, there is no evidence in the record that any Georgia class member received notice of the Kempton suit and made an intelligent election to join or decline to participate in it.

Kempton relies on *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 14 F.3d 151 (2d Cir.1994), to support his notion of a state-wide opt-out on behalf of all Georgia class members, regardless of their individual preferences

or actions. His reliance on this case is misplaced, however, as it provides no support for his contention that his power as a named state class representative allows him to act on behalf of all other state class members in a nationwide suit and exercise their opt-out rights for them. Rather, in that case the three groups of victims all possessed liquidated judgments or settlements which were in existence and final *prior to* the filing of the class action. The Second Circuit held that it was in the discretion of the trial court to deem subclasses which had obtained prior settlements or judgments to have opted out of the new class because their rights had been determined previously. *Id.* at 156. That theory is inapplicable to cases such as *1025 this in which the separate action is filed subsequently and the rights of the putative subclass have not been determined.

In addition, the temporary approval of the nationwide settlement stayed the state class actions. The federal court had the power to issue an injunction against continued state proceedings under the All Writs Act, 28 U.S.C. § 1651 (“[t]he All Writs Act ... empowers the federal courts to enjoin state proceedings that interfere, derogate, or conflict with federal judgments, orders, or settlements.” *Keith v. Volpe*, 118 F.3d 1386, 1390 (9th Cir.1997)) and the Anti-Injunction Act, 28 U.S.C. § 2283 (a federal court may intervene and enjoin state court proceedings in three narrow circumstances, one of which includes when it is necessary to protect the court's jurisdiction). Although comity requires federal courts to exercise extreme caution in interfering with state litigation, federal courts have the power to do so when their jurisdiction is threatened.

Further, Fed.R.Civ.P. Rule 23(d) vests a district court with the authority and discretion to protect the interests and rights of class members and to ensure its control over the integrity of the settlement approval process. “[A] district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981).

Because a class representative in a state class action, acting at the same time as a federal class action, lacks the power to opt-out an entire class without the permission of individual class members, the district court properly ruled that Kempton's actions served as an individual opt-out for Kempton alone.

IV.

Having concluded independent of settlement considerations that the proposed class passes certification muster, our analysis must turn to the proposed settlement itself. In that determination, we are guided by Rule 23(e) which provides:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in a manner as the court directs.

A.

Adequate notice is critical to court approval of a class settlement under Rule 23(e). In this case, the notice provided to the absent class members provided each member with the opportunity to opt-out and individually pursue any state law remedies that might provide a better opportunity for recovery. The objectors contended at oral argument that even if the notice provided to the class met the requirements of Rule 23(c)—which it clearly did—the absent class members still did not understand what they were giving up. There is no evidence of such wide-scale confusion or ignorance in the record.

On the contrary, the text of the notice plainly stated:

If the proposed settlement is approved, it will be binding and will release Chrysler from any and all claims, including any claims for consumer damages or equitable relief, arising out of or related to the Minivan rear liftgate latches, that were or could have been asserted by Settlement Class members in the Hanlon lawsuit. In addition, if the proposed settlement is approved, it will release any and all claims, arising out of or related to the Minivan rear liftgate latches, that were or could have been asserted for Settlement Class members in certain class action lawsuits pending in various state courts around the United States. The proposed settlement does not, however, release, dismiss, or affect any claims for personal injury or wrongful death as an alleged result of the rear-door latch on the Minivans.

The notice resulted in approximately 971 members of the class exercising their opt-out right. This number reveals two things: (1) at least some portion of the class understood the notice and chose not to participate in the

settlement for whatever reason; and (2) the vast majority of the class—over 99.9%—*1026 agreed to be bound. This is how Rule 23 works, and we decline any opportunity to rewrite it by implication.

The individual notice sent to each minivan owner, coupled with the pre-trial publicity, NHTSA actions, and nationwide dealer participation was sufficient to bring the urgency of the action to each class member's attention. There is no evidence that the settlement proposed and accepted by the district court did anything to advance the rights of one group of claimants over another and plaintiffs who were at risk of losing what they deemed valuable claims had an opportunity to protect their interests.

B.

Fed.R.Civ.P. 23(e) requires the district court to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.1992). Our review of the district court's decision to approve a class action settlement is extremely limited. *Id.* It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness. *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 628 (9th Cir.1982). Neither the district court nor this court have the ability to “delete, modify or substitute certain provisions.” *Id.* at 630. The settlement must stand or fall in its entirety. *Id.*

Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the 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. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.1993), quoting *Officers for Justice*, 688 F.2d 615, 625 (9th Cir.1982). To survive appellate review, the district court must show it has explored comprehensively all factors. See *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 434, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968).

Several circuits have held that settlement approval that takes place prior to formal class certification requires a higher standard of fairness. The dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court-designated class representative, weigh in favor of a more probing inquiry than may normally be required under Rule 23(e). This is the position adopted by the Third Circuit in *GM Pick-Up Litig.*, 55 F.3d at 805 (“We affirm the need for courts to be even more scrupulous than usual in approving settlements where no class has yet been formally certified.”); the Second Circuit in *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir.1982) (“district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care”); and the Seventh Circuit in *Mars Steel Corp. v. Continental Illinois Nat’l Bank & Trust*, 834 F.2d 677, 681 (7th Cir.1987) (“*Simer* and *Weinberger* emphasize ... that when class certification is deferred, a more careful scrutiny of the fairness of the settlement is required. We agree....”). See also *Manual for Complex Litigation* § 30.45 (3rd. ed. 1995) (“Approval under Rule 23(e) of settlements involving settlement classes ... requires closer judicial scrutiny than approval of settlements where class certification has been litigated.”) No circuit has held to the contrary. Because settlement class actions present unique due process concerns for absent class members, we agree with our sister circuits and adopt this standard as our own.

We have repeatedly stated that the decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is “exposed to the litigants, and their strategies, positions and proof.” *Officers for Justice*, 688 F.2d at 626 (internal quotation omitted). The district court held a hearing in August 1995 in which it granted *1027 preliminary approval of the settlement agreement and approved a class-wide notice. Two fairness hearings followed in November 1995, and a third was held in April 1996. The transcripts of the hearings reveal an exhaustive presentation by the objectors raising virtually all of the issues noted in the briefs and in oral argument before this court.

In approving the settlement under Rule 23(e), the district court noted that the class was not giving up any right to challenge the adequacy of the replacement latch and was relieved from any duty to prove that the original latch was defective. The monitoring by class counsel and the additional outreach provided by Chrysler also worked in favor of the class in terms of extended notification and the fulfillment of all terms. The district court also retains jurisdiction over the implementation of the settlement.

Class counsel may return to court if Chrysler is not using its “best efforts” to obtain the latch replacement goals or if the outreach and notification funds are allocated or spent in an inappropriate manner. The court also recognized that the alternatives to settlement were not promising; the parties could return to the bargaining table but that was no guarantee that the class would receive a better deal. Allowing the state court actions to proceed put the entire class at risk of “balkanized decisions” and high expenses—the only benefit being that “a few people would get a little more money.”

The judge’s decision to approve the settlement was correct on the merits, and reflected the proper deference to the private consensual decision of the parties. As we noted in *Officers for Justice*, “the court’s intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited 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.” *Id.* at 625. The fairness hearings support such a finding.

There is no evidence to suggest that the settlement was negotiated in haste or in the absence of information illuminating the value of plaintiffs’ claims. In fact, settlement negotiations began several months prior to the filing of the consolidated federal action and included numerous meetings. No evidence of collusion was presented to the district court or otherwise evident in the record.

The settlement presented to the district court obligates Chrysler to make the minivans safe. This fact alone sets this case apart from *GM Pick-Up Litig.* and *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 981 F.Supp. 969 (E.D.La.1997)—cases in which a settlement agreement was rejected in large measure because it did nothing to remedy the safety problem with the vehicles. Again and again, the objectors reiterated that their primary concern was the safety of the vehicles and the prevention of injury. Of course it is possible, as many of the objectors’ affidavits imply, that the settlement could have been better. But this possibility does not mean the settlement presented was not fair, reasonable or adequate. Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion. In this regard, the fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness. There was no

disparate treatment between class members; all stood to benefit equally, a fact which lessens the likelihood that the named plaintiffs and their attorneys colluded with Chrysler to increase their own recovery at the expense of the unnamed plaintiffs who class counsel had a duty to represent. No objector stepped forward and suggested that his or her personal claim was being sacrificed for the greater good—and if any thought that was the case, they had the right to opt-out of the class.

The district court's final determination to approve the settlement should be reversed "only upon a strong showing that the district court's decision was a clear abuse of discretion." *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 377 (9th Cir.1995) (internal quotation omitted). There was no such showing here.

*1028 C.

Several state Attorneys General,³ acting as amicus curiae, contest one paragraph of the settlement agreement.

Paragraph 24 of the agreement provides:

¶ 24. **Government Actions Affecting Settlement.** If any administrative proceeding or action is commenced by any federal (except NHTSA), state or local governmental authority in a *parens patriae* function (and not in its capacity as an owner of any Minivan that has opted-out of the Settlement Class) asserting claims within the scope of the Action, the Class Plaintiffs and Settlement Class Counsel shall intervene in that action at the request of Chrysler. They shall intervene to fully support Chrysler by asserting that the governmental action is within the scope of this agreement, the Class Action Complaint, and the judgment entered herein. Any time and expense incurred by the Class Plaintiffs and Settlement Class Counsel shall be deemed to be within the application(s) referenced in paragraph 14. Additionally, in the event any action is commenced by a governmental authority as stated in this paragraph, Chrysler shall have the option, in its sole discretion, to immediately suspend relief to citizens of that jurisdiction pending the outcome of the suit brought by the governmental authority.

The Attorneys General claim this provision is unfair and unreasonable because it will have a "chilling effect" on state enforcement. "For example," they claim, "if a governmental agency were to initiate an enforcement

action relating to the defective latch or the latch replacement program, such as for deceptive advertising of the program, Chrysler would have the discretion to suspend relief in the applicable jurisdiction." The effect is to place relief "outside the control of the class" and dependent upon the actions of nonparties to the action.

Paragraph 24 survives for several reasons. First, paragraph 24 does not prohibit any government action. The attorneys general remain free to act as they see necessary to enforce the consumer laws of their state. Chrysler and Class counsel cannot not prohibit state enforcement and never argued they could. Any "chilling effect" on state enforcement that flows from the settlement agreement comes from the danger that Chrysler will decide to contest the state action, invoke paragraph 24 of the settlement, and impose a delay on minivan owners. The chilling effect then comes from the potential anger of class members—who knowingly agreed to the settlement provisions, including paragraph 24, did not opt out, and readily accepted the benefits of the agreement—at the attorney general of their state for interfering with their receipt of the benefits of the settlement. The only impact of paragraph 24 falls on the plaintiff class members and they have agreed—by their inclusion in the class—to assume the risk.

Second, paragraph 24 has been included in the Settlement Agreement from the beginning. Class members had notice that they were exchanging their state rights for the contractual promises of the Agreement and the vast majority of the class agreed. Class Counsel is required by the agreement to come forward and explain this fact in any state enforcement proceeding, an appearance that would most likely be helpful to a court, rather than a hindrance.

Third, paragraph 24 is limited to local, state or federal enforcement actions that are within the *scope of the settlement agreement*. If, for example, there was evidence of fraud in the advertising of the replacement latch program, this would not fall under the original complaint. As a result, the state attorneys general would be free to bring an action and Chrysler could not suspend relief.

Again, we reiterate that the district court was not free to redraft the agreement, or strike out certain parts it found to be problematic. We do not think the inclusion of paragraph 24 warrants rejection of the agreement.

***1029 V.**

We review a district court's award of attorneys fees for an abuse of discretion. *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir.1994) ("WPPSS").

At Chrysler's insistence, class counsel and Chrysler did not negotiate or discuss attorneys fees until after the final settlement agreement was presented to the court. The parties then met with retired California Superior Court Judge Coleman Fannin in a fee mediation session. They eventually agreed to a fee of \$5 million coupled with \$200,000 in costs; Judge Fannin's affidavit indicated that he initially recommended this amount. The mediator's role did not include evaluating the benefits of the settlement so Judge Fannin had no way to ascertain whether \$5 million was an appropriate percentage recovery. His affidavit was submitted only to certify that the figure was the result of legitimate arms-length negotiations.

Contrary to the objectors' contention, we do not believe the weight the district court gave to the mediation proceeding was an abrogation of its duty to determine independently whether the fee award was proper. Rather, the court relied on the mediator as independent confirmation that the fee was not the result of collusion or a sacrifice of the interests of the class, an inquiry the court was required to make. More importantly, Judge Legge appears to have reviewed the award using a lodestar methodology by requiring class counsel to submit detailed evidence of their work on behalf of the class. The choice of method for determining attorney fees is also reviewed for an abuse of discretion. *WPPSS*, 19 F.3d at 1296.

This court has affirmed the use of two separate methods for determining attorneys fees, depending on the case. In "common-fund" cases where the settlement or award creates a large fund for distribution to the class, the district court has discretion to use either a percentage or lodestar method. *Id.* at 1295. The percentage method means that the court simply awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee. *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 272 (9th Cir.1989). This circuit has established 25% of the common fund as a benchmark award for attorney fees. *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir.1990).

Although no class member is entitled to a cash recovery—making valuation of the settlement agreement more difficult—Chrysler and class counsel valued the settlement at \$115 million. This is the amount Chrysler

charged against its earnings in order to account for its voluntary service action and the production and installation of the replacement latches. The fee award of \$5.2 million represents roughly 4.5% of this "common fund", significantly less than the 25% commonly used under *Six Mexican Workers*. We note, however, that the court rejected the idea of a straight percentage recovery because of its uncertainty as to the valuation of the settlement.

In employment, civil rights and other injunctive relief class actions, courts often use a lodestar calculation because there is no way to gauge the net value of the settlement or any percentage thereof. The lodestar calculation begins with the multiplication of the number of hours reasonably expended by a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The hours expended and the rate should be supported by adequate documentation and other evidence; thus, attorneys working on cases where a lodestar may be employed should keep records and time sheets documenting their work and time spent. The resulting figure may be adjusted upward or downward to account for several factors including the quality of the representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975).

Class counsel presented affidavits to the district court justifying their fees on the basis of their work on the individual state class actions. The fee award also includes all future services that class counsel must provide through the life of the latch replacement program. They must remain available to enforce the contractual elements of the settlement agreement and represent any class members who encounter difficulties. The ***1030** factual record provides a sufficient evidentiary basis for the district court's approval of the fee request. The lodestar calculation received further support from the mediator's recommendation, although we note that such a recommendation is never the starting point for calculation of a fee award. We find no abuse of discretion.

VI.

The certification of the settlement class, the approval of the class settlement and the fee award were well within the guidelines provided by *Amchem* and *Fed.R.Civ.P. 23*. Accordingly, we affirm the judgment of the district court.

All Citations

Footnotes

- 1 The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.
- 2 The Louisiana action, the first state action to commence, was filed in April 1994. It was followed by actions in Alabama (filed April 1994), Texas (filed in June 1994), California (two actions filed in December 1994), and New York (filed in March 1995).
- 3 The Attorneys General of Connecticut, Arizona, Iowa, Kansas, New York, Nevada, Oklahoma, Pennsylvania, Rhode Island, and Vermont joined in the amicus brief.

Exhibit 5



Positive

As of: May 18, 2022 12:05 AM Z

Patel v. Nike Retail Servs.

United States District Court for the Northern District of California

May 8, 2019, Decided; May 8, 2019, Filed

Case No. 14-cv-04781-RS

Reporter

2019 U.S. Dist. LEXIS 77988 *; 2019 WL 2029061

PAYAL PATEL, Plaintiff, v. NIKE RETAIL SERVICES, INC., Defendant.

Prior History: [Patel v. Nike Retail Servs., 2015 U.S. Dist. LEXIS 68613 \(N.D. Cal., May 27, 2015\)](#)

Counsel: **[*1]** For Payal Patel, an individual on behalf of herself, on behalf of all persons similarly situated, and as the representative of the State of California, Plaintiff: Norman B. Blumenthal, LEAD ATTORNEY, Kyle Roald Nordrehaug, Ruchira Piya Mukherjee, Aparajit Bhowmik, Blumenthal, Nordrehaug & Bhowmik, La Jolla, CA; David Elliot Gonzalez, LAWYERS for JUSTICE, PC, Glendale, CA; Molly Ann DeSario, Capstone Law APC, Los Angeles, CA; Victoria Bree Rivapalacio, Blumenthal, Nordrehaug and Bhowmik, La Jolla, CA United Sta.

For Nike Retail Services, Inc., a Corporation, Defendant: Jonathan Douglas Meer, Michael Afar, Orly Zelta Elson, Sheryl Lyn Skibbe, Seyfarth Shaw LLP, Los Angeles, CA.

Judges: RICHARD SEEBORG, United States District Judge.

Opinion by: RICHARD SEEBORG

Opinion

ORDER GRANTING APPROVAL OF SETTLEMENT OF PAYAL PATEL'S PAGA CLAIM

I. INTRODUCTION

This suit involves a dispute over the labor practices of Defendant Nike Retail Services, Inc. ("Nike") with regard to its employment of "assistant head coaches" ("AHC"). In November 2013, Plaintiff Payal Patel filed suit against Nike in Alameda County Superior Court for violating various provisions of California's wage and hour statutes, including a claim for civil penalties **[*2]** under the [Private Attorneys General Act \("PAGA"\)](#). Nike then removed the action to federal court in October 2014. Patel's motion for class certification was subsequently denied in 2016. Patel and Nike now jointly seek approval of a settlement agreement resolving her individual claims and her representative PAGA claim. (Dkt. 138.) This proposed settlement can be evaluated without oral argument pursuant to *Local Rule 7-1(b)*. For the reasons explained below, approval is granted.

II. BACKGROUND

The full facts of this case have been set forth in this Court's prior orders and need not be repeated here. For roughly three years, Patel was employed as an "assistant head coach" ("AHC") of a clearance store operated by Nike. Nike classified Patel as exempt from overtime pay and other benefits, a move Patel contends violates various provisions of California's wage and hour statutes. 40 aggrieved employees are covered by the PAGA action. (Dkt. 138, Ex. A.) Patel originally brought suit in Alameda County

Superior Court in November 2013, which was subsequently removed to federal court by Nike in October 2014. Patel's motion for class certification was denied in March of 2016 because she failed to show how any of her [*3] misclassification theories could be established with common proof. Subsequently, Nike twice unsuccessfully moved to strike Patel's allegation in support of her representative PAGA claim, or alternatively, for judgment on the pleadings.

On January 10, 2019, the parties participated in a settlement conference with a Magistrate Judge, at which they reached an agreement to settle the claims in this suit. On April 11, 2019, the parties submitted a joint stipulation requesting approval of the PAGA settlement and dismissal of Patel's individual and PAGA claims. (Dkt. 138.) In the settlement, Nike agrees to pay a total of \$185,000 (the "Gross Settlement Amount"). Of this amount, \$80,000 would be paid to Patel's counsel as attorneys' fees with \$60,000 in litigation costs. Additionally, \$20,000 would be paid to Patel to resolve her individual claims. Further, \$19,739 would be allocated to settlement of the PAGA claim, with 75% (\$14,804.25) to be paid as a Labor Code [section 558](#) payment to the aggrieved employees as part of their individual PAGA payments, and 25% (\$4,934.75) to be paid as a Labor Code [section 2699](#) payment, with 75% (\$3,701.06) of this amount being paid to the Labor Workforce Development Agency ("LWDA") [*4] and 25% (\$1,233.69) being paid to the aggrieved employees as part of their individual PAGA payments. Each individual PAGA payment is to be based on the number of pay periods attributed and apportioned to each aggrieved employee during the PAGA period (as determined by Patel's expert, Eric Lietzow) as a percentage of the total pay periods attributed to all aggrieved employees during that period. Finally, \$5,261 is to be paid to Simpluris, Inc. for administering the settlement. In the event the actual cost to administer the settlement is less, the difference will be added to the PAGA payment. If the actual expenses exceed the allocation, those expenses are to be paid from the Gross Settlement

Amount. The parties were ordered to submit a joint supplemental brief explaining why their PAGA settlement comports with the current case law rubric analyzing the fairness, reasonableness, and adequacy of PAGA settlements. (Dkt. 139.)

III. LEGAL STANDARD

A plaintiff suing under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies." [Arias v. Superior Court](#), 46 Cal. 4th 969, 986, 95 Cal. Rptr. 3d 588, 209 P.3d 923 (2009). Accordingly, a judgment in a PAGA action binds not only the plaintiff, but also the government and nonparty aggrieved employees. [Id.](#) at 985; see also [*5] [Iskanian v. CLS Transp. L.A., LLC](#), 59 Cal. 4th 348, 380, 173 Cal. Rptr. 3d 289, 327 P.3d 129 (2014). Under PAGA, a trial court must review and approve any settlement of PAGA claims. [Cal. Lab. Code § 2699\(l\)\(2\)](#).¹ Additionally, the proposed settlement must be submitted simultaneously to the California Labor and Workforce Development Agency. [Id.](#) However, PAGA does not establish a clear standard for evaluating PAGA settlements. [Ramirez v. Benito Valley Farms, LLC](#), No. 16-CV-04708-LHK, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794, at *3 (N.D. Cal. Aug. 25, 2017). Despite the lack of guidance, courts have been appropriately wary of plaintiffs using a PAGA claim as a "bargaining chip" without due consideration of the public interest and the rights of other aggrieved individuals. [O'Connor v. Uber Techs. Inc.](#), 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016).

Accordingly, certain courts have been willing to

¹ Although the current subsection appears only to apply to cases filed on or after July 1, 2016, the prior version of [§ 2699\(l\)](#) called for court approval of penalties sought as part of a proposed settlement. See [2004 Cal. Legis. Serv. Ch. 221 \(S.B. 1809\) \(WEST\) § 3](#). While PAGA requires court approval of any settlement of PAGA claims, court approval is not required to settle Patel's individual non-PAGA claims. Accordingly, only settlement provisions related to Patel's PAGA claim or her request for attorneys' fees will be discussed in this order.

approve PAGA settlements only if (1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals. See [*Rincon v. West Coast Tomato Growers, LLC*, No. 13-CV-2473-JLS, 2018 U.S. Dist. LEXIS 22886, 2018 WL 828104, at *2 \(S.D. Cal. Feb. 12, 2018\)](#); [*Gutilla v. Aerotek, Inc.*, No. 15-CV-00191-DAD-BAM, 2017 U.S. Dist. LEXIS 41655, 2017 WL 2729864, at *3 \(E.D. Cal. March 22, 2017\)](#). As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from [*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 \(9th Cir. 1998\)](#). [*Rincon*, 2018 U.S. Dist. LEXIS 22886, 2018 WL 828104, at *2](#). As a district court in the Southern District of California noted, the *Hanlon* factors are designed to determine the fairness of a settlement [*6] and consequently are useful in evaluating PAGA settlements. [*Rincon*, 2018 U.S. Dist. LEXIS 22886, 2018 WL 828104, at *2](#). As these cases prove persuasive, the PAGA settlement agreement between Patel and Nike will be evaluated accordingly.

Of the *Hanlon* factors, the following are relevant to evaluating the PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel. These factors will be evaluated in light of PAGA's public policy goals of "benefit[ing] the public by augmenting the state's enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance." [*O'Connor*, 201 F. Supp. 3d at 1132-33](#).

IV. DISCUSSION

A. Statutory Requirements

Patel satisfied the initial notice requirement prior to filing the PAGA claim. As alleged in the Complaint, Patel gave the required statutory notice on September 24, 2013 to the LWDA and Nike before filing the PAGA action. (See Compl. ¶ 97 & Ex. 1 (Dkt. 2-1).)² Further, Patel waited longer than the then-statutory waiting period of 33 days of the [*7] postmark date of the written notice if the LWDA did not provide a response.³ (*Id.*) Finally, although the current PAGA statute does not appear to require any written notice to the LWDA regarding proposed settlements of PAGA claims filed before July 2016,⁴ the parties served the LWDA with the Joint Stipulation which included the settlement agreement via the LWDA's online process. (Dkt. 141.) Patel's counsel represents the LWDA has not indicated any response or opposition to the proposed PAGA settlement. (Nordrehaug Decl. ¶ 2.) Therefore, the analysis can proceed to consider whether the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals.

B. Fairness, Reasonableness, and Adequacy of PAGA Settlement

The balance of the *Hanlon* factors favors approving the PAGA settlement because the agreement is fair, reasonable, and adequate in light of PAGA's public policy objectives.

1. Strength of Patel's Case

² At the time, the statute required only written notice by certified mail to both the LWDA and the employer. See 2004 Cal. Legis. Serv. Ch. 221 (S.B. 1809) (WEST) § 4.

³ The letter to the LWDA was postmarked September 20, 2013; Nike's was postmarked September 26, 2013. The Complaint was dated November 21, 2013.

⁴ [California Labor Code section 2699\(l\)\(2\)](#) states that, for cases filed on or after July 1, 2016, "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the [LWDA] at the same time that it is submitted to the court."

In general, legal uncertainty favors approval of a settlement. [*Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 U.S. Dist. LEXIS 86266, 2007 WL 4105971, at *10 \(N.D. Cal. Nov. 16, 2007\)](#). Here, Patel would be required to prove at trial each of the underlying Labor Code violations as to each of the 40 allegedly aggrieved employees in order to seek [*8] penalties under PAGA. See [*Cardenas v. McLane Foodservice, Inc.*, No. SACV 10-473 DOC \(FFMx\), 2011 U.S. Dist. LEXIS 13126, 2011 WL 379413, at *3 \(C.D. Cal. Jan. 31, 2011\)](#) ("Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant."). The strength of each aggrieved employees' PAGA claim may vary. Moreover, even if Patel prevailed, Patel may not recover all of the civil penalties sought. A court may reduce the penalty when "to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." [*Cal. Lab. Code. § 2699\(e\)\(2\)*](#); see also [*Fleming v. Covidien, Inc.*, No. ED CV 10-01487 RGK \(OPx\), 2011 U.S. Dist. LEXIS 154590, 2011 WL 7563047, at *4 \(C.D. Cal. Aug. 12, 2011\)](#) (finding the maximum PAGA penalties "unjust" because the employees had suffered no injuries and reducing the penalties by over 80%). Therefore, this factor favors approving the settlement.

2. Risk, Expense, Complexity, and Likely Duration of Further Litigation

For similar reasons, the need to demonstrate all 40 aggrieved employees' entitlement to a PAGA award threatens a risky, expensive, and complex trial that would extend the duration of the lawsuit. Additionally, Patel risks an adverse judgment which could result in either a diminished recovery or no recovery at all. Finally, Nike risks [*9] the potential for a judgment levying a significantly higher fine and attorneys' fee award than that proposed in the settlement agreement. Thus, this factor also favors approving the settlement.

3. Amount Offered in Settlement

Overall, the amount offered in settlement weighs towards approval of the settlement. First, the parties contend the proposed PAGA payment represents 22.8% of the \$86,554 that Patel's trial expert valued the PAGA claims.⁵ (Nordrehaug Decl. ¶ 6.) Second, over 80% of the PAGA payment is to be paid to the aggrieved employees, with the remaining approximately 19% (\$3,701.06) to be paid to the LWDA. This appears to be an adequate amount to advance PAGA's purpose of deterring noncompliance with California's labor law. Moreover, only the aggrieved employees' PAGA claims are being released. No individual claims of the aggrieved employees (besides Patel) are being released that are not tied to PAGA. As the Settlement Agreement states, "in no event shall the PAGA Released Claims in this Settlement Agreement release any claim of any individual other than the Plaintiff, including any class claim, which does not arise under PAGA." (Dkt. 138, Ex. 1 at ¶ III(5).)

As for Patel's individual [*10] settlement amount, although \$20,000 appears to be quite generous on its face, the parties assert this is less than half of what Patel's trial expert valued her individual claims (\$49,224). (Nordrehaug Decl. ¶ 3.) Moreover, Patel is the only named plaintiff, and she has borne the risk alone in pursuing litigation against a former employer for several years. In light of the circumstances, her individual settlement amount appears to be reasonable.

The amount set aside for the settlement administrator, Simpluris, (\$5,261) does not appear to be excessive. Moreover, any surplus is to be added to the PAGA payment. Finally, as for the attorneys' fees and costs, PAGA provides for reasonable awards but does not provide a specific standard for evaluating attorneys' fees in a

⁵ The parties state in their joint brief that there are approximately 783 alleged violations of the California Labor Code. (Dkt. 142 at 5.)

settlement of PAGA claims. [*Cal. Lab. Code § 2699\(g\)\(1\)*](#). In the Ninth Circuit, district courts generally may award attorneys' fees under a fee-shifting statute using either the lodestar method or the percentage-of-the-fund method. [*Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 \(9th Cir. 2002\)](#); see also [*Rincon*, 2018 U.S. Dist. LEXIS 22886, 2018 WL 828104, at *5](#) (approving attorneys' fees in a PAGA case using both the lodestar and the percentage methods); [*Ramirez*, 2017 U.S. Dist. LEXIS 137272, 2017 WL 3670794, at *6-7](#) (approving attorneys' fees in a PAGA case using the lodestar method).

The proposed attorneys' fees (\$80,000) and costs [*11] (\$60,000) constitute the largest single awards in the Gross Settlement Amount (combined they are almost 76% of the total settlement). Patel's counsel estimate that they have collectively spent 909.45 hours litigating this case for over five years and calculate a lodestar fee of \$437,549.75. (Nordrehaug Decl. ¶ 4 & Ex. 1 at 45.) The total fee is based on hourly rates of \$175-795. Thus, their requested fee award is approximately 18% of the lodestar. This appears to be reasonable in light of over five years of work involving substantial discovery, motion practice, and mediation efforts. The request for \$60,000 in costs also seems appropriate, particularly since it constitutes only 61% of counsel's estimated \$99,118.54 of costs. (Nordrehaug Decl. ¶ 5 & Ex. 1 at 51.) Therefore, this factor favors approving the settlement.

4. Extent of Discovery Completed and Stage of the Proceedings

This case has been litigated for several years: originally filed in 2013 and removed to federal court in 2014. At the time the proposed PAGA settlement was reached, the parties had completed both percipient and expert discovery and the parties were preparing for trial. Because the parties have engaged in extensive [*12] discovery and worked on this case for several years, this factor weighs in favor of finding the settlement fair, reasonable, and

adequate.

5. Experience and Views of Counsel

Patel's counsel represents they have extensive experience in employment litigation, including both wage and hour class actions and representative PAGA actions. (Nordrehaug Decl. ¶ 8; see also Ex. 2.) Based upon this experience, Patel's counsel believes the PAGA settlement is fair, reasonable, and adequate. Furthermore, Patel's counsel notes that Nike's counsel have been successful in defeating class actions and PAGA actions at the trial court level and on appeal. Based on the conduct observed during the approximately five years of litigation of this case (including losing a motion for class certification), Patel's counsel reasonably believe that Nike would continue to defend the claims aggressively through trial and through appeal, if necessary. This factor favors approving the PAGA settlement.

6. The Presence of a Government Participant

As discussed above, the LWDA has not directly intervened in this case or spoken on the proposed PAGA settlement. Therefore, this factor is neutral.

V. CONCLUSION

For the foregoing reasons, [*13] the settlement agreement between Patel and Nike is approved and the case is terminated. Jurisdiction is retained to resolve disputes under the settlement agreement.

IT IS SO ORDERED.

Dated: May 8, 2019

/s/ Richard Seeborg

RICHARD SEEBORG

United States District Judge

End of Document

Exhibit 6

201 F.Supp.3d 1110
United States District Court, N.D. California.

Douglas O'CONNOR, et al., Plaintiffs,
v.
UBER TECHNOLOGIES, INC., et al.,
Defendants.
Hakan Yucesoy, et al., Plaintiffs,
v.
Uber Technologies, Inc., et al.,
Defendants.

Case No. 13-cv-03826-EMC, Case No.
15-cv-00262-EMC

|
Signed August 18, 2016

Synopsis

Background: Current or former drivers filed class action and putative class action against operator of mobile network for connecting drivers with prospective passengers, alleging that drivers were employees rather than independent contractors, and thus were eligible for expense reimbursement and converted tips. Drivers filed motions for preliminary approval of proposed settlement. The District Court, [Edward M. Chen](#), J., ordered supplemental briefing.

The District Court, [Edward M. Chen](#), J., held that preliminary approval of proposed settlement would be denied, in light of inadequate settlement of claims under California's Private Attorneys General Act (PAGA).

Motions denied.

Attorneys and Law Firms

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ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL

O'Connor, Docket No. 518

Yucesoy, Docket No. 206

[EDWARD M. CHEN](#), United States District Judge

I. INTRODUCTION

Plaintiffs brought the instant class action and putative class action against Defendant Uber Technologies, Inc., alleging that Uber misclassifies drivers as independent contractors rather than employees. *O'Connor v. Uber Techs., Inc.*, Case No. 13-cv-3826-EMC, Docket No. 330 (Second Amended Complaint) (SAC) at ¶ 3; *Yucesoy v. Uber Techs., Inc.*, Case No. 15-cv-262-EMC, Docket No. 198 (Fourth Amended Complaint) (FAC) at ¶ 2. Following three years of contentious litigation, the parties

entered into a Settlement Agreement shortly before the *O'Connor* trial was to begin. *O'Connor*, Docket No. 518; *Yucesoy*, Docket No. 206.¹

Plaintiffs' motions for preliminary approval came on for hearing before the Court on June 2, 2016. The Court has also reviewed the parties' briefing and supplemental briefing, as well as the many objections challenging the adequacy of the Settlement Agreement. It also invited and considered the comments of the California Labor and Workforce Development Agency (LWDA). While recognizing sizeable settlement sum and policy changes proposed by the Settlement Agreement and the significant risk that drivers face in pursuing this litigation, for the reasons explained below, the Court concludes that the Settlement as a whole is not fair, adequate, and reasonable and therefore **DENIES** Plaintiffs' motion for preliminary approval.

II. BACKGROUND

A. Procedural History

The Settlement Agreement at issue covers two lawsuits pending before this Court. *O'Connor v. Uber Technologies, Inc.* was brought on behalf of all individuals who worked as Uber drivers in California.² Docket No. 330 (*O'Connor* Second Amended Complaint) (SAC) at ¶ 1. *O'Connor* alleged that Uber misclassified its drivers as independent contractors rather than employees. As employees, drivers would be entitled to the protections of the California Labor Code, including section 2802, which requires that employees be reimbursed for expenses such as gas and use of their vehicle. *Id.* at ¶¶ 3, 23. Plaintiffs also contend that although Uber advertised to customers that gratuity was included in the fare and that there was no need to tip drivers, drivers did not receive the total proceeds of any such gratuity. *Id.* at ¶¶ 1, 20. By failing to remit the full gratuity to drivers as required by California Labor Code section 351, Plaintiffs alleged that Uber violated California's Unfair Competition Law prohibition on unlawful business practices, and they sought to recover the portion of the gratuities that Uber withheld. *Id.* at ¶ 34. These claims, too, are predicated on drivers being employees rather than independent contractors.

Uber has argued that because it exercises minimal control over how drivers set their own hours and work schedule, its drivers cannot be considered employees. Plaintiffs, on the other hand, contend that Uber in fact exercised considerable control and supervision over the methods and means of its drivers' provision of transportation services, making drivers employees. *See id.* at ¶ 21.

Over the course of contentious litigation, the Court has adjudicated a motion to dismiss, for judgment on the pleadings, and for summary judgment, as well as numerous motions regarding class certification, arbitration, and stays. In its order denying Uber's motion for summary judgment, the Court applied California's two-step process for determining whether a worker is an employee or independent contractor. Docket No. 251 (March 11, 2015 Summary Judgment Ord.) at 6. First, it found that drivers provide a service to Uber because Uber is ultimately a transportation company, albeit a technologically sophisticated one. *Id.* at 10-11. The fact that Uber's drivers render a service to Uber created a rebuttable presumption of employment status. *Id.* at 15. Second, the Court applied California's *Borello* multi-factor test, focusing in particular on the most significant factor the putative employer's " 'right to control work details.' " *Id.* at 6 (quoting *S.G. Borello & Sons, Inc. v. Dep't of Indust. Relations*, 48 Cal.3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399 (1989)). It concluded that the ultimate determination of employment status had to be decided by a jury because there were disputes over material questions of fact, such as whether Uber has the right to significantly control the "manner and means" of drivers' transportation services. *Id.* at 20-25. The Court also found that a jury could reasonably find that the *Borello* test's secondary factors point in opposing directions, such that the test did not yield an unambiguous result. *Id.* at 25-27.

Following its denial of Uber's summary judgment motion, the Court certified the following class:

All UberBlack, UberX, and UberSUV drivers who have driven for Uber in the state of California at any time since August 16, 2009, and who (1) signed up to drive directly with Uber or an Uber subsidiary under their individual name, and (2) are/were paid by Uber or an Uber subsidiary directly and in their individual name, and (3) did not electronically accept any contract with Uber or one of Uber's subsidiaries which contains the notice and opt-out provisions previously ordered by this Court (including those contracts listed in the Appendix to this Order), *unless* the driver timely opted-out of that contract's arbitration agreement.

Docket No. 342 (September 1, 2015 Class Certification Ord.) at 7. The primary effect of this order was to limit the class to individuals who did not sign the 2014 arbitration agreements, as the Court found that individualized inquiries would be needed to determine whether there was procedural unconscionability with respect to those later contracts. *Id.* at 60-63. The September 1, 2015 certified class included approximately 8,000 drivers out of the estimated 160,000 California

drivers. *See* Docket No. 519 (April 21, 2016 Liss-Riordan Dec.) at ¶ 15; September 1, 2015 Class Certification Ord. at 5. Further, the Court only permitted the class to pursue the gratuities claim; it did not certify the class to seek the expense reimbursement claim. *See* September 1, 2015 Class Certification Ord. at 66-67. Although Uber sought interlocutory *1115 review of this order, the Ninth Circuit denied Uber's petition for permission to appeal. Docket No. 389.

The parties then filed extensive supplemental briefing concerning whether the class could be expanded to include other California drivers who signed the later arbitration agreements, as well as whether a class could be certified as to the claim for expense reimbursement under [California Labor Code section 2802](#). *See* Docket Nos. 359, 365. During a hearing on an unrelated motion, Plaintiffs' counsel for the first time argued that, as to the arbitration agreements, no unconscionability analysis was necessary because the arbitration clauses included a non-severable waiver of claims brought under California's Private Attorneys General Act of 2004 (PAGA), which was invalid as a matter of public policy. *See* Docket No. 379 (Nov. 4, 2015 Trans.) at 34:9-35:15.

After further briefing on this matter and oral arguments, the Court certified the following subclass of drivers:

All UberBlack, UberX, and UberSUV drivers who have driven for Uber in the state of California at any time since August 16, 2009, and meet all the following requirements: (1) who signed up to drive directly with Uber or an Uber subsidiary under their individual name, and (2) are/were paid by Uber or an Uber subsidiary directly and in their individual name, and (3) electronically accepted any contract with Uber or one of Uber's subsidiaries which contain the notice and opt-out provisions previously ordered by this Court, and did not timely opt out of that contract's arbitration agreement.

Docket No. 395 (December 9, 2015 Class Certification Ord.) at 32. This expanded the certified class to over 240,000 drivers. *See* April 21, 2016 Liss-Riordan Dec., Exh. 1. Both the September 1, 2015 class and December 9, 2015 subclass were certified to pursue the expense reimbursement claim, as well as the gratuities claim. In certifying the December 9, 2015 subclass, the Court relied on *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 173 Cal.Rptr.3d 289, 327 P.3d 129 (2014) and *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir.2015), which had held that a waiver of PAGA claims was void as a matter of public policy. December 9, 2015 Class Certification Ord. at 24. The Court concluded that this PAGA waiver could not be severed from the remainder of the arbitration agreement,

rendering the entire arbitration agreement void. *Id.* Because it relied on public policy rather than unconscionability, the Court did not engage in the procedural unconscionability analysis that defeated class certification in the original certification motion. *Id.*³

*1116 Two days after the Court found that the arbitration agreement was invalid as a matter of public policy, Uber issued a new arbitration agreement (hereafter, the December 2015 Agreement) to all Uber drivers, including members of the certified subclass. Plaintiffs in *O'Connor*, *Yucesoy*, and *In re Uber FCRA Litigation* filed separate motions to enjoin the December 2015 Agreement, arguing that it was an unauthorized communication designed to undermine or discourage participation in these and other pending cases against Uber. *See* Docket No. 435 (Rule 23(d) Ord.) at 2. The Court granted the motions pursuant to its Rule 23(d) "power to regulate the notice and opt-out processes and to impose limitations when a party engages in behavior that threatens the fairness of the litigation." *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 756 (9th Cir.2010), judgment vacated on other grounds, 565 U.S. 801, 132 S.Ct. 74, 181 L.Ed.2d 1 (2011). The Court explained that its rulings on Uber's motion for summary judgment and Plaintiffs' motions for class certification, including the voiding of the arbitration clauses, created a "legal landscape [that] has become materially more complicated for the drivers." Rule 23(d) Ord. at 3-4. While the Court explicitly declined to rule on whether the December 2015 Agreement was enforceable, it did conclude that this increasingly complex legal landscape required more robust notice to drivers, and ordered that the December 2015 Agreement could not be enforced without a revised cover letter and arbitration notice with a simplified opt-out option. *Id.* at 6-7. Uber moved to stay the Court's order pending appeal, arguing that the Rule 23(d) Order was unwarranted and burdened its First Amendment rights. Docket No. 439 at 2-3. This Court denied the motion; following an appeal of the order, the Ninth Circuit also denied to motion to stay. Docket No. 454; Case No. 16-15000, Docket No. 10.

Uber also moved to stay the case while it sought interlocutory review of the December 9, 2015 Class Certification Order, which this Court conditionally granted in part and denied in part. Docket No. 411. In that order, the Court ruled that the trial could proceed, but that it would not enter a final judgment as to the December 9, 2015 subclass if the appeals were still pending. Docket No. 429 at 9. The Ninth Circuit denied Uber's motion to stay the trial proceedings pending appeal. Case No. 15-17420, Docket Nos. 5, 14. However, on April 5, 2016, the Ninth Circuit granted Uber's petition for permission to appeal the December 9, 2015 Class Certification Order

per Rule 23(f). Docket No. 512 (Case No. 15-80220, Docket No. 9). Uber immediately filed a new motion for this Court to stay the case, which remains pending.

In the meantime, *Yucesoy* was filed on behalf of all Massachusetts drivers, bringing similar claims for independent contractor misclassification, violation of the Massachusetts Tips law, tortious interference with contractual and/or advantageous relations, unjust enrichment/*quantum meruit*, breach of contract, and violation of the Massachusetts minimum wage and overtime law. *Yucesoy*, Docket No. 27 (First Amended Complaint). After the Court ruled on three motions to dismiss, the remaining claims in *Yucesoy* are: (1) independent contractor misclassification (and attendant failure to pay business expenses), (2) violation of the Massachusetts tips law, and (3) tortious interference with advantageous relations. *Yucesoy*, Docket No. 198 (Fourth Amended Complaint). No motion for class certification has been brought in the *Yucesoy* case.

B. Settlement Agreement

1. Monetary Terms

Shortly before the trial in *O'Connor* was scheduled to commence, the *Yucesoy* and *1117 *O'Connor* Plaintiffs entered into a Settlement Agreement with Uber. Under this Agreement, Uber has agreed to pay \$84 million, plus an additional \$16 million contingent on an initial public offering (IPO) reaching one-and-a-half times Uber's most recent valuation (*i.e.*, about \$93.75 billion). April 21, 2016 Liss-Riordan Dec., Exh. 6 (Settlement Agreement) at ¶¶ 58, 125. Of the \$84 million, \$300,000 will be used for class administration, a maximum of \$73,000 will be allocated for enhancement payments to the named Plaintiffs and other Settlement Class members who contributed to the litigation, and \$8.7 million will be treated as wages reported on IRS Form W-2. Settlement Agreement at ¶¶ 125, 129, 133. Plaintiffs' counsel is also permitted to seek a fee and expense award of up to 25% of the Settlement Fund (\$21 to \$25 million), although Plaintiffs' counsel has since informed the Court that she will reduce her fee request by \$10 million. Settlement Agreement at ¶ 134; Docket No. 699 at 2. The \$10 million reduction is made regardless of whether the \$16 million contingency is triggered, thus resulting in an additional \$10 million for distribution to the class. Docket No. 699 at 2 n.1.

The remaining Settlement Fund will be separated into two funds: approximately \$5.5 to 6 million for the Massachusetts drivers, and \$56 to 66.9 million for the California drivers.⁴ Settlement Agreement at ¶ 144. A driver must submit a claim form to receive a payment. Settlement Agreement at ¶ 138. The driver's payment is based on the number of miles driven for Uber. Settlement Agreement at ¶ 145. Drivers may also receive "double weight" for their mileage if they opted out of Uber's 2013 and 2014 arbitration agreements, and if they are members of the *O'Connor* certified class. Settlement Agreement at ¶ 144. If a driver both opted out and is a member of the *O'Connor* certified class, he or she will receive quadruple weight for his or her mileage. Docket No. 617 (May 20, 2016 Joint Supp. Briefing) at 4. Assuming a 100% claim rate, Plaintiffs' counsel estimates that California certified class members will receive an average distribution of \$24 to \$1,950, California non-certified class members will receive an average distribution of \$10 to \$836, and Massachusetts drivers will receive an average distribution of \$12 to \$979. April 21, 2016 Liss-Riordan Dec., Exh. 1. For example, of the 243,320 California drivers who were part of the certified class, if all drivers filed claims, the 122,297 drivers who drove between 0-750 miles will receive an average distribution of \$24, while the 42,074 drivers who drove between 750-2,000 miles would receive an average distribution of \$89. On the higher end of the scale, the 7,534 drivers who drove over 25,000 miles would receive an average distribution of \$1,950. Of the 60,047 Massachusetts drivers, the 33,040 drivers who drove between 0-750 miles would receive an average of \$12, the 9,258 drivers who drove between 750-2,000 miles would receive an average of \$45, and the 1,489 drivers who drove over 25,000 miles would receive an average of \$979. In sum, the vast majority of class members are slated to receive less than \$100 each from the settlement.

The parties expect a 40% claim rate, which would increase the monetary amount paid to each claimant. *See* May 20, 2016 Joint Supp. Briefing at 58.

2. Non-Monetary Relief

In addition to the monetary payment, Uber has agreed to implement various forms of non-monetary relief. First, Uber *1118 has agreed to publish a comprehensive, written deactivation policy. Settlement Agreement at ¶ 135(a). Driver deactivation will only be allowed for sufficient cause, and low passenger acceptance rates will not be grounds for deactivation (although it would subject drivers to being logged out of the app for a limited period of time). Settlement Agreement at ¶ 135(a)(i); *see also*

Driver Deactivation Policy—US ONLY, Uber, <https://www.uber.com/legal/other/driver-deactivation-us-english/> (last visited August 3, 2016) (Uber Deactivation Policy). A driver may still be deactivated for having a high rate of cancellation, *i.e.*, where the driver initially accepted the fare but then canceled it (in contrast to never accepting the fare to begin with). *See* Uber Deactivation Policy. Uber will also provide at least two advance warnings before a driver is deactivated for reasons other than safety issues, discrimination, fraud, or illegal conduct (each, an “excluded matter”). Settlement Agreement at ¶¶ 135(a)(iii)-(iv). If a driver is deactivated, Uber will provide the driver with an explanation for the deactivation. Settlement Agreement at ¶ 135(a)(v). A deactivated driver may appeal the decision to a Driver Appeal Panel, unless the deactivation resulted from certain circumstances such as low star ratings, criminal activity, physical altercations, or sexual misconduct. Settlement Agreement at ¶ 135(a)(vi). In addition, except for the excluded matters (*e.g.*, safety issues, discrimination, fraud, or illegal conduct), drivers whose user accounts are deactivated will have the opportunity to take a “quality improvement course” and be reactivated upon completion of the course. Settlement Agreement at ¶ 135(a)(vii).

Second, Uber will provide more information regarding star ratings. Settlement Agreement at ¶ 135(d). Uber will also “consider” changes such as informing drivers how they rank against their peers, providing warnings when driver ratings go below a certain threshold, and warning drivers when their user accounts are at risk of deactivation for going below a certain threshold.

Third, the parties stipulate to the enforceability of the December 2015 Agreement. Settlement Agreement at ¶ 135(e). In exchange, Uber will pay for the filing and administrative arbitration fees in: (1) cases based on an alleged employment relationship between Uber and drivers, and (2) cases arising out of a final deactivation of a driver in the event of an excluded matter. The parties also agree to stipulate to vacating (retrospectively) this Court’s Rule 23(d) Orders, and they agree that Uber has the option of voiding the Settlement Agreement should the Court not vacate these orders. Plaintiffs also agree to withdraw the charges filed with the National Labor Relations Board (NLRB) on behalf of John Billington and Catherine London, challenging the enforceability of the 2014 arbitration agreements as a violation of the National Labor Relations Act, and will not further cooperate with the NLRB’s investigation unless compelled by subpoena or court order. Settlement Agreement at ¶ 33.

Fourth, Uber will institute an internal process for drivers

to raise concerns regarding the payment of specific fares in California and Massachusetts. Settlement Agreement at ¶ 135(f).

Fifth, Uber will collaborate with Plaintiffs regarding the creation and funding of a driver association as a means of “opening a dialogue between Uber and Drivers.” Settlement Agreement at ¶ 135(g). The association’s leaders are to be elected by drivers, and the leaders will have the opportunity to meet quarterly with Uber management to discuss driver concerns. Settlement Agreement at ¶¶ 135(g)(iv)-(v). The driver association will not be a union, and will have no right to bargain collectively with Uber. Settlement Agreement at *1119 ¶¶ 135(g)(ii)-(iii). The parties provided little detail on how the driver association will work in practice (in part due to the expected autonomy of each driver association), including what obligations Uber will have to fund the driver association.

Finally, Uber will make good-faith efforts to clarify its messaging to riders regarding tipping, *i.e.* that tips are not included in fares (except for UberTAXI), but that they are neither expected nor required. Settlement Agreement at ¶ 135(h); May 20, 2016 Joint Supp. Briefing at 18. Drivers will be permitted to put up signs requesting tips, although the parties disagree on whether this actually constitutes a change in policy. *See* May 20, 2016 Joint Supp. Briefing at 18 n.24 (“Uber expressly disputes Plaintiffs’ claim that Uber’s policy with respect to tipping signage will change as a result of this settlement”).

3. Scope of the Class and Released Claims

The Settlement Agreement covers “all Drivers in California and Massachusetts who have used the Uber App at any time since August 16, 2009, up to and including the Preliminary Approval Date.” Settlement Agreement at ¶ 103. Thus, the settlement class releasing claims will not only include the *O’Connor* certified class, but (1) all California drivers for Uber including California drivers who had been excluded by the class definition, *i.e.*, drivers who drove for a third-party transportation company or who used fictitious or corporate names; and (2) all Massachusetts drivers.

Furthermore, although the *O’Connor* and *Yucesoy* cases were limited to claims based on expense reimbursement and the payment of tips, the Settlement Agreement contains an expansive release provision: it will require settlement class members—all drivers in California and Massachusetts—to release *all* claims based on or reasonably related to the employment misclassification

claim, *i.e.*, overtime, minimum wage, meal and rest breaks, and workers' compensation. Settlement Agreement at ¶ 105.⁵ The Settlement Agreement requires that the Plaintiffs file amended complaints expanding the causes of action to include all claims related to the alleged misclassification of drivers as independent contractors. *See* Settlement Agreement at ¶ 29 and Exhs. A (Proposed Yucosoy Fifth Amended Complaint), B (Proposed O'Connor Fifth Amended Complaint). As a result, the Settlement Agreement will cover claims that are brought in at least fifteen other lawsuits currently pending in federal and California state courts, effectively terminating those suits.⁶ Settlement *1120 Agreement at ¶ 28. It could also affect proceedings pending before various administrative bodies such as the NLRB. *See NLRB v. Uber Techs., Inc.*, Board Case Nos. 20-CA-160717, 20-CA-160720 (filed September 24, 2015) (complainants required by Settlement Agreement to withdraw charges).⁷ The Settlement Agreement will also settle all civil penalties potentially due under PAGA, ending in all likelihood all currently pending PAGA litigation against Uber in the other lawsuits. Settlement Agreement at ¶ 105. Because PAGA is an action on behalf of the State, the PAGA settlement included in the Settlement Agreement would prohibit any other driver from bringing a PAGA claim (or obtaining relief through a PAGA representative suit) for the time period up to preliminary approval, even if that driver opts out of the Settlement Agreement. *See* Docket No. 732 (July 15, 2016 Joint Supp. Briefing) at 23; Docket No. 736 (Labor & Workforce Development Agency (LWDA) Resp.) at 2.

Finally, as noted above, the parties stipulate to the enforceability of the December 2015 Agreement, as well as to vacating the Court's December 2015 Rule 23(d) Order and January 19, 2016 Order regarding the arbitration agreement's notice provision and corrective cover letter (collectively, the Rule 23(d) Orders). Settlement Agreement at ¶ 135(e). The effect of such action, if agreed to by the Court, would be to retroactively strip drivers of the protections afforded by this Court's Rule 23(d) order. If the Court does not agree to vacate these orders, Uber is permitted to void the Settlement Agreement.

III. DISCUSSION

A. Standard of Review

Pursuant to [Federal Rule of Civil Procedure 23\(e\)](#), "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." As the Ninth Circuit has explained, "[t]he purpose of [Rule 23\(e\)](#) is to protect the unnamed

members of the class from unjust or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir.2008). Accordingly, before a court approves a settlement, it must conclude that the settlement is "fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998); *see also Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir.2015) (same). This inquiry:

requires the district court to balance a number of factors: the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the 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 government participant; and the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d at 1026; *see also Churchill Vill. L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.2004) (same). "In determining whether the proposed settlement falls within the range of reasonableness, perhaps the most important factor to consider is plaintiffs' expected recovery balanced *1121 against the value of the settlement offer." *Cotter v. Lyft, Inc.*, Case No. 13-cv-4065-VC, 176 F.Supp.3d 930, 935, 2016 WL 1394236, at *4 (N.D.Cal. Apr. 7, 2016) (internal quotation omitted); *see also Procedural Guidance for Class Action Settlements*, United States District Court—Northern District of California, <http://cand.uscourts.gov/ClassActionSettlementGuidance> (last visited August 12, 2016). While it is not necessarily unusual or improper for a class action settlement agreement to release claims not originally brought by the plaintiff, the court must consider the strength and value of those claims in deciding whether to approve the settlement. *See Cotter*, 176 F.Supp.3d at 934–35, 2016 WL 1394236, at *4.

"[W]hether a settlement is fundamentally fair within the meaning of [Rule 23\(e\)](#) is different from the question whether the settlement is perfect in the estimation of the reviewing court." *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir.2012). However, "when ... the settlement takes place before formal class certification, settlement approval requires a 'higher standard of fairness.'" *Id.*; *see also Hanlon*, 150 F.3d at 1026 ("settlement approval that takes place prior to formal class certification requires a higher standard of fairness [because t]he dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court[-]designated class representative, weigh in favor of a more probing inquiry than may normally be required under [Rule 23\(e\)](#)"). This more "exacting review" is warranted "to ensure that class

representatives and their counsel do not secure a disproportionate benefit at the expense of the unnamed plaintiffs who class counsel had a duty to represent.” *Lane*, 696 F.3d at 819 (internal quotation omitted).

In this case, because the Settlement Agreement covers the claims of both certified class members and drivers who fall outside the class definition and thus have *not* been certified (for example, all Massachusetts drivers and the California drivers who drove for a third-party transportation company or under a corporate name), this Court must apply the more “exacting” standard in determining whether this settlement is fair, adequate, and reasonable. Further, with respect to all of the drivers, the parties propose to release *all* claims related to misclassification, including many which had not been brought in this case. This not only results in the addition of claims that Plaintiffs’ counsel may not have fully investigated or reviewed, but would also eliminate at least fifteen other cases pending in California courts wherein the claims sought to be added and waived herein are being litigated. See Settlement Agreement at ¶ 28. Thus, exacting review is additionally warranted as newly added claims have not been subject to class certification. Moreover, as this Court has noted, the Court must be especially sensitive to the risk of collusion or a less than full adversarial process where claims pending in other lawsuits are released for minimal value, in order to induce the defendant to settle *this* case.⁸ See Docket No. 724 at 9.

Courts implementing Rule 23(e) have required a two-step process for the approval of class action settlements: the Court first determines whether class action settlement deserves preliminary approval and *1122 then, after notice is given to class members, whether final approval is warranted. *In re High-Tech Emp. Antitrust Litig.*, Case No. 11-CV-2509-LHK, 2014 WL 3917126, at *3 (N.D.Cal. Aug. 8, 2014). As a general matter, “there is relatively scant appellate authority regarding the standard that a district court must apply in reviewing a settlement at the preliminary approval stage.” *Id.* Some district courts “have stated that the relevant inquiry is whether the settlement ‘falls within the range of possible approval’ or ‘within the range of reasonableness,’ ” looking at factors such as whether the settlement is the product of non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval. *Id.*; see also *Harris v. Vector Mktng. Corp.*, Case No. C-08-5198-EMC, 2011 WL 1627973, at *7 (N.D.Cal. Apr. 29, 2011). Although the Ninth Circuit has not specified what standard should apply at the preliminary approval stage, “district courts often state or imply that scrutiny should be more lax.”

Cotter v. Lyft, Case No. 13-cv-4065-VC, 193 F.Supp.3d 1030, 1035–36, 2016 WL 3561742, at *3 (N.D.Cal. June 23, 2016).

More recently, in *Cotter*, Judge Chhabria questioned this “lax review,” finding that:

lax review makes little practical sense, from anyone’s standpoint. If the district court, by taking a quick look rather than a careful one, misses a serious flaw in the settlement, the parties and the court will waste a great deal of money and time notifying class members of the agreement, only to see it rejected in the end, requiring the parties to start over. The same is true if the district court *does* identify a potentially serious flaw at the preliminary stage but waits until final approval to conclude that it’s fatal. What’s worse, if a court waits until the final approval stage to thoroughly assess the fairness of the agreement, momentum could have a way of slanting the inquiry, in a manner that deprives the class members of the court protection that Rule 23 demands.

Id. at 1037, at *4. “[B]y scrutinizing the agreement carefully at the initial stage and identifying any flaws that can be identified, the court allows the parties to decide how to respond to those flaws (whether by fixing them or opting not to settle) before they waste a great deal of time and money in the notice and opt-out process.” *Id.*

The Court finds Judge Chhabria’s view persuasive, particularly where, as here, the class includes nearly 400,000 individuals, and thus a great deal of expense would be incurred and substantial confusion could ensue were the Settlement Agreement preliminarily approved but ultimately disapproved on final review. And, as noted above, close review is particularly warranted where Plaintiffs seek to add new claims and drivers not previously certified, and the settlement would settle not only the instant case but claims brought in at least fifteen other pending lawsuits for relatively modest value. Further, the Settlement Agreement at issue has already been the subject of numerous objections challenging its adequacy even at the preliminary approval stage. As Judge Chhabria explained, it makes little sense to apply a lax standard at the preliminary approval stage to factors already known and amenable to analysis. Instead, the Court finds it more prudent to apply with full force the factors articulated by the Ninth Circuit in *Hanlon* and *Churchill Village*, while recognizing that some of these factors—such as the reaction of class members—are not currently known and cannot be assessed at the stage of preliminary approval and thus would have to await the stage of final approval.

1123 B. Hanlon Approval Factors*1. Strength of the Plaintiffs' Case; the Risk, Expense, Complexity, and Likely Duration of Further Litigation; and the Risk of Maintaining Class Action Status**

In considering the first three factors, the Court looks at the risks to both Plaintiffs and Uber in continuing this litigation.

a. Risks to Drivers

The most obvious risk to Plaintiffs is, of course, that the Ninth Circuit will uphold the validity of the arbitration provision contained in the 2013 and/or 2014 agreements, which this Court found was invalid as a matter of public policy in certifying the December 9, 2015 Subclass. *See* Ben Hancock, *Uber ADR Pact May Get Green Light*, The Recorder, June 16, 2016 (“A panel of federal appeals judges gave clear signs Thursday that it is ready to reverse a lower court decision finding the arbitration agreements that Uber Technologies Inc. circulated to its drivers were unenforceable”); Bonnie Eslinger, *9th Cir. Leans Toward Restoring Uber Arbitration Pacts*, Law360, June 16, 2016. This risk is heightened by the Ninth Circuit’s decision to grant Uber’s petition for permission to appeal the December 9, 2015 Class Certification Order. *See* Docket No. 512. A finding that one or both of the arbitration clauses is valid and enforceable would substantially change the scope and course of Plaintiffs’ case, as it would likely require the vast majority of the class to go to arbitration on their non-PAGA claims, thus jeopardizing the scope and potential viability of the class action at bar. Plaintiffs face a considerable risk that they will not proceed as a class action in any court, or at least be limited to a class action greatly reduced in size. Even if the Ninth Circuit were to limit a finding of enforceability to the more recent contracts, and hold only the 2013 arbitration agreement not to be enforceable, this could substantially decrease the class from approximately 240,000 drivers to 8,000 drivers, dramatically lowering any class monetary recovery that Plaintiffs might obtain through the class action. *See* April 21, 2016 Liss-Riordan Dec. at ¶ 15. Requiring the drivers to arbitrate their claims individually will likely reduce by a substantial degree overall recovery for drivers, as typically only a fraction of individuals pursue arbitration.

In addition to this risk to maintaining class action status, as this Court has previously noted, Plaintiffs face risks on the merits of the case. The fundamental question of whether Uber drivers are employees or independent contractors is not a simple one. As this Court held in

denying Uber’s motions for summary judgment, there are factors under the *Borello* analysis that support each side’s position. While the Court found that drivers performed a service for Uber and were therefore presumptively employees, it found that questions of fact existed as to the primary *Borello* inquiry of Uber’s control over the drivers. March 11, 2015 Class Certification Ord. at 15, 25. For example, although drivers could choose their own days and hours of work, Uber controlled certain aspects of driver performance; for instance, Uber could terminate individuals with low acceptance rates. *Id.* at 21-25. Moreover, as to the secondary factors set forth in *Borello*, the Court found that these factors cut both ways. *Id.* at 25-26. Several factors pointed in favor of employment status, such as: (1) driving is an occupation that typically does not require close supervision, (2) driving does not require a special skill, and (3) the drivers were performing a regular and integral part of Uber’s business. *Id.* at 26. On the other side, several factors favored independent contractor status, including: (1) the drivers’ use of their own vehicles, (2) the ability of drivers to employ other drivers to drive on their own behalf, and *1124 (3) the drivers signing an agreement stating no employment relationship was created. *Id.* As a result, should the issue of employee versus independent contractor status proceed to trial, it would be up to the jury to make the ultimate determination, the outcome of which cannot be predicted with any certainty. *See id.* at 27 (finding that “[t]he application of the traditional test of employment—a test which evolved under an economic model very different from the new ‘sharing economy’—to Uber’s business model creates significant challenges”); *Cotter*, 193 F.Supp.3d at 1037, 2016 WL 3561742, at *5 (“there is no straight answer to the question whether those drivers must be classified as employees or independent contractors under California law”); *cf. Alatraqchi v. Uber Techs., Inc.*,⁹ Case No. 13-cv-3156-JSC, Docket No. 9 at 6-9 (attaching California Labor Commissioner’s August 1, 2012 decision, which found that a driver was an independent contractor) with *Berwick v. Uber Techs., Inc.*, Case No. 11-46739 EK (June 3, 2015), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1988&context=historical> (last visited August 5, 2016) (performing *Borello* analysis and concluding that a driver was Uber’s employee).

Moreover, even if drivers were determined at trial to be employees, Uber challenges recovery on their claims. For instance, with respect to the expense reimbursement claim, Plaintiffs’ counsel noted that Uber intended to argue that it already structured the fare to be “all-inclusive that takes into account things like expenses.” April 21, 2016 Liss-Riordan Dec. at ¶ 31 (citing *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 559, 67

Cal.Rptr.3d 468, 169 P.3d 889 (2007) (“We conclude that an employer may satisfy its statutory reimbursement obligation by paying employees enhanced compensation in the form of increases in base salary or increases in commission rates, or both, provided there is a means or method to apportion the enhanced compensation to determine what amount is being paid for labor performed and what amount is reimbursement for business expenses”).

Plaintiffs’ counsel also notes that there is a risk as to which IRS mileage reimbursement rate would apply. Plaintiffs have argued for use of the fixed rate while Uber would likely advocate for use of the variable rate, a potential reduction of 60%. *Id.* at ¶¶ 33-34. Further, as to Massachusetts drivers, Plaintiffs perceive an additional risk because Massachusetts does not have an express expense reimbursement statute, and thus recovery for expenses in Massachusetts may be less likely. Mot. at 23 n.25; May 20, 2016 Joint Supp. Briefing at 7 (“the law is not entirely established in Massachusetts as to whether employees may recover unreimbursed business expenses from their employers”). Similarly, Plaintiffs acknowledged risks to their tips claim, should a jury find that Uber’s communications indicating that “tip is included” in a fare were too variable or not widespread enough to conclude that a tip *1125 was actually included. April 21, 2016 Liss-Riordan Dec. at ¶ 45.

There are additional risks to the claims the parties seek to add to this case and for which releases are sought. First, as to meal and rest breaks, California courts have found liability for failure to provide such breaks when the employer lacked a policy authorizing and permitting breaks. *E.g., Benton v. Telecon Network Specialists, Inc.*, 220 Cal.App.4th 701, 725–26, 163 Cal.Rptr.3d 415 (2013). But Uber states that it has set up a system in which “drivers log in and out whenever they want, so that there can never be any circumstance in which a driver might feel pressure (even implicitly) not to take a break. In other words, Uber’s entire system can be understood to constitute a policy of ‘permitting’ or ‘authorizing’ breaks whenever a driver wants.” July 15, 2016 Joint Supp. Briefing at 11. There has been little argument that Uber drivers lack the freedom to choose their days and hours of work (although there has been evidence of the control Uber exercises over drivers when they *do* report to work), *see* March 11, 2015 Summary Judgment Ord. at 25, creating a potential risk that a jury would find that Uber had not deprived its drivers of meal and rest breaks.

Second, with respect to minimum wage and overtime, the primary question appears to be whether drivers would be entitled to compensation for time spent waiting to perform

a task. *See* Docket No. 724 at 11. This Court previously dismissed with prejudice the minimum wage and overtime claims in *Yucesoy*, finding that Plaintiffs had failed to plead specific facts to support their claim that waiting time should be compensable. *Yucesoy*, Docket No. 194 at 10-11. For example, there Plaintiffs did not explain how often ride requests came in, how many requests they had to accept, and the magnitude of the risk of deactivation if requests were not accepted. *Id.* In so finding, the Court looked to the Ninth Circuit’s test in Fair Labor Standards Act cases, the same test applied by California courts. *Id.*; *Gomez v. Lincare, Inc.*, 173 Cal.App.4th 508, 523, 93 Cal.Rptr.3d 388 (2009) (looking to the Ninth Circuit’s test to determine whether an employee was free to engage in personal activities while on call).¹⁰ While the Court does not conclude that drivers could not prevail on this claim were sufficient allegations pleaded and evidence presented, there are significant risks.¹¹

Finally, regarding the workers’ compensation claims, the Court notes that the settlement is not intended to release individual workers’ compensation claims or personal injury claims against an employer who failed to carry workers’ compensation insurance. July 15, 2016 Joint Supp. Briefing at 14. Rather, what is at issue is a claim in which a driver challenges Uber’s *1126 failure to obtain workers’ compensation insurance, and seeks to recover Uber’s “savings” from not obtaining such insurance under California’s Unfair Competition Law (UCL). *See* Docket No. 592 (Ghazi Obj.) at 1-2. There is a risk that such a claim could not be enforced through the UCL, as the California Supreme Court has generally found that the UCL cannot be used to recover money in which the plaintiff does not have an ownership interest. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1143–53, 131 Cal.Rptr.2d 29, 63 P.3d 937 (2003). While the State has brought a similar claim under the UCL, *see People ex rel. Harris v. Pac. Anchor Transp., Inc.*, 59 Cal.4th 772, 775–76, 174 Cal.Rptr.3d 626, 329 P.3d 180 (2014), it is not clear that private individuals could recover under such a claim, in light of *Korea Supply Co.*¹²

b. Risks to Uber

While Plaintiffs thus face substantial risks both in their ability to maintain class certification and on the merits, the Court reiterates that Uber also faces substantial risks of losing on the misclassification question. As noted above, in its March 11, 2015 Summary Judgment Order, this Court held, as a matter of law, “Uber’s drivers render service to Uber, and thus are Uber’s presumptive employees.” March 11, 2015 Summary Judgment Ord. at 15. Thus, the burden is on Uber to disprove an

employment relationship, both in California and in Massachusetts. *Id.* at 16; see also *Sebago v. Boston Cab Dispatch, Inc.*, 471 Mass. 321, 327, 28 N.E.3d 1139 (2015) (“an individual performing any service is presumed to be an employee[, and t]he purported employer may rebut the presumption of employment by establishing ... three indicia of an independent contractor relationship”) (internal quotations omitted). While Uber has emphasized that drivers are free to pick and choose when they work, this Court has found that this freedom does not preclude a finding of an employment relationship, as the more relevant inquiry is how much control Uber exercises over drivers *while* they are on duty for Uber. March 11, 2015 Summary Judgment Ord. at 25. Judge Chhabria recognized in *Cotter* that:

although a jury could be tempted to conclude that people who drove only sporadically for Lyft should be independent contractors, it seems equally likely that the jury could analogize Lyft drivers to restaurant workers who work in multiple venues, but only occasionally at each particular venue. There is no dispute that, under California law, someone who picks up a couple of restaurant shifts here and there is an ‘employee’ of that restaurant (“along with any other restaurant where he works”).

Cotter, 176 F.Supp.3d at 944, 2016 WL 1394236 at *11. And just as Judge Chhabria found that “if the jury reached a similar conclusion about Lyft drivers, the consequences for Lyft would be enormous,” the Court concludes that the consequence for Uber of an adverse jury verdict would be substantial. *Id.*

Next, even if Uber were to prevail on its argument that the 2013 and/or 2014 arbitration *1127 agreements were enforceable, it would face substantial risks and costs absent settlement. First, PAGA claims¹³ cannot be compelled to arbitration. See *Iskanian*, 59 Cal.4th at 360, 173 Cal.Rptr.3d 289, 327 P.3d 129; *Sakkab*, 803 F.3d at 431–40.¹⁴ Thus, the employment classification question could still be decided by this or another court in the adjudication of a PAGA claim. See Docket No. 593 (Richardson Obj.).¹⁵ Should a court conclude that Uber drivers are, in fact, employees, both Plaintiffs and the LWDA conclude the statutory penalty against Uber would exceed \$1 billion. See LWDA Resp. at 3. Further, such a PAGA judgment could have an influential and perhaps even binding effect on Uber in arbitration. In *Arias v. Superior Court*, 46 Cal.4th 969, 985, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009), the defendants argued that it would be unfair not to impose class action requirements for PAGA claims because “the defendant would be a party to every lawsuit while each of the various plaintiffs would be a party in only one lawsuit, [and therefore] the defendant would in later lawsuits be bound by any

adverse determination of the common issues, while none of the plaintiffs would be similarly bound by prior determinations in the defendant’s favor.” The California Supreme Court concluded, however, there was no unfairness because a PAGA judgment would be “binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding.” *Id.*

Second, if one or more drivers were not bound by arbitration (e.g., because like the class representatives in *O'Connor*, they opted out of arbitration), they would be free to litigate the merits of their claims, again raising the prospect that were Uber to lose on the merits of the classification question, that judgment would affect the outcome of arbitrations. Simply put, without the benefit of the release and waiver conferred by the Settlement Agreement, Uber still faces a substantial risk of litigation.

Further, even if the class were wholly or partially decertified and hundreds of thousands of drivers were remitted to arbitration, if even a fraction of the 380,000 drivers invoked arbitration, the mere transactional costs for Uber (in the absence of the broad release effected by the Settlement Agreement) of arbitrating thousands of cases would be substantial, not to mention the risks of findings of liability and imposition of damages (which for any driver could well be ten times greater than the award scheduled under *1128 the Settlement Agreement) by the arbitrators.

2. The Amount Offered in Settlement

a. Monetary Amount

Under the Settlement Agreement, Uber has agreed to make an \$84 million guaranteed payment (including a \$1 million payment for PAGA), as well as a \$16 million payment contingent on the success of an IPO. As an initial matter, the Court cannot consider the \$16 million contingent payment as part of the settlement amount because there is no information on the likelihood that this contingency will be triggered. At the June 2, 2016 hearing, Uber stated that the \$16 million payment was “very likely” based on public reports about Uber’s cash infusions and analysts’ reports. See Docket No. 691 (June 2, 2016 Trans.) at 35:17–36:1. However, when the Court requested this public information, Uber stated that “it would not be proper for Uber to provide such information.” July 15, 2016 Supp. Briefing at 25. While Plaintiffs provide a number of articles, none of the articles address the likelihood that an Uber IPO will yield an average valuation of at least 1.5 times Uber’s most recent valuation within 365 days from the closing of the IPO.

See Docket No. 733 (July 15, 2016 Liss-Riordan Dec. at 10 n.4). Thus, absent a showing that there is a realistic likelihood that the additional \$16 Million will be realized, the Court will only consider the \$84 million monetary amount in assessing the adequacy of the Settlement Agreement.

By comparison, Plaintiffs have estimated that the verdict value of the non-PAGA claims being released are:

CLAIM:	VALUE:
Expense Reimbursement (Mileage) ¹⁶	\$700 million
Expense Reimbursement (Phones)	\$30 million
Tips	\$122 million
Overtime	\$2.4 million
Total:	\$854.4 million

[Editor's Note: The preceding image contains the reference for footnote¹⁶].

Mot. at 24; *see also* April 21, 2016 Liss-Riordan Dec. at ¶ 57. For all other non-PAGA claims, Plaintiffs' counsel attributes no value on the basis that "there would be a substantial risk of no recovery on this claim." As discussed above, the Court agrees with Plaintiffs that there were substantial risks as to the breaks claims, minimum wage and overtime claims, and workers' compensation claims, and it was therefore reasonable for Plaintiffs' counsel to assign no or little value to these claims when considering the overall full-verdict value. *Compare with* *1129 *Cotter*, 193 F.Supp.3d at 1038, 2016 WL 3561742, at *5 (finding that failure to assess value of a particular gratuity claim "does not automatically invalidate the settlement they reached. If the unconsidered claims are not particularly strong or valuable, such that they're not likely to have materially influenced the overall settlement, counsel's failure to consider the claims would not be a basis for rejecting the agreement").

After considering the information provided to the Court in response to the Court's order for supplemental briefing, the Court concludes that the parties' assessment of the value of all the non-PAGA claims is reasonably accurate. Thus, looking solely at the monetary relief, the settlement of \$84 million constitutes about 10% of the full verdict value of the non-PAGA claims—*i.e.* a 90% discount off the verdict value of the non-PAGA claims. This substantial discount is well illustrated by the case of Ms. Berwick, who drove 6,468 miles and was awarded \$3,878.08 in unreimbursed expenses by the California Labor Commissioner, would likely receive approximately \$455 if she was a California class member, or \$195 if she was a California non-class member. *See* Liss-Riordan Dec. Exh. 1 (average distributions); *Berwick v. Uber Techs., Inc.*, Case No. 11-46739 EK.

b. Non-Monetary Relief

The Settlement Agreement is, of course, not limited to the \$84 million payment, but includes a number of non-monetary relief that also provide benefits to the class. However, much of this non-monetary relief is not as valuable as the parties suggest, limiting their worth in considering the amount being offered in settlement.

First, Uber has agreed to "promulgate a comprehensive written deactivation policy," which will permit deactivation only for sufficient cause. Settlement Agreement at ¶ 135(a). Notably, a driver can no longer be deactivated because of low acceptance rates. Settlement Agreement at ¶ 135(a)(i); *see also* Uber Deactivation Policy. This is a significant change from prior contracts which seemed to allow Uber to fire its drivers for any reason at any time. *See* March 11, 2015 Summary Judgment Ord. at 20. But while Uber will no longer deactivate drivers because of low acceptance rates, it will still exercise substantial control over a driver's ability to accept or decline ride requests, as the deactivation policy still permits Uber to "temporarily ... log[a driver] out of the app for a limited period of time" based on low acceptance rates. Uber Deactivation Policy; *see also* Travis Kalanick, *Growing and Growing Up*, Uber Newsroom (Apr. 21, 2016), <https://newsroom.uber.com/growing-and-growing-up/> ("As part of the settlement, Uber has agreed not to deactivate drivers who regularly decline trips when they are logged into the app.... [W]here drivers do have low acceptance rates ... we will alert them to the issue. If things don't pick up, we may log them out of the app for a limited period of time").

Moreover, although Uber has added a Driver Appeal Panel to which a deactivated driver can appeal a deactivation decision, as well as agreed to pay for the arbitration costs of a challenge to a final deactivation decision in the event of an "excluded matter," both these avenues of review leave out an important reason for deactivation—low star ratings. Plaintiffs' counsel noted that star ratings are "a frequent reason for deactivation." June 2, 2016 Trans. at 84:12-13. While star ratings based on customer reviews might seem to be a relatively objective basis upon which Uber may deactivate a driver without an appeal process, but there may be value to such a process. For instance, Uber has expressed concern about bias and subjectivity on the part of passengers with respect to tipping; deactivations based on star ratings could likewise be subject to *1130 the same bias and subjectivity. *See* June 2, 2016 Trans. at 85:9-16.

Second, the Court is not convinced that the change to tipping policy will result in the “substantially increased income” that Plaintiffs’ counsel promises. *See* May 20, 2016 Joint Supp. Briefing at 16. Plaintiffs’ counsel suggests that if passengers tip 5% on average, Uber drivers would have earned an additional \$125 million since 2009. Docket No. 611 (Plaintiffs’ Resp. at 21). In support of this assertion, Plaintiffs cite Lyft’s model, where customers have tipped drivers more than \$85 million since the company’s founding. May 20, 2016 Joint Supp. Briefing at 16. Plaintiffs’ \$125 million valuation suffers a number of flaws. As an initial matter, it relies on a 100% tipping rate, which is highly unlikely given that even Lyft, which includes an *in-app* tipping function (thus making it clear to riders that tipping is not already included in the fare), only has a 70% tipping rate. *See* Plaintiffs’ Resp. at 21 n.18. By contrast, Uber has made it clear that it will not add an *in-app* tipping function, thus requiring riders to tip using cash (which many riders may not have readily on-hand, given Uber’s emphasis on the cashless transaction).¹⁷ Importantly, while Uber has agreed to “clarify” its tipping policy to make clear that tips are not included in the fare, it has also actively *discouraged* tipping, arguing that it is inconsistent with its business model, drivers’ interests, and a positive rider experience. May 20, 2016 Joint Supp. Briefing; *see also* *Our Approach to Tipping*, Uber Under the Hood (Apr. 28, 2016), <https://medium.com/uber-under-the-hood/our-approach-to-tipping-aa0074c0fddc#.wb66dqmuq>. In other words, Uber may be permitting tipping, but it is also telling riders *not* to tip, further decreasing the amount of tips that riders are likely to give. Given the lack of an *in-app* tipping function and Uber’s active dissuasion of tipping, the value of this tipping policy (which Uber strenuously disputes is even a change, *see* May 20, 2016 Joint Supp. Briefing at 18) is, while not meaningless, not nearly as valuable as Plaintiffs suggest. The fact that no *in-app* tipping function will be included will also make it difficult, if not impossible, to measure the effectiveness of the new tipping policy.

Finally, the parties have stipulated to the enforceability of the December 2015 Agreement and that this Court’s [Rule 23\(d\)](#) Orders be vacated. Settlement Agreement at ¶ 135(e). Although included as part of the non-monetary relief, this portion of the Settlement is an additional benefit to Uber, not the class, and the Settlement Agreement is voidable at Uber’s option should the Court not vacate its prior orders. By stipulating to the enforceability, drivers will be prevented from challenging the validity of the December 2015 Agreement, even in cases unrelated to employment misclassification such as whether arbitration would violate the National Labor

Relations Act or on the ground that it denies a class member a contractual right to effectual relief, a claim that has been brought in *Congdon v. Uber Technologies, Inc.*, Case No. 16-cv-2499-YGR. *See* July 15, 2015 Joint Supp. Briefing at 27.

Further, as expressed at the June 2, 2016 hearing, the Court is concerned about retroactively vacating its orders and the potential impact on the due process rights of drivers who may not have opted out of the December 2015 Agreement in reliance on those orders. *See* June 2, 2016 Trans. at *1131 117:2-25. This is because the Court’s [Rule 23\(d\)](#) Order specifically held that Uber could not enforce the December 2015 Agreement until it added more robust cover letter and notice provisions, and thus a driver was not required to exercise his or her opt-out right until Uber complied with Court’s directives. [Rule 23\(d\)](#) Ord. at 6-7. Uber did not comply with the order. To retroactively revoke the protection that this Court imposed to protect the rights of drivers without affording drivers a right to now opt-out would be to put a driver in a worse position than if the Court had not issued the [Rule 23\(d\)](#) Orders at all. Such retroactive elimination of protection afforded by the Court could raise due process issues. *Cf. Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992) (“Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (“The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute’s prospective application under the Clause may not suffice to warrant its retroactive application”) (internal quotation omitted). Further, vacating this Court’s [Rule 23\(d\)](#) would effectively circumvent and nullify both this Court’s and the Ninth Circuit’s denial of Uber’s motions to stay the Court’s [Rule 23\(d\)](#) Orders on January 8 and January 13, 2016, respectively.

3. The Extent of Discovery Completed and the Stage of the Proceedings

The parties entered into the Settlement Agreement shortly before the *O’Connor* case was to go to trial, after having litigated two class certification motions and two summary judgment motions, as well as submitted their trial plans in preparation for trial. During this time, the parties conducted a significant amount of discovery, including a combined 326 Requests for Production, 216

interrogatories, 71 requests for production, and multiple depositions, including depositions of Uber's Senior Vice President of Operations, Ryan Graves, and five named plaintiffs. April 21, 2016 Liss-Riordan Dec. at ¶ 4. In addition, the parties exchanged discovery prior to settlement discussions. *Id.* at ¶ 25; *see also* July 15, 2016 Joint Supp. Briefing at 6.

4. The Experience and Views of Counsel

This Court previously found that Plaintiff's counsel is a "capable advocate" and a leading practitioner in the field of employment misclassification. September 1, 2015 Class Certification Ord. at 66. Plaintiff's counsel has strongly advocated for preliminary approval of the Settlement Agreement, particularly after considering the risks of this Court's arbitration orders being overturned, and even offered to reduce her fees by \$10 million so that these funds could be distributed to the class, regardless of whether the \$16 million contingent payment is triggered. Docket No. 699 at 2. However, as noted above, deference to the views of counsel must be tempered here where the Settlement Agreement at the eleventh hour folds in new claims and class members at the expense of litigation pending in other courts, while attributing almost no value to those claims, in order to induce Uber to settle the cases at bar.

5. The Presence of a Governmental Participant

In general, there has been no governmental participant in this case. However, as will be more fully discussed below, the California LWDA has, at the invitation of the Court, submitted a letter regarding the *1132 PAGA claim, in which it expresses serious reservation about the \$1 million allocated to the newly added PAGA claim. *See* LWDA Resp. at 3.

6. The Reaction of the Class Members to the Proposed Settlement

Plaintiffs' counsel submits that since the announcement of the settlement, her firm has received feedback from more than 2,500 drivers; of these, 1,797 e-mails were from drivers wanting to confirm they were in the class or asking how to submit a claim. 71 class members expressed support for the Settlement Agreement, while 33 class members expressed negativity towards the Settlement Agreement. Docket No. 613-1 (Mason Dec.) at ¶¶ 8, 12, 13, 15. However, even at this preliminary state, this Court has received (and continues to receive)

numerous objections, filed both by individuals and attorneys representing drivers in other California cases. *E.g.*, Docket No. 529, 536-540, 546-548, 551-553, 556, 559, 561, 567, 569-571, 579, 581, 582, 584, 592, 594, 599, 601-604, 626, 652, 662, 688, 675, 690, 737. These objectives are in addition to five motions to intervene and one motion to disqualify Plaintiffs' counsel. Docket Nos. 588, 591, 627, 637, 644, 677.

7. Balancing the Factors

Balancing the *Hanlon* factors, the Court agrees with Plaintiffs' assessment that there is a substantial risk on the arbitration question in light of the Ninth Circuit's actions thus far, a risk that many of the objectors fail to appreciate. This risk would have the effect of substantially altering—if not effectively terminating—the class action in this Court, as well as in pending state court cases. These risks could well render a settlement providing for monetary relief reflecting a 90% discount off the verdict value along with limited non-monetary relief fair and adequate. Indeed, while at the low end of reasonable recovery,¹⁸ the Court would be inclined, after weighing the *Hanlon* factors, to find the consideration afforded by the settlement to be adequate for release of the non-PAGA claims.¹⁹ However, the parties' inclusion of waiver of PAGA claims as part of the settlement considerably alters the Court's assessment of the fairness and adequacy of the settlement as a whole.

C. Private Attorneys General Act (PAGA)

In 2003, California enacted the Private Attorneys General Act of 2004. *Arias*, 46 Cal.4th at 980, 95 Cal.Rptr.3d 588, 209 P.3d 923. As explained by the LWDA:

By creating a cause of action under which private plaintiffs may recover civil penalties otherwise recoverable by the state, PAGA benefits the public by augmenting the state's enforcement capabilities, encouraging compliance with *1133 Labor Code provisions, and deterring noncompliance. This furthers the state's policy to protect workers from substandard and unlawful conditions and also to protect employers "who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards."

LWDA Resp. at 2 (quoting Cal. Lab. Code § 90.5(a)); *see also Arias*, 46 Cal.4th at 980, 95 Cal.Rptr.3d 588, 209 P.3d 923 (explaining that in passing PAGA, "[t]he Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum

compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorney generals, to recover civil penalties for Labor Code violations”). The California Supreme Court has also recognized that “PAGA was clearly established for a public reason,” such that a prohibition of a representative PAGA action would be contrary to public policy. *Iskanian*, 59 Cal.4th at 383, 173 Cal.Rptr.3d 289, 327 P.3d 129; see also *id.* at 383, 173 Cal.Rptr.3d 289, 327 P.3d 129 (explaining that a pre-dispute PAGA waiver “serves to disable one of the primary mechanisms for enforcing the Labor Code”).

A plaintiff who brings a PAGA claim “does so as the proxy or agent of the state’s labor law enforcement agencies.” *Arias*, 46 Cal.4th at 986, 95 Cal.Rptr.3d 588, 209 P.3d 923. Because the “plaintiff represents the same legal right and interest as state labor law enforcement agencies,” the California Supreme Court has found that “a judgment in an employee’s action under the act binds not only that employee but also the state labor law enforcement agencies.” *Id.* In short, because the employee’s PAGA action acts as a “substitute” for a governmental action, the judgment binds all those who would be bound by an action brought by the government, including nonparty employees. *Id.* Thus, in a lawsuit which asserts a PAGA claim and seeks class certification for labor/wage claims, even class members who opt out of the class would be bound by an adverse PAGA judgment or settlement. For that reason, the LWDA rightly has stressed that:

It is thus important 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.

LWDA Resp. at 2-3.

Here, Plaintiffs seek formally to add the PAGA claim to the suit and settle it for \$1 million, despite having previously argued that the PAGA claim could result in penalties over \$1 billion. April 21, 2016 Liss-Riordan Dec. at ¶ 82. As noted above, the LWDA also concludes that the verdict value of the PAGA claim in this case exceeds \$1 billion. See LWDA Resp. at 3 (“LWDA believes it is accurate to estimate the potential PAGA penalty exposure as in excess of \$1 billion”). This \$1 billion amount makes up more than half of the total

verdict value of the case. Plaintiffs propose settling the PAGA claim for 0.1% of its estimated full worth. The Court is cognizant that even if a verdict were rendered for PAGA plaintiff(s), a penalty of \$1 billion could well be reduced, as a court may reduce the penalty when “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” *1134 Cal. Lab. Code § 2699(e)(2).²⁰ Nonetheless, as the LWDA concludes, there is “no rationale for allocating \$1 million of the proposed settlement fund to the PAGA claim ... other than that this is a ‘round’ number and a large figure in comparison to other PAGA settlements.” *Id.* The parties have failed to demonstrate how the *Hanlon* factors or any other coherent analysis justifies settling the PAGA claim for such a relatively meager value.

It is important to note that where plaintiffs bring a PAGA representative claim, they take on a special responsibility to their fellow aggrieved workers who are effectively bound by any judgment. See *Iskanian*, 59 Cal.4th at 381, 173 Cal.Rptr.3d 289, 327 P.3d 129 (“When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as through the person were a party”). Such a plaintiff also owes responsibility to the public at large; they act, as the statute’s name suggests, as a private attorney general, and 75% of the penalties go to the LWDA “for enforcement of labor laws ... and for education of employers and employees about their rights and responsibilities under this code.” Cal. Lab. Code § 2699(i). This duty imposed upon the PAGA representative is especially significant given that PAGA does not require class action procedures, such as notice and opt-out rights. The Court must be cognizant of the risk that despite this responsibility, there may be a temptation to include a PAGA claim in a lawsuit to be used merely as a bargaining chip, wherein the rights of individuals who may not even be members of the class and the public may be waived for little additional consideration in order to induce the employer to agree to a settlement with the class.

This is not to suggest that the PAGA claim must comprise a disproportionate amount of class settlements which include a PAGA claim, with the majority of funds going to the State simply because the PAGA penalty has the potential to be larger than the actual claims. Such a requirement would come at the expense of the workers, who might otherwise benefit from a larger non-PAGA settlement. Rather, in reviewing a settlement that includes both a Rule 23 class and a PAGA claim, the Court must closely examine *both* aspects of the settlement. While a

proposed settlement must be viewed as a whole, *see In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934, 944 (9th Cir.2015), 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 [Rule 23](#) class is robust, the purposes of PAGA may be concurrently fulfilled. By providing fair compensation to the class members as employees and substantial monetary relief, a settlement not 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. Likewise, if the settlement resolves the important question of the status of workers as employees entitled to the protection of the Labor Code or contained substantial injunctive relief, this would ***1135** support PAGA's interest in "augmenting the state's enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance." LWDA Resp. at 2. But where, as here, the compensation to the class amounts is relatively modest when compared to the verdict value, the non-monetary relief is of limited benefit to the class, and the settlement does nothing to clarify the status of drivers as employees versus independent contractors, the settlement of the non-PAGA claims does not substantially vindicate PAGA. In these circumstances, the adequacy of settlement as a whole turns in large part on whether the PAGA aspect of the settlement can stand on its own.

Here, the Court cannot find that the PAGA settlement is fair and adequate in view of the purposes and policies of the statute. Plaintiffs propose settling PAGA for only 0.1% of the potential verdict value, a reduction that the LWDA has found has no rational basis.²¹ This 99.9% reduction does not adequately reflect the parties' respective risks, particularly when the PAGA claim would not be subject to the same arbitration risk that this Court has found justifies in part the 90% discount in the verdict value of the non-PAGA claims. Instead, the risks at issue rest primarily on the merits of drivers' labor codes claims and the discretionary reduction of statutory penalties, not on the risk of compelled arbitration. However, as discussed above, those risks are not limited to Plaintiffs; Uber also takes on a significant risk that should a representative PAGA claim be litigated and adjudicated, it could lose on this question (especially given that this Court has found a presumption of employee status, *see* March 11, 2015 Summary Judgment Ord. at 15), and such an adverse judgment would carry not only a direct monetary penalty, but potentially could affect other litigation including arbitrations. Instead of adequately considering these risks to Uber and the full value of the

PAGA claim, in settling the PAGA claim herein, Plaintiffs appear to treat the PAGA claim simply as a bargaining chip in obtaining a global settlement for Uber's benefit, even though the PAGA claim alone is worth more than half of the full verdict value of all claims being released. The Court shares the LWDA's view that there is "no rationale for allocating \$1 million of the proposed settlement fund to the PAGA claim ... other than that this is a 'round' number and a large figure in comparison to other PAGA settlements," LWDA Resp. at 3. Given the sweeping consequences of the proposed PAGA waiver, viewed in the context of a relatively modest settlement of the non-PAGA claims, the Settlement Agreement is not as a whole is fair, adequate and reasonable.

Even if the PAGA claim were not separately scrutinized, viewing all the claims combined (PAGA and non-PAGA), the Settlement Agreement yields less than 5% of the total verdict value of all claims being released. Although the litigation risks to the plaintiffs are substantial, absent the sweeping releases conferred by the Settlement Agreement, Uber faces significant risks and costs, regardless of the outcome of pending interlocutory appeals. The settlement as a whole as currently structured is not fair, adequate, and reasonable.

***1136 IV. CONCLUSION**

The Court therefore **DENIES** Plaintiffs' motion for preliminary approval.

Although the Court denies Plaintiffs' motions for preliminary approval and thus refuses to vacate its [Rule 23\(d\)](#) orders pursuant to the parties' stipulation, it will **TERMINATE** its [Rule 23\(d\)](#) orders. The legal landscape no longer requires the protection afforded by the Orders. *See* Docket No. 522; Case No. 14-5200, *In re Uber FCRA Litig.*, Docket No. 175. Thus, Uber is permitted to issue the December 2015 Agreement to new drivers without satisfying the enhanced notice provisions required by the Court. Uber may also re-issue the December 2015 Agreement to current drivers, with the exception of the certified *O'Connor* class and claims (which, according to Uber, they did not intend the December 2015 Agreement to affect to begin with, *see* Docket No. 408, Exh. C; Docket No. 410 at 4; Docket No. 428 at 38:24-39:7). The Court will not, however, retroactively vacate its [Rule 23\(d\)](#) orders, and thus it will not deem the December 2015 Agreement effective as to drivers who did not timely opt out of the arbitration agreement during the pendency of the [Rule 23\(d\)](#) orders; the Court does not rule on the enforceability of the December 2015 Agreement.

Because the Court denies Plaintiffs' motion for preliminary approval, Uber's motion to stay filed on April 6, 2016 remains pending. Docket No. 506. The parties are ordered to meet and confer to discuss how they wish to proceed with that motion, as well as the general status of this case in light of the Court's ruling and the pendency of the appeals pending in the Ninth Circuit. A joint status report will be due on September 8, 2016, and a Status Conference will be held at 10:30 a.m. on September 15, 2016.

This order disposes of *O'Connor*, Docket No. 518 and *Yucesoy*, Docket No. 206.

IT IS SO ORDERED.

All Citations

201 F.Supp.3d 1110, 95 Fed.R.Serv.3d 933, 2016 Wage & Hour Cas.2d (BNA) 268,517

Footnotes

- 1 All subsequent docket numbers are based on the *O'Connor* docket, unless otherwise indicated.
- 2 The *O'Connor* suit was originally brought on behalf of all individuals who worked as Uber drivers in the United States (except in Massachusetts). See Docket No. 1 (Compl.) at ¶ 1. After the Court found that the California laws that the *O'Connor* Plaintiffs relied on did not apply extraterritorially, the *O'Connor* Plaintiffs amended their complaint to be limited to California drivers. See Docket No. 136 (Ord. on Motion for Judgment on the Pleadings) at 21.
- 3 In analyzing the arbitration agreement, the Court noted its earlier ruling of procedural unconscionability warranted reconsideration:

the California Supreme Court's ruling in *Sanchez v. Valencia Holding Co.*, 61 Cal.4th 899, 190 Cal.Rptr.3d 812, 353 P.3d 741 (2015), cast doubt on the viability of the aspects of *Gentry* on which this Court relied. In *Sanchez*, the California Supreme Court held that the contract drafter "was under no obligation to highlight the arbitration clause of its contract, nor was it required to specifically call that clause to Sanchez's attention." 61 Cal.4th at 914, 190 Cal.Rptr.3d 812, 353 P.3d 741. "Any state law imposing such an obligation would be preempted by the [Federal Arbitration Act]." *Id.* Thus, at the November 4, 2015 hearing on Plaintiff[s'] motion to file a Fourth Amended Complaint, the Court informed the parties that it was taking a second look at its procedural unconscionability analysis because *Gentry's* required disclosure of the disadvantages of arbitration was not necessarily consistent with *Sanchez's* ruling. Docket No. 379 at 8:13-10:23.

December 9, 2015 Class Certification Ord. at 9-10.
- 4 This amount does not include the \$10 million that Plaintiffs' counsel has reduced her attorney's fee request by.
- 5 Uber also contends that the release would also apply to "claims based on or reasonably relating to the conduct alleged in the proposed settlement complaint, regardless of whether classification as an employee is technically a requirement of that claim." Docket No. 732 (July 15, 2016 Joint Supp. Briefing) at 26. For example, Uber would argue that a claim "based on or reasonably related to an alleged entitlement to a tip, even though that driver may or may not also allege she was an Uber employee" would be released by the Settlement Agreement. *Id.* at 26-27.
- 6 These lawsuits include: (1) *Price v. Uber Technologies, Inc.*, Case No. BC554512; (2) *Del Rio v. Uber Technologies, Inc.*, Case No. 3:15-cv-3667-EMC; (3) *Berger v. Uber Technologies, Inc.*, Case No. 3:16-cv-41-MEJ; (4) *In re Uber FCRA Litigation*, Case No. 3:14-cv-5200-EMC; (5) *Ghazi v. Uber Technologies, Inc.*, Case No. CGC-15-545532; (6) *Richardson v. Uber Technologies, Inc.*, Case No. RG15775562; (7) *Zine v. Uber Technologies, Inc.*, Case No. BC591351; (8) *Narsi v. Uber Technologies, Inc.*, Case No. BC599027; (9) *Tabola v. Uber Technologies, Inc.*, Case No. CGC-16-550992; (10) *Barajas v. Uber Technologies, Inc.*, Case No. CGC-16-550198; (11) *Aquino v. Uber Technologies, Inc.*, Case No. BC608873; (12) *Adzhemyan v. Uber Technologies, Inc.*, Case No. BC608874; (13) *Gollnick v. Uber Technologies, Inc.*, Case No. CGC-15-547878; (14) *Mokeddas v. Uber Technologies, Inc.*, Case No. RG16807483; and (15) *Berwick v. Uber Technologies, Inc.*, Case No. CGC-15-546378 (appeal of Labor

Commissioner award). *See* Settlement Agreement at ¶ 28.

- 7 *See NLRB v. Uber Technologies, Inc.*, Case No. 16-80057-KAW (N.D. Cal.) Docket No. 31 (motion by Uber to stay NLRB's application for order enforcing subpoenas because of pendency of motion for preliminary approval of settlement herein).
- 8 This is not to suggest there is something inherently wrong with releases that are broader than the complaint; however, the reviewing court must examine, *inter alia*, the verdict value of all claims released, not just those alleged in the complaint (and the benefit obtained by the defendant in averting existing litigation) in assessing the reasonableness of the suit.
- 9 Of note, in *Alatraqchi*, the California Labor Commissioner found that Uber's "business was engaged in technology and not in the transportation industry," and thus the services Alatraqchi "provided were not part of the business operated by [Uber]." *Alatraqchi v. Uber Techs., Inc.*, Case No. 13-cv-3156-JSC, Docket No. 9 at 8. This Court came to the opposite conclusion, finding that "it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one. In fact, as noted above, Uber's own marketing bears this out, referring to Uber as 'Everyone's Private Driver,' and describing Uber as a "transportation system" and the 'best transportation service in San Francisco.'" March 11, 2015 Summary Judgment Ord. at 10-11.
- 10 While the *Price* objectors cited the California Supreme Court's decision in *Mendiola v. CPS Security Solutions* for the proposition that "on-call or standby time may require compensation" under California law, the California Supreme Court went on to explain that to determine whether on-call time constitutes compensable time requires a determination of the extent of the employer's control. 60 Cal.4th 833, 840, 182 Cal.Rptr.3d 124, 340 P.3d 355 (2015). To make this determination, the California Supreme Court applied the same FLSA factors that this Court used in *Yucesoy*.
- 11 On the other hand, Uber could be found liable for waiting time given their prior policy of deactivating drivers for low acceptance rates, and their present policy of suspending drivers for low acceptance rates. *See* Uber Deactivation Policy. Again, the problem with the pleadings in *Yucesoy* was that Plaintiffs had failed to plead sufficient facts in their complaint, despite it being their fourth complaint in that action. *Yucesoy*, Docket No. 194 at 10-11.
- 12 As for the remaining claims, some require a finding of willfulness (e.g., Cal. Lab. Code § 203 ("[i]f an employer *willfully* fails to pay ... any wages of an employee who is charged or who quits") (emphasis added); Cal. Lab. Code § 1174.5 ("Any person employing labor who *willfully* fails to main the records required ... shall be subject to a civil penalty of five hundred dollars (\$500)") (emphasis added); Cal. Lab. Code § 226.8 (concerning "willful misclassification")) or injury (e.g., Cal. Lab. Code § 226(e)(1)) (requiring injury for failure to furnish accurate wage statement to be entitled to recover damages or penalty), while other claims have problems of proof (e.g., April 21, 2016 Liss-Riordan Dec. at ¶ 75) (no evidence that Uber delays final payment to deactivated drivers).
- 13 This Court has not ruled on whether Plaintiffs may bring PAGA claims for violations of California Labor Code sections 351 and 2802; the issue remains under submission in *O'Connor*. *See* Docket No. 401 at 5.
- 14 While Plaintiffs have suggested that there is a "significant risk" that the Supreme Court will determine that PAGA claims are arbitrable, *see* July 15, 2016 Joint Supp. Briefing at 27 n.26, the Supreme Court has twice denied review of *Iskanian's* holding. *CLS Transp. L.A., LLC v. Iskanian*, — U.S. —, 135 S.Ct. 1155, 190 L.Ed.2d 911 (2015) (denying petition for writ of certiorari); *CarMax Auto Superstores Cal., LLC v. Areso*, — U.S. —, 136 S.Ct. 689, 193 L.Ed.2d 520 (2015) (denying petition for writ of certiorari on the question of whether *Iskanian* is preempted by the FAA).

- 15 There is a substantial likelihood that a PAGA suit would not be stayed pending arbitration. If the PAGA representative has opted out of arbitration, there is no obvious basis for a stay. Even if the representative has not opted out and thus has both nonarbitrable and arbitrable claims to prosecute, the decision to stay pending arbitration rests with the court's discretion. *See ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 394–95 (4th Cir.2012); *United Commc'ns Hub, Inc. v. Qwest Commc'ns, Inc.*, 46 Fed.Appx. 412, 415 (9th Cir.2002).
- 16 The mileage provided for the expense reimbursement estimate were produced as a part of discovery, prior to settlement discussions, and covered the period up to April 8, 2016. July 15, 2016 Joint Supp. Briefing at 9; April 21, 2016 Liss-Riordan Dec. at ¶ 35. In responding to discovery, the parties are required to be truthful, and counsel is ethically bound to ensure truthful responses. July 15, 2016 Joint Supp. Briefing at 9. Further, Plaintiffs' counsel represents that they analyzed the total mileage recorded in the trip histories of Plaintiffs Manahan and Gurfinkel, compared these numbers to the mileage produced by Uber, and found that the figures lined up "almost exactly," with differences of less than .2%. *Id.* at 9 n.13; July 15, 2016 Liss-Riordan Dec. at ¶¶ 7-8.
- 17 Furthermore, for safety reasons, drivers may not carry much cash with which to make change if a rider decides to tip but does not have the appropriate denominations in hand. Requiring drivers to handle cash (or at least the public perception thereof) could also raise safety concerns.
- 18 Compare *Harris v. Vector Mktg. Corp.*, 2011 WL 4831157, at *5, 2011 U.S. Dist. LEXIS 117927, at *15 (N.D.Cal. Oct. 12, 2011) (denying final approval of a settlement where the actual payout to the class was 6.56% of the maximum verdict value) and *Cotter*, 176 F.Supp.3d at 939-40, 943-44, 2016 WL 1394236, at *8, *11 (denying preliminary approval of a settlement where the settlement was 8.82% of the reimbursement claim, and finding that the settlement must be increased to 17% of the value of the reimbursement claim); with *Dunleavy v. Nadler (In re Mego Fi. Corp. Sec. Litig.)*, 213 F.3d 454, 458–59 (9th Cir.2000) (finding that settlement for approximately 16.67% of the potential recovery was adequate where the district court had "properly found that the Plaintiffs' case was weak and the risk, expense, and complexity of trial weighed against them").
- 19 The Court's reservations would lay primarily with the stipulation that the Court vacate retroactively its [Rule 23\(d\)](#) orders. The Court also questions the parties' refusal to provide for an easier [Rule 23](#) opt-out mechanism (e.g. using e-mail, opt out forms, or hyperlinks), which would not require drivers to send a written letter by traditional mail to the administrator in order to opt out.
- 20 See also *Cotter*, 193 F.Supp.3d at 1037, 2016 WL 3561742, at *5 (finding that "[a] significant reduction" of the PAGA claim "would be appropriate" because "[t]his is not a case where a company has deliberately evaded a clear legal obligation to provide legally required pay and benefits to its employees[, n]or does this appear to be a case where a company negligently failed to learn about its obligations under the wage and hour laws").
- 21 Even if the Court was to add all \$10 million from Plaintiffs' counsel's proposed reduction, making the PAGA settlement \$11 million, this would only represent 1.1% of the potential verdict value. Moreover, this would effectively take away \$10 million that could otherwise have been distributed to the *drivers*, putting the burden of supporting the public interest on the employee rather than the employer.

Exhibit 7

2016 WL 4797497
United States District Court, E.D. California.

Justin TITUS, Plaintiff,
v.
MCLANE FOODSERVICE, INC., a
corporation; and Does 1-100, inclusive,
Defendants.

No. 2:16-cv-00635-KJM-EFB

Signed September 13, 2016

Filed 09/14/2016

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ORDER

Kimberly Mueller, UNITED STATES DISTRICT
JUDGE

*1 Defendant McLane Foodservice, Inc. (“McLane”) moves to dismiss or, alternatively, to strike plaintiff Justin Titus’s requests for damages, civil penalties, and injunctive relief in connection with his fifth claim, for failure to provide notice of paid sick leave in violation of [California Labor Code section 246\(h\)](#).¹ Plaintiff opposes the motion in part. The court held a hearing and initial scheduling conference on May 18, 2016, at which Jenny Baysinger appeared for plaintiff and Matthew Kane appeared for defendant. For the following reasons, the

court GRANTS defendant’s motion.

I. BACKGROUND

A. Statutory Background

The court first provides an overview of the relevant statutes, the Private Attorneys General Act of 2004, [Cal. Lab. Code § 2698 et seq.](#) (“PAGA”), and the Healthy Workplaces, Healthy Families Act of 2014, [Cal. Lab. Code §§ 245–249](#) (“the Healthy Workplaces, Healthy Families Act” or “the Act”).

1. PAGA

In 2003, the California Legislature adopted PAGA to improve enforcement of existing Labor Code obligations. *See Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 379 (2014), *cert. denied*, 135 S. Ct. 1155 (2015); *Caliber Bodyworks, Inc. v. Superior Court*, 134 Cal. App. 4th 365, 370, 374 (2005). PAGA “prescribe[s] a civil penalty for existing Labor Code sections for which no civil penalty has otherwise been established and...allow[s] aggrieved employees...to bring a civil action to collect civil penalties for Labor Code violations previously only available in enforcement actions initiated by the State’s labor law enforcement agencies.” *Caliber Bodyworks*, 134 Cal. App. 4th at 374.

Specifically, it provides, in relevant part,

Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency [(LWDA)]...for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

[Cal. Lab. Code § 2699\(a\)](#). However, [section 2699\(g\)\(2\)](#) creates an exception to that general rule: It provides that “[n]o action shall be brought under this part for any violation of a posting, notice, agency, reporting, or filing requirement of [the Labor Code], except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.” [Cal. Lab. Code § 2699\(g\)\(2\)](#).

The California Supreme Court has explained that in bringing a PAGA action, “the aggrieved employee acts as the proxy or agent of state labor law enforcement

agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties.” *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th 993, 1003 (2009) (citations omitted). The penalties recovered in this kind of civil action generally are distributed seventy-five percent to the State and twenty-five percent to the aggrieved employee. *Caliber Bodyworks*, 134 Cal. App. 4th at 370.

*2 Section 2699.3 establishes procedural prerequisites to a civil action for PAGA remedies, which vary with the type of violation alleged. *Cal. Lab. Code* § 2699.3. An action alleging a violation of any provision listed in section 2699.5 must comply with the requirements of *section 2699.3(a)*; an action alleging a violation of any provision of Division 5 (commencing with section 6300) other than those listed in section 2699.5 must comply with the requirements of *section 2699.3(b)*; and an action alleging a violation of any provision not listed in section 2699.5 or Division 5 must comply with the requirements of *section 2699.3(c)*. *Id.* Here, as noted, plaintiff alleges a violation of *section 246(h)*, which is not listed in section 2699.5 or in Division 5, so the requirements of *section 2699.3(c)* apply if plaintiff’s action is not otherwise barred. *Section 2699.3(c)* requires an aggrieved employee to give the LWDA and the employer written notice of the alleged violation and then wait thirty-three days to allow the employer to cure the alleged violation. *Id.* § 2699.3(c)(1)–(2) (“notice and cure provisions”). If the alleged violation is not cured within the thirty-three day period, the employee may commence a civil suit. *Id.* § 2699.3(c)(2)(A).

2. The Healthy Workplaces, Healthy Families Act

In 2014, the California Legislature enacted the Healthy Workplaces, Healthy Families Act. *Section 246(h)*² reads as follows, in relevant part:

An employer shall provide an employee with written notice that sets forth the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either the employee’s itemized wage statement described in Section 226³ or in a separate writing provided on the designated pay date with the employee’s payment of wages....

Cal. Lab. Code § 246(h) (2014).

Section 248.5 allows the Labor Commissioner to bring a civil action against an employer violating the Act and to seek legal or equitable relief on behalf of the aggrieved employees, including reinstatement or injunctive relief, backpay, restitution, liquidated damages, attorney’s fees

and costs, and additional penalties. *Id.* § 248.5(e). Section 248.5 also provides “that any person or entity enforcing [the Act] on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive, or restitutionary relief, and reasonable attorney’s fees and costs.” *Id.*

B. Relevant Facts and Procedural Background

The only claim subject to defendant’s motion is plaintiff’s fifth claim for failure to provide notice of paid sick leave in violation of *California Labor Code section 246(h)*. The complaint alleges the following facts to support that claim. Plaintiff Titus was employed as a transportation driver for defendant McLane from July 15, 2015 until he was terminated on October 19, 2015. *See* Compl. ¶¶ 19, 29, Def.’s Appendix of Docs. Ex. A, ECF No. 4. As of August 15, 2015, plaintiff had worked for defendant for at least thirty days, so he was entitled to paid sick leave under *California Labor Code section 246*. *Id.* ¶ 58. However, during plaintiff’s employment, defendant did not provide him with written notice of the paid sick time he had available, as required by *section 246(h)*. *Id.* ¶¶ 59–60. In connection with his fifth claim, plaintiff seeks recovery of “compensatory, special, and general damages, including lost wages and related benefits”; “civil and statutory penalties, including those available under *Labor Code sections 226, 248.5, and 2699(f)*”; an injunction ensuring defendant’s compliance with the Labor Code; pre-judgment and post-judgment interest; and attorneys’ fees and costs. *Id.* at 11.

*3 On December 30, 2015, plaintiff filed a civil action in the San Joaquin Superior Court. *See generally* Compl. Defendant removed the action on March 25, 2016. ECF No. 1. On April 15, 2016, defendant filed the instant motion to dismiss. Mot., ECF No. 9. Plaintiff opposed the motion in part, Opp’n, ECF No. 11, and defendant replied, Reply, ECF No. 12.

At hearing, the court granted the parties leave to submit supplemental briefing “(1) addressing whether plaintiff’s PAGA claim is barred by *Cal. Lab. Code sections 2699.3 and 2699.5*, and (2) responding to plaintiff’s citation of *Willis v. California*, 22 Cal. App. 4th 287 (1994), for the first time at hearing.” Minutes, May 18, 2016, ECF No. 14. Each party subsequently filed a supplemental brief. Pl.’s Suppl. Brief, ECF No. 15; Def.’s Suppl. Brief, ECF No. 16. Both parties’ briefs went beyond the scope of the briefing allowed by the court, so the court allowed each party to file further supplemental briefing responding to the other’s respective unauthorized, new arguments. Order, Aug. 9, 2016, ECF No. 19. The court also ordered

the parties to identify any state laws other than PAGA that allow a private person to enforce the Act on behalf of the public. *Id.* Each party submitted a second supplemental brief and a list of authorities. ECF Nos. 21–24. Both parties identified the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, 17204, as the only state law other than PAGA that allows a private person to enforce the Act on behalf of the public. Pl.’s Statement, ECF No. 22; Def.’s Statement, ECF No. 24.

II. LEGAL STANDARDS

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the court’s subject matter jurisdiction. *See, e.g., Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039–40 (9th Cir. 2003). When a party moves to dismiss for lack of subject matter jurisdiction, “the plaintiff bears the burden of demonstrating that the court has jurisdiction.” *Boardman v. Shulman*, No. 12-00639, 2012 WL 6088309, at *2 (E.D. Cal. Dec. 6, 2012), *aff’d sub nom. Boardman v. C.I.R.*, 597 Fed.Appx. 413 (9th Cir. 2015). If a plaintiff lacks standing, the court lacks subject matter jurisdiction under Article III of the U.S. Constitution. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move to dismiss a complaint for “failure to state a claim upon which relief can be granted.” The motion may be granted only if the complaint “lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). Although a complaint need contain only “a short and plain statement of the claim showing that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), in order to survive a motion to dismiss this short and plain statement “must contain sufficient factual matter...to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint must include something more than “an unadorned, the-defendant-unlawfully-harmed-me accusation” or “ ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 555). Determining whether a complaint will survive a motion to dismiss for failure to state a claim is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. Ultimately, the inquiry focuses on the interplay between the factual allegations of the complaint and the dispositive issues of law in the action. *See Hishon v. King & Spalding*, 467

U.S. 69, 73 (1984).

*4 In making this context-specific evaluation, this court must construe the complaint in the light most favorable to the plaintiff and accept its factual allegations as true. *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007). This rule does not apply to “a legal conclusion couched as a factual allegation,” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)), “allegations that contradict matters properly subject to judicial notice,” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988–89 (9th Cir. 2001), or material attached to or incorporated by reference into the complaint, *see id.* A court’s consideration of documents attached to a complaint, documents incorporated by reference in the complaint, or matters of judicial notice will not convert a motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003); *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *cf. Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (noting that even though court may look beyond pleadings on motion to dismiss, generally court is limited to face of the complaint on 12(b)(6) motion).

III. DISCUSSION

Defendant moves to dismiss each claim for relief sought for the alleged violation of section 246(h): (1) “compensatory, special, and general damages, including lost wages and related benefits”; (2) civil penalties under section 226; (3) civil penalties under section 248.5 through PAGA; and (4) an injunction ensuring defendant’s compliance with the Labor Code. *See* Mot. at 1–2. The court examines each request for relief in turn.

A. Individual Damages Under Section 246(h)

Plaintiff agrees, and the court independently concludes, plaintiff cannot bring an individual claim for the alleged violation of section 246(h), because there is no private right of action to enforce that provision. Opp’n at 2 n.1; *see Cal. Lab. Code § 246(h)* (no express private right of action). Compare Assembly Bill No. 1522 at 13, 2013–2014 Regular Session, Mot. Ex. B,⁴ ECF No. 9 (original draft of section 248.5(e) allowing “a person” to bring a civil action), with Cal. Lab. Code § 248.5(e) (enacted provision omitting reference to “a person”). Accordingly, the court DISMISSES plaintiff’s individual claim and request for individual damages for a violation of section 246(h). Because amendment would be futile, the claim is dismissed without leave to amend. *See Fed.*

R. Civ. P. 15(a); *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) (a court need not grant leave to amend under Federal Rule of Civil Procedure 15(a) when amendment would be futile).

B. Penalties Under Section 226

In addition, plaintiff concedes, and the court independently concludes, it is proper to dismiss plaintiff's claim for penalties under section 226, because section 246(h) expressly precludes the recovery of penalties under section 226 for a violation of that subdivision. Opp'n at 2 n.1; see Cal. Lab. Code § 246(h) ("The penalties described in this article for a violation of this subdivision shall be in lieu of the penalties for a violation of Section 226."). Accordingly, the court also DISMISSES plaintiff's request for penalties under section 226 without leave to amend. See *Cafasso*, 637 F.3d at 1058.

C. Penalties Under PAGA

Defendant advances three arguments for dismissing plaintiff's claim for civil penalties for the alleged violation of section 246(h): (1) PAGA does not allow for recovery of civil penalties here, because section 246(h) is not listed in section 2699.5; (2) PAGA does not allow for recovery of civil penalties here, because section 246(h) is a notice requirement within the meaning of section 2699(g)(2); and (3) section 248.5(e) independently precludes the recovery of PAGA penalties, because it expressly limits the relief available to a private person who is enforcing section 246(h) on behalf of the public to only equitable, injunctive, or restitutionary relief. See Reply at 1–5; Def.'s Suppl. Brief at 1–5.

*5 Defendant's first argument incorrectly interprets PAGA. Contrary to defendant's assertion, a provision of the Labor Code need not be listed in section 2699.5 for a plaintiff to recover penalties for a violation of that provision under PAGA. As explained above, and as this court previously has concluded, whether a provision is listed in section 2699.5 merely determines whether a plaintiff must comply with the procedural requirements of section 2699.3(a), or the different requirements of 2699.3(b) or (c). See *Stoddart v. Express Servs., Inc.*, No. 12-01054, 2015 WL 5522142, at *3 (E.D. Cal. Sept. 16, 2015) ("An employee may also bring a PAGA action for violations of sections other than those listed in section 2699.5, but an employee must allow the employer an opportunity to cure the alleged violation in addition to providing notice to the LWDA." (citing Cal. Lab. Code §

2699.3(c))).

However, defendant's second argument has merit. As stated above, the text of PAGA provides that "[n]o action shall be brought under this part for any violation of a posting, notice, agency, reporting, or filing requirement of [the Labor Code], except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting." Cal. Lab. Code § 2699(g)(2). The complaint, in turn, brings a claim for PAGA penalties for a violation of section 246(h)'s requirement that an employer "provide an employee with written notice that sets forth the amount of paid sick leave available." Compl. ¶¶ 56–61 (emphasis added); *id.* at 11. There is scant case law interpreting section 2699(g)(2), but the plain statutory language indicates section 246(h) is a notice requirement within the meaning of that provision. Section 2699(g)(2) broadly excludes "any" violation of a "posting, notice, agency, reporting, or filing requirement," except for a narrow category of mandatory payroll and workplace injury reporting requirements. Plaintiff does not argue section 246(h) falls within the narrow exception-to-the-exception in the last clause, and the plain language of sections 2699(g)(2) and 246(h) suggests it does not. Section 246(h) requires an employer to provide written notice to an employee; it does not require an employer to file or report payroll or workplace injury information with or to the government agency. See *Lawrence v. Indus. Apple Inc.*, No. 14-00417, 2015 WL 5088675, at *2–3 (Cal. Sup. Ct. July 27, 2015) (Trial Order) (distinguishing "filing or reporting requirements" from "posting or notice requirements").

The court is not persuaded by plaintiff's argument that in light of PAGA's remedial purpose, the exception created in section 2699(g)(2) should be construed narrowly to cover only notices and postings advising of "static employee rights (i.e. notice of workers' compensation carrier and coverage under Labor Code 3550; notification of established paydays required by Labor Code 207)," and not those advising of changing substantive information, such as paid sick leave available under section 246. Pl.'s Further Suppl. Brief at 2. Nothing in the language of section 2699(g)(2) supports plaintiff's reading. The Legislature could have limited section 2699(g)(2)'s exception to specific notice provisions of the Labor Code. Or it could have carved out an exception-to-the-exception for notices advising employees of "changing substantive information," as it did with mandatory payroll and workplace injury reporting requirements. But instead, the Legislature chose to exclude broad categories of requirements, including all notice requirements of the Labor Code, from PAGA's enforcement scheme.

Because the text of PAGA itself precludes a private person from bringing a PAGA action to enforce [section 246\(h\)](#), the court need not reach defendant's third argument, that [section 248.5\(e\)](#) independently bars plaintiff from recovering PAGA penalties. The court notes that its interpretation of [section 2699\(g\)\(2\)](#) is consistent with the language of [section 248.5\(e\)](#). Under the court's interpretation, each statute provides that only the LWDA may recover civil penalties for a violation of [section 246\(h\)](#). See *Cal. Lab. Code § 248.5(e)* (providing that the Labor Commissioner may bring a civil action for specified civil penalties, but then stating that "any person or entity enforcing this article on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive, or restitutionary relief, and reasonable attorney's fees and costs").

*6 In summary, [section 2699\(g\)\(2\)](#) bars plaintiff as a matter of law from bringing a PAGA action for the alleged violation of [section 246\(h\)](#)'s notice requirement. Accordingly, the court DISMISSES plaintiff's request for penalties under [sections 248.5](#) and [2699\(f\)](#) without leave to amend. See *Cafasso*, 637 F.3d at 1058.

D. Injunctive Relief

Plaintiff's request for injunctive relief lacks a cognizable legal theory. As explained above, there is no private right of action to directly enforce [section 246\(h\)](#). In addition, plaintiff cannot seek injunctive relief on behalf of the LWDA through a PAGA action because, as discussed above, [section 2699\(g\)\(2\)](#) entirely bars plaintiff from bringing a PAGA action for a violation of [section 246\(h\)](#)'s notice requirement.⁵

The complaint invokes no other statutory framework for seeking injunctive relief. Even if plaintiff could amend the complaint to identify a different statutory pathway, plaintiff, a former employee, would lack standing to seek

injunctive relief. See *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004) ("In the context of injunctive relief, the plaintiff must demonstrate a real or immediate threat of an irreparable injury [to have Article III standing]." (citation and emphasis omitted)); see also *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011) (certain plaintiffs, as former employees, did not have standing to pursue injunctive relief in an employment action).

Because amendment would be futile, the court DISMISSES plaintiff's request for injunctive relief without leave to amend. See *Cafasso*, 637 F.3d at 1058.

IV. CONCLUSION

For the foregoing reasons, the court GRANTS defendant's motion to dismiss. Accordingly, the court DISMISSES plaintiff's fifth claim for failure to provide notice of paid sick leave in violation of [section 246\(h\)](#) without leave to amend. This leaves the complaint's first through fourth claims for various violations of the California Fair Employment and Housing Act, *Cal. Gov't Code § 12940 et seq.*, on which the case proceeds.

In addition, plaintiff has not responded to the court's August 9, 2016 order to show cause why the "Doe" defendants should not be dismissed. ECF No. 19. Accordingly, the court DISMISSES the "Doe" defendants.

IT IS SO ORDERED.

DATED: September 13, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 4797497, 2016 Wage & Hour Cas.2d (BNA) 300,414

Footnotes

¹ All statutory citations are to California authorities unless otherwise specified.

² The California Legislature recently amended [section 246](#). 2015 California Senate Bill No. 3, California 2015–2016 Regular Session (filed Apr. 4, 2016). The amendment did not alter the relevant language, but it relabeled subsection "(h)" as subsection "(i)." *Id.* Because the complaint and the parties address the prior version of the Act, and to avoid confusion, the court refers to this provision as subsection "(h)" throughout this order, both with respect to the alleged past violations and with respect to the requested injunctive relief prohibiting future violations.

- 3 Section 226 requires employers to furnish their employees with accurate itemized wage statements that show specific information, including (1) gross wages earned, (2) total hours worked, (3) number of piece-rate units earned and applicable piece rate, (4) all deductions, (5) net wages earned, (6) inclusive dates of the pay period, (7) name of the employee and last four digits of the employee's social security number, (8) name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect and the corresponding number of hours worked at each hourly rate. [Cal. Lab. Code § 226\(a\)](#).
- 4 The court takes judicial notice of Assembly Bill No. 1522, as introduced on January 16, 2014, because it “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned,” [Fed. R. Evid. 201\(b\)\(2\)](#).
- 5 The court here does not decide whether plaintiff's qui tam theory of standing would otherwise have merit. *See* Opp'n at 5–6 (arguing plaintiff can seek injunctive relief on behalf of the LWDA, which is the real party in interest in a PAGA action); Pl.'s Suppl. Brief at 4–5.

Exhibit 8

2020 WL 5846464

Only the Westlaw citation is currently available.

United States District Court, C.D. California.

Cesar RAMIREZ

v.

C AND J WELL SERVICE, INC., et al

Case No. CV 20-535 PSG (SSx)

Filed 03/27/2020

Attorneys and Law Firms

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Proceedings (In Chambers): Order GRANTING IN PART and DENYING IN PART Defendant's motion to dismiss without prejudice and DENYING the motion to strike.

The Honorable Philip S. Gutierrez, United States District Judge

*1 Before the Court is Defendant C and J Well Service, Inc.'s ("Defendant") motion to dismiss and/or strike Plaintiff Cesar Ramirez's ("Plaintiff") First Amended Complaint. *See* Dkt. # 11 ("Mot"). Plaintiff has opposed the motion, *see* Dkt. # 12 ("Opp."), and Defendant replied, *see* Dkt. # 13 ("Reply"). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. After considering the moving, opposing, and reply papers, the Court **GRANTS IN PART and DENIES IN PART** the motion to dismiss without prejudice, and **DENIES** the motion to strike.

I. Background

This is a putative wage and hour class action. Plaintiff was a crew worker for Defendant, an oil-well provider, from January 2018 through May 2019. *See First Amended Complaint*, Dkt. # 1-1 ("FAC"), ¶ 6.

Plaintiff alleges that Defendant frequently and routinely forced him to work off the clock and start his shifts before he was scheduled to. *See id.* ¶ 18. Plaintiff also only received 60 percent of his pay for time spent traveling and was not compensated for all hours spent working, including applicable overtime hours. *See id.* Defendant also failed to maintain a legally compliant meal and rest period policy and practice, as Plaintiff and other employees were unable to take meal periods and never received second meal periods for shifts of over ten hours. *See id.* ¶¶ 19-20. Finally, Plaintiff and other employees were required to use their personal cell phones for work purposes and were promised a \$250 per diem for food, lodging, and travel expenses. *See id.* ¶ 23. However, Defendant never reimbursed Plaintiff or the other employees for these expenses. *See id.*

Defendant also failed to comply with several reporting requirements and its obligations upon termination. Specifically, Defendant did not provide Plaintiff with proper notice of accrued sick leave. *See id.* ¶ 24. Because Defendant was not paying Plaintiff all wages owed under state overtime laws, Defendant was also providing Plaintiff with inaccurate wage statements. *See id.* ¶¶ 26-29. Upon separation, Defendant failed to pay Plaintiff for his hours worked during his final pay period, sending him an ADP Aline Pay Card that was empty. *See id.* ¶ 25. Defendant also failed to pay Plaintiff his unused sick leave and vacation time. *See id.* ¶¶ 24-26.

On November 18, 2019, Plaintiff filed this case in Ventura Superior Court. *See Complaint*, Dkt. 1-1. Plaintiff filed his First Amended Complaint ("FAC"), the operative complaint, on December 12, 2019. *See generally FAC*. Plaintiff brings the following ten causes of action:

First Cause of Action: Failure to Pay All Wages, Including Overtime Wages. *Id.* ¶¶ 38-51.

Second Cause of Action: Meal Period Violations. *Id.* ¶¶ 52-59.

Third Cause of Action: Rest Period Violations. *Id.* ¶¶ 60-66.

Fourth Cause of Action: Failure to Reimburse for Required Business Expenses. *Id.* ¶¶ 67 72.

Fifth Cause of Action: Failure to Pay Accrued Vacation Pay Upon Separation. *Id.* ¶¶ 73 77.

Sixth Cause of Action: Violation of California Sick Pay Requirements. *Id.* ¶¶ 78 81.

*2 Seventh Cause of Action: Late Pay and Waiting Time Penalties. *Id.* ¶¶ 82 89.

Eighth Cause of Action: Failure to Provide Accurate Itemized Wage Statements. *Id.* ¶¶ 90 99.

Ninth Cause of Action: Unfair Practice under the Unfair Competition Act (“UCL”). *Id.* ¶¶ 100 08.

Tenth Cause of Action: Statutory Penalties pursuant to Private Attorneys General Act (“PAGA”), Cal. Lab. Code §§ 2699 et seq. *Id.* ¶¶ 109 13.

Plaintiff seeks to certify the following class: “All current and former hourly, non-exempt employees of Defendants [sic] in California, at any time from four years prior to the initiation of this action until the date of certification.” *Id.* ¶ 34. Plaintiff also seeks to certify various sub-classes. *Id.*

On January 17, 2020, Defendant removed the action to this Court. *See Notice of Removal*, Dkt. # 1 (“NOR”). Defendant now moves to dismiss the FAC and strike many of the allegations therein. *See generally Mot.*

II. Legal Standard

A. Motion to Dismiss

To survive a motion to dismiss under Rule 12(b)(6), a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City & Cty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. However, “[t]hreadbare

recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Accordingly, “for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

B. Motion to Strike

Rule 12(f) states that a district court “may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” *Fed. R. Civ. P.* 12(f); *First Nat. Ins. Co. of Am. v. Peralta Cmty. Coll. Dist.*, No. 12-CV-5943 JSC, 2013 WL 622944, at *7 (N.D. Cal. Feb. 15, 2013). Its main function is “to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). However, “[m]otions to strike are generally disfavored, and ‘should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation’” *Holmes v. Elec. Document Processing, Inc.*, 966 F. Supp. 2d 925, 930 (N.D. Cal. 2013) (quoting *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004)). When ruling on a motion to strike, just as with a motion to dismiss, the court should view the pleading in the light most favorable to the nonmoving party. *Id.* (quoting *Platte*, 352 F. Supp. 2d at 1057).

III. Discussion

A. Motion to Dismiss

i. First Cause of Action: Failure to Pay Wages Including Overtime

*3 Plaintiff’s First Claim for Relief is for failure to pay wages including overtime in violation of California Labor Code sections 1194 and 1197. In the context of the Federal Labor Standards Act, the Ninth Circuit has held that in order to state a claim for failure to pay overtime wages a plaintiff must specify a particular work week in which they were not paid properly. *See Landers v. Quality*

Commc'ns, Inc., 771 F.3d 638, 646 (9th Cir. 2014) (“[Plaintiffs] should be able to allege facts demonstrating there was at least one workweek in which they worked in excess of forty hours and were not paid overtime wages.”); *Boon v. Canon Bus. Sols., Inc.*, 592 Fed. App’x. 631, 632 (9th Cir. 2015) (“*Landers* also held that plaintiffs in these types of cases must allege facts demonstrating that there was at least one workweek in which they worked in excess of forty hours and were not paid overtime wages.”). This holding has been applied to cases brought under the California Labor Code as well. See *Tan v. GrubHub, Inc.*, 171 F. Supp. 3d 998, 1006 (N.D. Cal. 2016) (“Although *Landers* discussed FLSA claims, its reasoning applies to California Labor Code claims as well. Plaintiffs give the Court no reason to depart from the well-reasoned logic of these other courts in extending *Landers* to various Labor Code claims.”) (citation omitted); *Soratorio v. Tesoro Ref. & Mktg. Co., LLC*, No. CV 17-1554 MWF (RAOx), 2017 WL 1520416, at *5 (C.D. Cal. Apr. 26, 2017).

Defendant makes two arguments in support of dismissing this cause of action. First, Defendant contends that Plaintiff insufficiently pleaded these claims under *Landers*. See *Mot.* 3:16 5:8. Second, Defendant argues that Plaintiff’s claims for travel time are barred because the company may pay its employees different rates for different tasks so long as the rates are above the minimum wage. See *id.* 5:9 6:6. Plaintiff responds that because *Landers* does not require detailed factual allegations of unpaid wages, he sufficiently pleaded this claim. See *Opp.* 6:12 26. Taken together, his allegations about pre and post shift work, along with underpayment for travel time, state a plausible claim for unpaid wage relief. See *id.*

The Court agrees with Defendant that Plaintiff has not pleaded this claim in conformance with *Landers*. The Ninth Circuit unmistakably held in *Landers* that an employee “should be able to allege facts demonstrating there was at least one workweek in which they worked in excess of forty hours and were not paid overtime wages.” *Landers*, 771 F.3d at 646. While Plaintiff here alleges that Defendant “frequently” required employees to work off the clock pre and post shift, Plaintiff’s allegations must be more specific in order to survive a motion to dismiss. See *FAC* ¶ 41. Although Plaintiff need not allege overtime and other unpaid wages “with mathematical precision,” Plaintiff must describe specific instances of missing wages in greater detail. See *Landers*, 771 F.3d at 646. Therefore, Plaintiff’s first claim fails as pleaded.

Plaintiff’s allegations about underpayment for travel time are also insufficient to state a plausible claim for unpaid wages. Plaintiff seems to argue both that Defendant’s

decision to pay less for travel time is unlawful on its own and that this fact, in combination with Defendant’s other violations, leads to a reasonable inference of unpaid wages. See *Opp.* 12:1 14. However, the Ninth Circuit has held that employers are free to set different pay rates so long as “minimum wages and overtime payments are paid when due.” *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 804 (9th Cir. 2010). Plaintiff does not cite any authority to the contrary. His second, broader argument fails for the reasons articulated above: Plaintiff’s allegations are not specific enough under *Landers*, even when considered together.

Accordingly, the Court **GRANTS** Defendant’s motion to dismiss the first cause of action.

ii. Second and Third Causes of Action: Meal and Rest Period Violations

Plaintiff’s second and third causes of action are based on alleged violations of California Labor Code sections 226.7 and 512, which require an employer to provide an employee with a thirty-minute meal period if the employee works at least five hours and a ten-minute rest break for every four hours the employee works. *Cal. Labor Code* §§ 226.7, 512; *Indus. Welfare Comm’n*, *Wage Order* § 12(A). The obligation to provide a meal period is generally satisfied if the employer “relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30 minute break, and does not impede or discourage them from doing so.” *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1040 (2012).

*4 Defendant argues that these claims fail because Plaintiff merely recites their statutory elements, which is insufficient to support his putative class action. See *Mot.* 6:17 20. It also contends that there are no allegations in the FAC suggesting that Plaintiff was prevented from taking his meal or rest breaks. See *id.* 7:1 8:20. Plaintiff responds that he has sufficiently pleaded these causes of action because he makes concrete factual assertions about meal and rest periods that he missed “on many occasions.” See *Opp.* 13:3 20. According to Plaintiff, Defendant demands “exacting specificity that is not required under Rule 8.” See *id.* 14:28 15:1.

Plaintiff makes allegations that this Court has found insufficient to sustain meal and rest period claims. See, e.g., *Dawson v. Hitco Carbon Composites, Inc.*, No. CV16-7337 PSG (FFMx), 2017 WL 7806358, at *5 (C.D. Cal. May 5, 2017). Plaintiff only indicates that he and

other class members missed or experienced shortened meal and rest breaks. *See FAC* ¶¶ 19-20. But, he does not state that Defendant actively prevented or discouraged him and other employees from taking their breaks. Plaintiff does not, for example, allege that Defendant ordered him to work through breaks, or that the duties had to be completed before a break could be taken, or that duties were assigned as he prepared to take a break. *See Lopez v. Wendy's Int'l, Inc.*, No. CV 11-00275 MMM JCX, 2011 WL 6967932, at *6 (C.D. Cal. Sept. 19, 2011) (“An employer at a busy restaurant who insists that employees complete assigned tasks does not, without more, impede, discourage, or dissuade employees from taking meal breaks and rest periods.”); *Christie v. Tuesday Morning, Inc.*, No. CV 14-6505 PSG (AGRx), 2015 WL 12781053, at *4 (C.D. Cal. May 27, 2015) (dismissing meal break claims where the pleading failed to “distinguish between actively discouraging employees from taking breaks [which constitutes a violation of law] and failing to ensure that they took breaks [which does not necessarily establish illegality].”); *Gonzalez v. Fallanghina, LLC*, No. CV 16-1832 MEJ, 2016 WL 3951655, at *6 (N.D. Cal. July 22, 2016) (dismissing meal break claims because allegations failed to plead specific facts about what instructions Plaintiff was given, and by whom, that would have prevented plaintiff from taking meal breaks); *cf. Miranda v. Coach, Inc.*, No. CV 14 2031 JD, 2015 WL 636373, at *2 (N.D. Cal. Feb. 13, 2015) (finding allegations that defendant had a uniform policy of checking every employee’s bags, which counted against their required meal break time and was uncompensated, sufficient to state a claim).

As such, the Court **GRANTS** Defendant’s motion to dismiss the second and third causes of action.

iii. Fourth Cause of Action: Failure to Reimburse Business Expenses

Plaintiff alleges that Defendant failed to reimburse expenses under California Labor Code § 2802. Under California Labor Code § 2802:

[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

Cal. Labor Code § 2802(a). Similar to its attack on Plaintiff’s other claims, Defendant argues that Plaintiff

has not pleaded this cause of action with requisite specificity. *See Mot.* 10:3 12:5.

Here, Plaintiff alleges that he was required to travel for work and was required to communicate with his employer using his personal cell phone. *See FAC* ¶ 23. While Plaintiff and class members were promised that Defendant would reimburse them at \$250 per day for these expenses, Defendant failed to do so, and employees were left paying for their work-related travel expenses out of their own pockets. *See id.* The Court finds that these allegations are sufficient. *See Beal v. Liufetouch, Inc.*, No. 10-8454, 2011 WL 995884, at *2 (C.D. Cal. Mar. 15, 2011) (finding the allegations that defendants “required Plaintiff and class members to use personal cellular telephones for business purposes” and that “Defendants did not provide Plaintiff and Class members any reimbursement for use of their personal cellular telephones for business purposes” sufficient); *Lopez*, 2011 WL 6967932, *13 (granting a motion to dismiss where plaintiff failed to allege that she paid for a uniform or equipment); *cf. Nelson v. Dollar Tree Stores, Inc.*, No. 2:11-CV-01334 JAM-CMK, 2011 WL 3568498, at *2 (E.D. Cal. Aug. 15, 2011) (“Indeed, the Complaint fails to explain how or when Defendant failed to reimburse Plaintiff, or any other potential class members, for business expenses; the specific nature of the business expenses at issue; and whether and how Defendant not only acquired knowledge that such expenses were incurred by Plaintiff, or any other class members, but also willfully refused to reimburse such expenses.”).

***5** Therefore, Defendant’s motion to dismiss Plaintiff’s fourth cause of action is **DENIED**.

iv. Fifth Cause of Action: Failure to Pay Vacation Time Owed

Next, Plaintiff alleges that Defendant failed to pay him his accrued vacation time upon termination. *See FAC* ¶ 22. Under Cal. Lab. Code § 227.3, an employee who is discharged must be paid for all accrued vacation at the time of their termination. Defendant argues that while Plaintiff may have sufficiently pleaded this claim with respect to his own vacation time, he has failed to do so on behalf of a putative class. *See Mot.* 12:23 13:14.

The Court agrees with Defendant. Plaintiff alleges that Defendant refused to pay him 23.36 hours of unused vacation upon his termination. *See FAC* ¶ 22. While this allegation is sufficient to state his own claim for failure to pay vacation time, it is not sufficient on a class-wide

basis. Aside from the conclusory allegation that “other employees ... were also denied ... unused vacation time and pay,” Plaintiff alleges no facts to demonstrate that any member of the putative class had a similar experience. For instance, the FAC does not allege any facts showing that Defendant had policies or practices on vacation time such that common questions of fact and/or law could provide class-wide answers and would be susceptible to class-wide proof. *See Byrd v. Masonite Corp.*, No. EDCV 16-35 JGB (KKX), 2016 WL 756523, at *4 (C.D. Cal. Feb. 25, 2016).

Ultimately, the Court **GRANTS** Defendant’s motion to dismiss this claim as to the class.

v. Sixth Cause of Action: Violation of California Sick Pay Requirements

Plaintiff seeks PAGA penalties for violations of California’s sick pay law, codified as [Cal. Lab. Code § 246\(i\)](#). Specifically, Plaintiff alleges that Defendant failed to provide sick days and further failed to distribute and maintain required documentation as to how many sick days were available. *See FAC* ¶ 79. Defendant argues that Plaintiff cannot seek PAGA penalties under this provision because PAGA expressly exempts actions brought for violation of a notice requirement, and [Cal. Lab. Code § 246\(i\)](#) is a notice requirement within the meaning of PAGA. *See Mot.* 13:23 25.

The Court dismisses this claim because Plaintiff cannot bring it under PAGA. The text of PAGA provides that “[n]o action shall be brought under this part for any violation of a posting, notice, agency, reporting, or filing requirement of [the Labor Code], except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.” [Cal. Lab. Code § 2699\(g\)\(2\)](#). Here, the FAC brings a claim for PAGA penalties for a violation of [section 246\(i\)](#)’s requirement that an employer provide an employee with notice of sick time. *See FAC* ¶ 79. PAGA excludes “any” violation of a “posting, notice, agency, reporting, or filing requirement,” except for a narrow category of mandatory payroll and workplace injury reporting requirements of which the sick pay law is not a part. *See Titus v. McLane Foodservice, Inc.*, No. 2:16-CV-00635 KJM EFB, 2016 WL 4797497, at *5 (E.D. Cal. Sept. 14, 2016). Therefore, because [section 246\(i\)](#) requires an employer to provide written notice to an employee, and it does not require an employer to file or report payroll or workplace injury information with or to the government agency, Plaintiff cannot bring this claim under PAGA for civil penalties.

See id.; *see also Segal v. Aquent LLC*, No. 18CV346-LAB (JLB), 2018 WL 4599754, at *7 (S.D. Cal. Sept. 24, 2018) (striking a [§ 246\(i\)](#) claim “because notice and posting requirements are not bases for a PAGA action”).

*6 Accordingly, the Court **GRANTS** Defendant’s motion to dismiss this claim.

vi. Seventh Cause of Action: Late Final Wage Payment

California law controls the manner of the payment of final wages upon the discharge or resignation of an employee. [Cal. Lab. Code §§ 201, 202](#). If an employer “willfully fails to pay” in accordance with [Sections 201](#) or [202](#), the employer is subject to statutory penalties; known as “waiting time” penalties. *Id.* § 203(a).

In the FAC, Plaintiff alleges that “Defendants willfully failed to pay former employees in the Class their earned and unpaid wages, either at the time of their discharge or within seventy-two (72) hours of quitting.” *See FAC* ¶ 84. Plaintiff further explains that while he received a letter claiming that his final wages were on an ADP Aline Pay Card, the card was empty. *See id.* ¶ 87. Defendant argues that this claim does not meet the Rule 8 pleading standard because it is devoid of supporting factual allegations. *See Mot.* 14:10 23.

The Court concludes that Plaintiff has sufficiently pleaded how he failed to receive his allegedly unpaid wages, but that it must dismiss this claim because the underlying claim is insufficiently pleaded. Plaintiff specifically alleges that he received an empty ADP Aline Pay Card that purportedly contained his unpaid wages. *See FAC* ¶ 87. However, because this claim is partially based on Plaintiff’s claimed “unpaid wages,” it is derivative of the first cause of action for unpaid overtime wages. Therefore, because the Court has held that the first claim is insufficiently pleaded, this accompanying claim is insufficiently pleaded as well. *See Dawson*, 2017 WL 7806358, at *5; *Lopez v. Aerotek, Inc.*, No. SACV1400803 CJC JCGX, 2015 WL 4504691, at *2 (C.D. Cal. July 23, 2015) (dismissing Plaintiff’s § 203 claim where the complaint merely alleged that “Defendants willfully failed to pay their workers accrued wages due promptly upon separation, as required by [Code sections 201](#) and [202](#),” and failed to even generally allege what wages were earned and paid at the time of termination).

As such, the Court **GRANTS** Defendant’s motion to dismiss this claim.

vii. Eighth Cause of Action: Inaccurate Wage Statements

Plaintiff alleges that Defendant “intentionally and willfully” failed to furnish to him and the putative class members itemized wage statements that include the accurate number of hours worked and applicable hourly rates as required by California Labor Code section 226(a) (“§ 226(a)”). FAC ¶¶ 26-29. A claim for damages under Section 226(e) requires a showing of three elements: (1) a violation of Section 226(a); (2) that is “knowing and intentional;” and (3) a resulting injury. *Willner v. Manpower Inc.*, 35 F. Supp. 3d 1116, 1128 (N.D. Cal. 2014); *Price v. Starbucks, Inc.*, 192 Cal. App. 4th 1136, 1142 (2011).

Plaintiff fails to properly plead this claim because he does not allege that Defendant failed to accurately report the wages actually paid to him in the corresponding pay period. “The purpose of section 226 is to ‘document the paid wages to ensure the employee is fully informed regarding the calculation of those wages.’” *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1337 (2018). Here, Plaintiff has alleged only that the amount he was paid was incorrect because Defendant omitted the unpaid wages from the first three claims, not that the wage statements inaccurately reflected the wages he was paid at the time. See FAC ¶¶ 26-29; *Sherman v. Schneider Nat’l Carriers, Inc.*, No. CV 18-08609-AB (JCX), 2019 WL 3220585, at *5 (C.D. Cal. Mar. 6, 2019) (“In fact, Plaintiff’s opposition implicitly concedes that the wage statements accurately stated the wages actually paid. Accordingly, the wage statements do not violate § 226(a) even if the amount paid was incorrect.”). Therefore, this claim fails as pleaded because Plaintiff does not allege that the wage statements he was given were inaccurate based on the wages he was paid at the time.

*7 As such, the Court **GRANTS** Defendant’s motion to dismiss this claim.

viii. Ninth Cause of Action: UCL Claim

In his ninth cause of action, Plaintiff asserts a violation of the UCL, which prohibits “any unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. Under the “unlawful” prong of the UCL, which Plaintiff invokes in his allegations, “section 17200 borrows violations of other laws and treats them as

unlawful practices that the unfair competition law makes independently actionable.” *Velazquez v. GMAC Mortg. Corp.*, 605 F. Supp. 2d 1049, 1068 (C.D. Cal. 2008); *Cel Tech Commc’ns, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999). Where a plaintiff cannot state a claim under the “borrowed” law, he cannot state a UCL claim either. See, e.g., *Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001); *Pellerin v. Honeywell Int’l, Inc.*, 877 F. Supp. 2d 983, 992 (S.D. Cal. 2012) (“A UCL claim must be dismissed if the plaintiff has not stated a claim for the predicate acts upon which he bases the claim.”).

Here, Plaintiff alleges that Defendant violated the UCL when it engaged in the wage and hour violations that underlie Plaintiff’s other claims. FAC ¶¶ 100-08. Thus, Plaintiff’s UCL claim is derivative of his other causes of action. Because the Court finds that Plaintiff has sufficiently pleaded a claim for unreimbursed expenses (fourth cause of action), Plaintiff has sufficiently pled a claim under the “unlawful” prong of the UCL as to this cause of action.

Accordingly, the Court **DENIES** Defendant’s motion to dismiss Plaintiff’s ninth cause of action insofar as it premised on Plaintiff’s fourth cause of action, but **GRANTS** the motion insofar as it is premised on Plaintiff’s other causes of action.¹

ix. Tenth Cause of Action: PAGA Claim

Plaintiff’s final claim is for civil penalties under PAGA. See FAC ¶¶ 109-13. PAGA provides that any civil penalty provided for by the Labor Code, which is assessed and collected by the Labor and Workforce Development Agency, “may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees.” Cal. Lab. Code § 2699.

Plaintiff’s PAGA claim is derivative of his other wage and hour claims. As such, the Court **DENIES** Defendant’s motion to dismiss Plaintiff’s tenth cause of action insofar as it premised on Plaintiff’s fourth cause of action, but **GRANTS** the motion insofar as it is premised on Plaintiff’s other causes of action.

B. Motion to Strike

*8 Defendant moves to strike Plaintiff's prayer for attorneys' fees under Cal. Lab. Code § 218.5, civil penalties under Cal. Lab. Code § 558, and for an injunction. See *Reply* 12. Defendant also moves to strike allegations related to Cal. Lab. Code § 1174 and Cal. Lab. Code § 204 because, according to Defendant, Plaintiff cannot bring them as a matter of law. See *id.*

However, striking a claim or remedy as unavailable as a matter of law is not a proper subject for a 12(f) motion. See *Whittlestone*, 618 F.3d at 976 (9th Cir. 2010) (holding that "Rule 12(f) of the Federal Rules of Civil Procedure does not authorize a district court to dismiss a claim for damages on the basis it is precluded as a matter of law"); see also *Cardinale v. La Petite Acad., Inc.*, 207 F. Supp. 2d 1158, 1163 (D. Nev. 2002) ("The inclusion of claims for attorneys' fees in the Complaint does not constitute an 'insufficient defense or any redundant, immaterial, impertinent, or scandalous matter' such that a motion to strike pursuant to Rule 12(f) is proper."); *Finuliar v. BAC Home Loans Servicing, L.P.*, No. 11 02629, 2011 WL 4405659, at *14 (N.D. Cal. Sept. 21, 2011) (denying a Rule 12(f) request to strike a request for attorneys' fees under *Whittlestone*); *Rosenstein v. Pratt*, No. 15CV2183 JM (JLB), 2016 WL 308593, at *4 (S.D. Cal. Jan. 25, 2016) ("[A] motion to strike Plaintiff's demand for injunction is not the appropriate procedural vehicle."). Here, the Court will not grant Defendant's motion to strike because it seeks to attack these allegations and remedies on the merits, rather than because they contain "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." See Fed. R. Civ. P. 12(f).

Accordingly, Defendant's motion to strike is **DENIED**.

Footnotes

- 1 Defendant raises the additional argument Plaintiff's claims for failing to provide meal and rest breaks, failing to timely pay all final wages, failing to timely pay wages during employment, failing to issue accurate wage statements, and failing to keep complete payroll records may not be sought as restitution under the UCL. See *Mot.* 22:18 24:3. Because Plaintiff has yet to adequately plead these claims, the Court finds it premature to address the viability of this argument at this time.

IV. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. See *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Courts consider whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. See *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper "unless it is clear that the complaint could not be saved by any amendment." *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

The Court has concluded that many of Plaintiff's claims are inadequately pleaded. However, at this early stage of the proceedings, the Court is not convinced that Plaintiff cannot cure these defects via amendment. Accordingly, the Court **GRANTS** Plaintiff leave to amend.

V. Conclusion

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion to dismiss and **DENIES** the motion to strike. The Court also **GRANTS** Plaintiff leave to amend his claims. Any amended complaint must be filed no later than **April 27, 2020** or the dismissed claims will be dismissed with prejudice.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 5846464

Exhibit 9

2018 WL 4599754

Only the Westlaw citation is currently available.
United States District Court, S.D. California.

[Elizabeth SEGAL](#), individually, and on
behalf of herself and all others similarly
situated, Plaintiffs,

v.

AQUENT LLC, a Massachusetts limited
liability company, et al., Defendants.

CASE NO. 18cv346-LAB (JLB)

Signed 09/24/2018

Attorneys and Law Firms

[Thomas D. Rutledge](#), Law Office of Thomas D. Rutledge,
San Diego, CA, for Plaintiffs.

[Olivia Jee Un Wada](#), [Timothy M. Rusche](#), [Elizabeth Mary Levy](#), Seyfarth Shaw LLP, Los Angeles, CA, for
Defendants.

ORDER GRANTING INDIVIDUAL DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION [Dkt. 30];

ORDER GRANTING IN PART AND DENYING IN PART CORPORATE DEFENDANTS' MOTION TO DISMISS AND/OR STRIKE [Dkt. 29]

Honorable [Larry Alan Burns](#), United States District Judge

*1 Plaintiff Elizabeth Segal sued Aquent LLC and Scout Exchange, LLC ("Corporate Defendants") as well as several individual officers of those companies ("Individual Defendants"). The Individual Defendants now move to dismiss Segal's complaint for lack of personal jurisdiction and the Corporate Defendants move to dismiss and/or strike portions of the complaint under [FRCP 12\(b\)\(6\)](#) and [12\(f\)](#). For the reasons below, the Individual Defendants' Motion is **GRANTED** and the

Corporate Defendants' Motion is **GRANTED** in part and **DENIED** in part.

1. Background

On April 4, 2018, Segal filed a Second Amended Complaint ("SAC") against the various Defendants, alleging a variety of wage and hour violations on behalf of herself and a putative class consisting of all the Corporate Defendants' current and former employees who worked in California during the last four years. The Corporate Defendants' business model involves hiring individuals like Segal as employees and assigning them out to companies looking to hire short-term workers. Dkt. 20 at ¶ 22. The companies needing labor, in turn, pay the Corporate Defendants a fee for the placement. Dkt. 20 at 26. While Plaintiff and her fellow employees were paid by Corporate Defendants and performed their work remotely, their hours were largely determined by the companies they were assigned to. *Id.* at ¶ 32. The central allegation of Plaintiff's complaint is that Corporate Defendants' recruiters misrepresented the number of hours Plaintiff and her fellow employees would receive from their assigned companies, which led to her being unable to take on other paying work. *Id.* at ¶ 33-34. Plaintiff further claims that she was required to "report to work" via daily teleconference, regardless of whether there was work or not. *Id.* at ¶ 35-41. Plaintiff alleges that these misrepresentations and reporting requirements violate various provisions of California law.

In addition to the Corporate Defendants, Plaintiff also sued John Chuang, Doug Kaplan, Cheryl King, and Ken Lazarus¹, each of whom is a senior officer of either Aquent or Scout. *Id.* at ¶ 10-13. Segal's SAC pleads no facts about these Individual Defendants other than their corporate titles, but she argues that their positions with the Corporate Defendants make them an "other person acting on behalf of an employer," subjecting them to personal liability under [Labor Code §§ 558](#) and [558.1](#). *Id.*

2. Individual Defendants' Motion to Dismiss for Lack of Personal Jurisdiction

Each of the remaining Individual Defendants move to dismiss Plaintiff's SAC for lack of personal jurisdiction, alleging that there are insufficient contacts between the Defendants and California to permit this Court to exercise

jurisdiction over them. [FRCP 12\(b\)\(2\)](#).

When a defendant moves to dismiss for lack of personal jurisdiction, the burden of proving personal jurisdiction rests with the plaintiff. [Pebble Beach Co. v. Caddy](#), 453 F.3d 1151, 1154 (9th Cir. 2006). Personal jurisdiction over each defendant must be assessed individually. [Calder v. Jones](#), 465 U.S. 783, 784 (1984). Courts may not assume the truth of allegations in a pleading when those allegations are contradicted by affidavit. [Data Disc, Inc. v. Systems Technology Associates, Inc.](#), 557 F.2d 1280, 1284 (9th Cir. 1977).

*2 In considering personal jurisdiction in cases where no federal statute governing personal jurisdiction applies, the Court applies the law of the state in which the district court is located. [Schwarzenegger v. Fred Martin Motor Co.](#), 374 F.3d 797, 800 (9th Cir. 2004). California's long-arm statute is coextensive with federal due process, so jurisdictional analysis for federal due process controls. *Id.* at 801. Personal jurisdiction is only proper where the defendant has "minimum contacts" with the forum state such that exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." [International Shoe Co. v. Washington](#), 326 U.S. 310, 316 (1945).

Personal jurisdiction can be either general or specific. [Goodyear Dunlop Tires Operations, S.A. v. Brown](#), 564 U.S. 915, 919 (2011). General personal jurisdiction is present where a defendant's ties to a state are so "continuous and systematic" as to render the defendant essentially at home in the forum state. [International Shoe](#), 326 U.S. at 317. A defendant who is an individual is essentially at home in the state in which the defendant is domiciled. [Goodyear](#), 564 U.S. at 924. Domicile requires a physical presence and an intent to stay in the state indefinitely. [Rice v. Thomas](#), 64 Fed.Appx. 628, 628-29 (9th Cir. 2003).

Specific personal jurisdiction in the Ninth Circuit is analyzed through a three-prong test. [Schwarzenegger](#), 374 F.3d at 802. The first prong requires that the defendant have purposefully directed his activities at the forum state (in tort cases) or purposefully availed himself of the benefits of the forum state (in contract cases). *Id.* The second prong requires that the claim arise out of the defendant's forum-related activity. *Id.* The third prong requires that the exercise of personal jurisdiction be reasonable. *Id.* The first prong must follow an effects test, under which the defendant must commit an intentional act, the act must be expressly aimed at the forum state, and the act must cause harm that the defendant knows is likely to be suffered in the forum state. [Dole Food Co.](#),

[Inc. v. Watts](#), 303 F.3d 1104, 1111 (9th Cir. 2002). The second prong must satisfy a but-for causation test. [Bancroft & Masters, Inc. v. Augusta Nat. Inc.](#), 223 F.3d 1082, 1088 (9th Cir. 2000).

A defendant's status as an employee does not shield them from liability for intentionally tortious acts. [Calder](#), 465 U.S. at 790. However, mere association with a corporation that causes injury is not sufficient to permit personal jurisdiction without a further reason for the court to disregard the corporate form. [Davis v. Metro Productions, Inc.](#), 885 F.2d 515, 520 (9th Cir. 1989).

a. John Chuang

John Chuang is the Chairman of Aquent. Dkt. 30-2. He states in an affidavit that he is a citizen and resident of Massachusetts. *Id.* He does not maintain a residence in California, does not own any property in California, and does not intend to reside in California. *Id.*

Plaintiff alleges that general personal jurisdiction is proper over Chuang because Aquent LLC does business in California. Even if "doing business" were the standard for jurisdiction over corporate entities (it is not), Aquent's activity does not justify personal jurisdiction over its employees. See [Keeton v. Hustler Magazine, Inc.](#), 465 U.S. 770, 781 (1984) ("[J]urisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him...."). Chuang stated in affidavit that he was not involved with the decisions leading to the alleged tort, and his relationship to the company is not in itself sufficient to permit jurisdiction. Plaintiff offered no evidence to contradict Chuang's affidavit, and the allegations in the complaint cannot be taken as true because they are contradicted by Chuang's affidavit. [Data Disc, Inc.](#), 557 F.2d at 1284. General personal jurisdiction over Chuang is therefore improper because he is not domiciled in California. Aquent's general business activity does not affect the analysis.

*3 Specific personal jurisdiction over Chuang is also inappropriate. Chuang's only contacts with California are a small number of visits for vacations or work-related purposes. Dkt. 30-2. But there is no evidence these visits were a but-for cause of the harms Segal alleges. [Bancroft & Masters, Inc.](#), 223 F.3d at 1088. This Court therefore has no specific personal jurisdiction over Chuang.

For these reasons, this Court has neither general personal jurisdiction nor specific personal jurisdiction over Chuang.

b. Douglas Kaplan

Douglas Kaplan is the CEO of Aquent. Dkt. 30-3. Kaplan states in an affidavit that he is a resident and citizen of Massachusetts. *Id.* Like Chuang, he states that he does not maintain a residence in California, does not own any property in California, and does not intend to reside in California. *Id.*

Plaintiff's arguments as to why this Court should exercise jurisdiction over Kaplan are identical to her arguments regarding Chuang, and they fail for the same reasons. Although Kaplan visited California more often than Chuang, his visits likewise do not constitute a but-for cause of Segal's alleged harms. As stated in his affidavit, he did not supervise California employees, oversee California operations, or develop any of the policies at issue. *Id.* Kaplan's contacts with the state of California thus do not give rise to jurisdiction over him.

c. Cheryl King

Cheryl King is the President of Aquent Staffing and Studios, a division of Aquent. Dkt. 30-4. King states in affidavit that she is a citizen and resident of the state of Washington. *Id.* Although she owns personal property in California, she has no intent to reside there. *Id.* Plaintiff has made no allegation that King is domiciled in California, nor has Plaintiff produced any evidence of such. There is no evidence or even allegation of the necessary intent to reside in California permanently.

For the reasons set out with respect to Chuang and Kaplan, this Court finds that exercising jurisdiction over King would be improper.

d. Labor Code § 558.1

Segal argues that even if the Court could not ordinarily exercise personal jurisdiction over the Individual Defendants, California Labor Code § 558.1 provides jurisdiction. That statute provides that "[a]ny ... other person acting on behalf of an employer, who violates, or causes to be violated, [certain provisions of the California Labor Code] may be held liable as the employer for such violation." Cal. Labor Code § 558.1(a) (emphasis added).

Segal claims that the Individual Defendants are "other persons" acting on behalf of the Corporate Defendants and thus may be personally liable under California law.

Segal's argument, however, confuses liability with jurisdiction. It may well be that she could hold the Individual Defendants liable under § 558.1. In order to do so, though, the Court must first have jurisdiction over them. See *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990) ("Liability and jurisdiction are independent. Liability depends on the relationship between the plaintiff and the defendants and between the individual defendants; jurisdiction depends only upon each defendant's relationship with the forum."). Section 558.1 does not itself create jurisdiction. As the Individual Defendants point out, a recent case from this District involved a similar claim of individual liability under § 558.1. *Overholt v. Airista Flow Inc.*, 2018 WL 355231, at *10–11 (S.D. Cal. Jan. 10, 2018). Rather than assume the statute created jurisdiction, the court there applied traditional personal jurisdiction analysis and found that jurisdiction was lacking.

*4 Plaintiff relies on *Jamshid-Negad v. Kessler*, 15 Cal.App.4th 1704 (Cal. App. 1 Dist. 1993) to support her argument that § 558.1 provides a jurisdictional hook. In that case, the court found that personal jurisdiction could be exercised over Connecticut parents who sent their minor son to a public university in California, where he was alleged to have committed a tort against the Plaintiffs. *Id.* However, the court did not rely on the relevant liability statute³ for jurisdiction; it found that defendants purposefully availed themselves of the forum state. *Id.* at 1709-10. In other words, the court relied on traditional personal jurisdiction analysis.

For these reasons, Plaintiff's claim that § 558.1 provides an independent basis for personal jurisdiction over the Individual Defendants fails. There being no basis for this Court to exercise personal jurisdiction over the Individual Defendants, their Motion to Dismiss is granted.

3. Corporate Defendants' Motion to Dismiss and/or Strike

The Corporate Defendants move to dismiss or strike various portions of Plaintiff's complaint. Dkt. 29. The Court grants in part and denies in part their motion.

a. Reporting Time Pay Subclass

Defendants move to strike Plaintiff's "Reporting Time Pay" subclass as overly broad. A Rule 12 motion, however, is not the proper vehicle for this type of challenge. *Shaw v. Experian Solutions, Inc.*, 49 F.Supp.3d 702, 709 (S.D. Cal. 2012). Instead, a Rule 23 motion should be used to challenge class allegations. *Connelly v. Hilton Grant Vacations Co., LLC*, 2012 WL 2129364, at *3 (S.D. Cal. 2012). Defendants' motion to strike with respect to the subclass is denied.

b. Reporting Time Pay Claim

Next, Defendants argue that Plaintiff's claims related to "Reporting Time Pay" fail as a matter of law and must be dismissed. Reporting time pay is governed by Cal. Code Regs., tit. 8, § 11040(5)(A), which provides that an employee is entitled to up to half their daily pay when that employee is "required to report for work and does report, but is not put to work." The issue in this case is whether an employee "reports for work" within the meaning of the statute when the employee is required to call by telephone to see if there is work available. This is a question of first impression for this Court, but it has been considered by the Central District of California in *Casas v. Victoria's Secret Stores, LLC*, 2014 WL 12644922, and the Eastern District of California in *Bernal v. Zumiez*, 2017 WL 3585230. Both cases contain similar facts to the instant case.

In *Casas*, the defendant-employer scheduled the plaintiff-employees for two separate types of shifts: regular work shifts, where the employees would report to work in the traditional fashion, and "call-in" shifts, where the plaintiffs would have to call two hours in advance of the shift and then, if asked, report to work. *Casas*, 2017 WL 358230, at *1. The defendant instructed plaintiffs to treat call-in shifts the same as regular work shifts and to not schedule any personal activities within those times. *Id.* The *Casas* court considered the plain meaning of the wage order and determined that "report for work" required physical presence. *Id.* at *3 (considering various dictionary definitions which impute a physical aspect). The *Casas* court further considered legislative history and reasoned that previous iterations of the wage order, which referred to reporting for work in terms of transporting oneself to the location, as well as the consistency in language throughout the various iterations of the wage order further support the determination that "report for work" requires physical presence. *Id.* at *4-5.

*5 In *Bernal*, plaintiff-employees were required to call in an hour before regularly scheduled shifts to check if work would be available for them. *Bernal*, 2017 WL 3585230, at *1. These calls usually took five to ten minutes. *Id.* The *Bernal* court considered the plain language and concluded that reading a physical requirement into "report for work" added an extraneous term to the definition, ultimately refusing to accept that interpretation. Turning to legislative history, the court held that an interpretation requiring a physical presence would defeat the purpose of protecting workers' general welfare, allowing employers to set up a phone-based system that would evade any reporting time liability. *Id.* at *4.

In the instant case, Segal alleges that Defendants' recruiters promised her 40 hours of work per week. But she was required to call ahead each day and, when she did, was often told there was no work available for her. She alleges that the Defendants required her to be available at those times regardless of whether work was available, thus precluding her from taking on other work. In her view, these calls constituted "report[ing] for work" that triggered the mandatory half-day pay under California law.

The Court is persuaded by the reasoning of the *Bernal* court: the statutory definition of "report for work" does not necessarily require a physical presence. There is nothing in the plain language of the statute that requires "reporting" be physical in nature. The Court declines to read into the statute an additional requirement not placed there by the legislature, especially in light of the general policy that wage and hour statutes should be construed liberally to promote worker protection. See *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1026-27 (2012). As the *Bernal* court points out:

"The incentives that led employers to engage in behavior that caused the IWC to create the wage orders in the first place still exist: creating a surplus pool of contingent workers ready to begin work at a moment's notice, only to notify some number of them that their services would not be required, provides an enormous benefit to employers, while forcing workers to prepare a set of contingency plans depending on whether they are given a shift to work or not."

Bernal, 2017 WL 3585230, at *4. Segal's allegations, which must be accepted as true at this stage, implicate these same concerns. She claims that she was financially harmed because the Defendants overrepresented the number of hours she would receive, required her to forego any other work on her assigned days, and then failed to give her hours once she called in to report for work each day. As pled, the Court finds that Segal "reported for work" within the meaning of the statute. Defendants'

motion to dismiss with respect to these claims is denied.³

c. Labor Code §§ 216, 218, 225.5, 1182.12, 1197, and 1197.1

Defendants next move to strike or dismiss the portions of Segal’s First Cause of Action predicated on Labor Code §§ 216, 218, 225.5, 1182.12, 1197, and 1197.1. Defendants argue that none of these code sections include a private right of action. Plaintiff concedes this point, but notes that, even if there is no private right of action, she may recover civil penalties for violation of these statutes under her PAGA claim. Defendants do not deny that she may assert violations of these statutes as part of her PAGA claim, which is her Fifth Cause of Action. Instead, they challenge whether she may do so individually and on behalf of the class in her First Cause of Action. The Court agrees with the Defendants that these statutes do not provide a private right of action and cannot support stand-alone claims. The portions of her First Cause of Action predicated on these provisions therefore fail as a matter of law and are dismissed. This does not affect whether Segal may assert violations of these statutes as part of her PAGA claim.

d. Labor Code §§ 201 and 202

*6 Defendants move to strike or dismiss portions of Plaintiff’s Second Cause of Action for lack of standing. Labor Code § 201 concerns terminated employees and § 202 concerns quitting employees. Plaintiff was terminated from her employment, so Defendants argue she may not bring a claim under § 202 on behalf of quitting employees. Plaintiff argues that so long as an employee is affected by at least one labor code violation (here, § 201), they may pursue penalties on behalf of the state for unrelated violations by the same employer (here, § 202) under the PAGA statute. But, again, whether Segal can pursue a PAGA claim for violation of a statute is distinct from whether she can pursue an individual or class claim under that same statute. While she may be able to allege a violation of § 202 as part of her PAGA claim—she does not currently—she has no standing to sue under that statute individually or on behalf of the putative class. See *In re Adobe Sys. Privacy Lit.*, 66 F. Supp. 3d 1197, 1211 (N.D. Cal. 2014) (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)) (“In a class action, named plaintiffs representing a class ‘must allege and show that they personally have been injured, not that injury has been

suffered by other, unidentified members of the class to which they belong and which they purport to represent.’ ”). Her Second Cause of Action is therefore dismissed to the extent it is predicated on § 202.

e. Labor Code § 226(a)(8)

Defendants move to strike or dismiss portions of Plaintiff’s Third Cause of Action alleging a failure to provide accurate wage statements. Under Labor Code § 226(a)(8), wage statements must include “the name and address of the legal entity that is the employer.” Segal’s Complaint attaches a copy of her wage statement, which lists the following information:

Aquent LLC
Aquent, Vitamin T, Scout
501 Boylston Street, 3rd Floor
Boston, MA 02116

Dkt. 20 at ¶ 63, Ex. 1. Segal argues that because Aquent, Vitamin T, and Scout are not legal entities, their inclusion on the paycheck violates § 226(a)(8).

Defendants note that Aquent, Vitamin T, and Scout are Aquent LLC’s trade names or “dba’s”, and that courts routinely dismiss claims like Plaintiff’s that are based on the inclusion of trade names on wage statements. See, e.g., *Delgado v. New Albertson’s, Inc.*, 2009 WL 10670628, at *4 (C.D. Cal.) (granting defendant’s motion for summary judgment where the wage statement listed the employer’s name as “Albertson’s, a SUPERVALU Company” rather than the official legal entity, “American Stores Company, LLC.”). Here, Defendants argue, the wage statements are even more consistent with the statutory requirements because the wage statements list both the actual entity name *and* the trade names. The Court agrees. Aquent LLC was Plaintiff’s employer, and the inclusion of additional trade names on her pay check does not give rise to a cause of action under § 226(a)(8). The portion of Segal’s Third Cause of Action based on a violation of § 226(a)(8) is therefore dismissed.

f. PAGA Claim

Defendants move to strike portions of Plaintiff’s PAGA claim on various grounds. A Rule 12(f) Motion to Strike may be granted to remove language in a pleading that is, as relevant here, either “redundant,” “immaterial,” or “impertinent.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618

F.3d 970, 973-74 (9th Cir. 2010). Language is “redundant” when it appears elsewhere in the complaint; is “immaterial” when it has no important relationship to the claim for relief; is “impertinent” when it does not pertain, and is not necessary, to the issues in question. *Id.* Motions to strike are generally disfavored. *Murphy v. Fullbright*, 2012 WL 4754730 (S.D. Cal. 2012). However, where the motion may have the effect of making the trial of the action less complicated, the motion to strike may be granted. *State of Cal. ex rel. State Lands Commission v. U.S.*, 512 F.Supp. 36 (N.D. Cal. 1981). A motion to strike references to a statute may be granted where no violation of the statute is alleged. *Conwright v. City of Oakland*, 2011 WL 855824 (N.D. Cal. 2011). The Court, at its discretion, may also treat a motion to strike as a Rule 12(b)(6) motion to dismiss. See *Kelley v. Corrections Corp. of America*, 750 F.Supp.2d 1132, 1146 (E.D. Cal. 2010).

*7 Defendants argue that various statutory references in Plaintiff’s Complaint should be stricken because she makes no effort to allege a violation. Specifically, Defendants point to Labor Code §§ 246, 246.5, 247, 247.5, 248.5, 512, 1198, 2810.3, and 2810.5. Although Plaintiff’s opposition demonstrates that at least some of these statutory references are supported by her Complaint, which is all that’s required at this stage of the case, the Court strikes: (1) her references to §§ 246, 247, and 2810.5, because notice and posting requirements are not bases for a PAGA action⁴; (2) her references to §§ 246.5, 247.5, and 249.5, because injunctive relief, not PAGA penalties, is the only relief available for sick leave claims⁵; and (3) her reference to § 512, which she admits was included by mistake. Defendants’ motion to strike as to the other provisions is denied.

Relatedly, Defendants argue that other statutory references should be stricken because Plaintiff’s Complaint has not *adequately alleged* a violation. Specifically, Defendants point to her claims under §§ 204, 204(b), 210, 225.5, 1174, 1174.5, 1198.5, and 2804. The Court is satisfied that Plaintiff has pled some basis for each of these claims, which is all that’s required to survive a Rule 12(f) Motion to Strike. Defendants’ motion is denied as to these claims.

Defendants further move to strike references to statutes that “do not create any employer obligation”—§§ 218, 218.5—or that are exclusively criminal—§ 216. However, Defendant fails to show that a statute with criminal penalties like § 216 cannot also be basis for a PAGA claim. Nor do Defendants show that Plaintiff’s inclusion of §§ 218 and 218.5, the latter of which provides for attorneys’ fees in wage claims, is impermissible.

Defendants’ motion is denied as to these claims.

Defendants final request related to the PAGA claim is to strike references to various PAGA penalties under the reasoning that each of these provisions has a specific penalty, and § 2699(f) only provides penalties for code sections without a pre-existing penalty. However, FRCP 12(f) does not authorize courts to strike damages claims on grounds that they are precluded as a matter of law, which is in effect what Defendants are asking this Court to do. *Whittlestone*, 618 F.3d at 975. Defendants’ motion is denied as to these claims.

g. California Unfair Competition Law Claim

Defendants move to strike in part and dismiss in part Plaintiff’s claim under California Unfair Competition Law (UCL). The UCL allows only for restitution and injunctive relief, not for penalties. *Montecino v. Spherion Corp.*, 427 F.Supp.2d 965 (C.D. Cal. 2006). Unpaid wages qualify as restitution rather than penalties. *Id.* References to recovery that does not meet the requirements of the UCL can be struck from the complaint. *Id.* Former employees lack standing to bring claims for injunctive relief. *Walsh v. Nevada Dept. of Human Resources*, 471 F.3d 1033 (9th Cir. 2006).

Defendants’ argument is, essentially, that Plaintiff’s UCL claims are predicated on her other statutory claims. Thus, if the Court determines that a predicate statutory claim should be stricken, the Court must also strike the corresponding UCL claims. The Court agrees. To the extent the Court has stricken or dismissed a predicate statutory claim, the corresponding UCL claim is also stricken or dismissed.

Defendant is correct in that references to recovery under codes that do not provide for restitution or injunctive relief can be stricken, as they were by the *Montecino* court. Plaintiff alleges no penalties under the UCL, asking instead for “restitution,” and thus there is no reference to damages to which the motion to strike can apply. Plaintiff lacks standing to seek injunctive relief as a former employee. As such, Plaintiff’s UCL claim is dismissed with respect to any penalties or injunctive relief.

4. Disposition

*8 For the foregoing reasons: (1) the Individual

Defendants' motion to dismiss for lack of jurisdiction is **GRANTED** and those defendants are **DISMISSED WITH PREJUDICE** from the case; and (2) the Corporate Defendants' motion to dismiss and/or strike is **GRANTED IN PART** and **DENIED IN PART**, as set forth above.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 4599754

Footnotes

- 1 Lazarus has been voluntarily dismissed. Dkt. 28.
- 2 [Cal. Civ. Code § 1714.1](#)
- 3 The Court is aware that the Ninth Circuit is currently considering an appeal on this very issue. *Herrera v. Zumiez, Inc.*, Case No. 18-15135. The parties should keep the Court apprised of developments in that case.
- 4 *See Titus v. McLane Foodservice, Inc.*, 2016 WL 4797497, at *6 (E.D. Cal. 2016)
- 5 *See Stearne v. Heartland Payment Systems LLC*, 2018 WL 746492, at *2-3 (E.D. Cal. 2018)

Exhibit 10



Alcala v. Meyer Logistics, Inc.

United States District Court for the Central District of California

June 17, 2019, Decided; June 17, 2019, Filed

CV 17-7211 PSG (AGRx)

Reporter

2019 U.S. Dist. LEXIS 166879 *; 2019 WL 4452961

Tomas Alcala v. Meyer Logistics, Inc.

Counsel: [*1] Attorneys for Plaintiff(s): Not Present.

Attorneys for Defendant(s): Not Present.

Judges: Philip S. Gutierrez, United States District Judge.

Opinion by: Philip S. Gutierrez

Opinion

CIVIL MINUTES - GENERAL

Proceedings (In Chambers): The Court GRANTS Plaintiff's motion for preliminary approval of class action settlement

Before the Court is a motion for preliminary approval of class action settlement filed by Plaintiff Tomas Alcala ("Plaintiff"). *See* Dkt. # 50 ("Mot."). Defendant Meyer Logistics, Inc. ("Defendant" or "Meyer") does not oppose the motion. The Court held a hearing in this matter on June 10, 2019. The parties subsequently filed a stipulation making further amendments to the Settlement Agreement. *See* Dkt. # 52 ("Stip."). Having considered the moving papers, the arguments made at the hearing, and the stipulation, the Court **GRANTS** Plaintiff's motion.

I. Background

Plaintiff seeks preliminary approval of a \$400,000 settlement ("the Settlement") with Defendant. *Mot.* 1:26-2:20.

On September 29, 2017, Plaintiff initiated this putative class action by filing a complaint against Defendant in this Court. *Id.* 3:7-8; *see also* Dkt. # 1 ("Compl."). Plaintiff worked as a non-exempt truck driver for Defendant and alleges that [*2] to comply with Defendant's rigorous delivery schedule, he had to skip required meal and rest periods. *Compl.* ¶¶ 14-15. Plaintiff also alleges that he was insufficiently compensated for time worked for Defendant, including overtime. *Id.* ¶¶ 11-13. Finally, Plaintiff alleges that Defendant violated the Fair Credit Reporting Act ("FCRA") by unlawfully inserting a liability release provision into employment application forms that purported to grant Defendant the authority to conduct a background check on Plaintiff, and in so doing, unlawfully obtaining consumer report information about Plaintiff. *Id.* ¶¶ 9-10. The First Amended Complaint ("FAC")—the operative pleading in this case—alleges that Defendant violated various provisions of the FCRA, the California Labor Code, and the California Business and Professions Code. It asserts eleven causes of action: (1) failure to make proper disclosures that it was obtaining consumer reports of employees; (2) failure to secure proper authorization for obtaining those consumer reports; (3) unfair competition; (4) failure to provide required meal periods; (5) failure to provide required rest periods; (6) failure to pay minimum wages; (7) failure to pay [*3] overtime wages; (8) failure to provide accurate wage

statements; (9) failure to reimburse employees for required expenses; (10) failure to provide timely wages; and (11) civil penalties under California's Private Attorney General Act of 2004 ("PAGA"). *Mot.* 3:9-25; *see also First Amended Complaint*, Dkt. # 24 ("FAC"); *Declaration of Kyle Nordrehaug*, Dkt. # 50-2 ("*Nordrehaug Decl.*"), ¶¶ 7-8. Plaintiff seeks to represent a class of similarly situated employees.

On July 18, 2018, the parties engaged in mediation with Mark Rudy, and after lengthy negotiations, they reached an agreement in principle to settle all claims as set forth in a Memorandum of Understanding executed on July 23, 2018. *Mot.* 5:7-11; *Nordrehaug Decl.* ¶ 12.

The parties then entered into a long form settlement agreement. *Mot.* 5:11-13; *see also Nordrehaug Decl.*, Ex. 1 ("*Settlement*"). The settlement classes ("the Classes" or "the Class Members") consist of (1) "all prospective employees for whom Defendant procured a background check during the time period of September 29, 2012 to June 5, 2018" (the "FCRA Class" or "FCRA Class Members"), "which class shall be subdivided into those screened from September 29, 2015 to June 5, 2018" [*4] (the "Two Year FCRA Subclass"), and "those screened from September 29, 2012 through September 28, 2015" (the "Five Year FCRA Subclass"); and (2) "all individuals who worked for Defendant Meyer Logistics, Inc. in California as a non-exempt driver from September 29, 2013 up to and through October 21, 2018" (the "California Class" or "California Class Members"). *Mot.* 1:14-25; *Settlement* ¶ I.K.

Plaintiff now moves the Court to preliminarily approve the proposed settlement. *See Mot.* Specifically, Plaintiff asks the Court to (1) certify the California Class and FCRA Class (with its subclasses, or "FCRA Subclasses"), (2) preliminarily approve the settlement as fair, reasonable, and adequate, (3) direct the class notice and exclusion form to be disseminated to Class Members, (4) appoint KCC Class Action Services,

LLC to serve as the Settlement Administrator, (5) appoint Class Counsel, and (6) set a hearing for final approval of the settlement and consideration of Class Counsel's motion for award of fees, costs, expenses, and service award. *See generally id.*

II. Class Certification for Settlement Purposes

Plaintiff seeks to certify two classes for settlement purposes only: the California Class [*5] and the FCRA Class, with the FCRA Class subdivided into the Two Year FCRA Subclass and the Five Year FCRA Subclass. *Mot.* 1:14-25; *see also Settlement* ¶ I.K.

When parties settle an action prior to class certification, the court is obligated to "peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). Preliminary approval of a class settlement is generally a two-step process. First, the court must assess whether a class exists. *Id.* (citing [*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 \(1997\)](#)). Second, the court must determine "whether [the] proposed settlement is fundamentally fair, adequate, and reasonable." *Id.* (citing [*Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 \(9th Cir. 1998\)](#)) (internal quotation marks omitted). The decision to approve or reject a settlement is within the Court's discretion. [*Hanlon*, 150 F.3d at 1026](#).

A. Legal Standard

Parties seeking certification of a settlement-only class must still satisfy the [*Federal Rule of Civil Procedure 23*](#) standards. *See id. at 1019-24*. Under [*Rule 23*](#), a plaintiff must satisfy the four prerequisites of [*Rule 23\(a\)*](#) and demonstrate that the action is maintainable under [*Rule 23\(b\)*](#). *See Amchem*, 521 U.S. at 613-14. The four prerequisites of [*Rule 23\(a\)*](#) are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *See Fed. R. Civ. P. 23(a)*. Plaintiffs seek certification under [*Rule 23\(b\)\(3\)*](#), *see Mot.* 21:17-21, which requires that "questions [*6] of

law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," [*Fed. R. Civ. P. 23\(b\)\(3\)*](#).

B. Discussion

i. Numerosity

The first requirement for maintaining a class action under [*Rule 23\(a\)*](#) is that the class is "so numerous that joinder of all members would be impracticable." [*Fed. R. Civ. P. 23\(a\)\(1\)*](#). Courts generally presume numerosity when there are at least forty members in the proposed class. See [*Charlebois v. Angels Baseball, LP, No. SACV 10-0853 DOC \(ANx\), 2011 U.S. Dist. LEXIS 71452, 2011 WL 2610122, at *4 \(C.D. Cal. June 30, 2011\)*](#).

Here, the California Class consists of approximately 77 current and former employees and the FCRA Class consists of 1,950 individuals. *Mot.* 18:28-19:2. Numerosity is therefore satisfied.

ii. Commonality

To fulfill the commonality requirement, plaintiffs must establish questions of law or fact common to the class. See [*Fed. R. Civ. P. 23\(a\)\(2\)*](#). The class claims must depend on a common contention that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." [*Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 \(2011\)*](#). "What matters to class certification . . . is not the raising of common 'questions'—even [*7] in droves—but rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (internal quotation marks omitted) (emphasis removed). For the purposes of [*Rule 23\(a\)\(2\)*](#), even a single common question satisfies

the requirement. See *id. at 359*; [*Abdullah v. U.S. Sec. Assocs., 731 F.3d 952, 957 \(9th Cir. 2013\)*](#) (citing [*Mazza v. Am. Honda Motor Co., 666 F.3d 581, 589 \(9th Cir. 2012\)*](#)).

Here, Plaintiff identifies a number of questions of fact and law common to the Classes. Specifically, Plaintiff contends that the California Class Members share questions of whether Defendant miscalculated the regular rate when paying overtime and whether Defendant failed to properly provide and/or pay for meal and rest periods. *Id.* 19:14-15. Further, whether Defendant violated the FCRA in using the noncompliant consent forms is a question common to the FCRA Class Members. *Id.* 19:16. Plaintiff also adds that Defendants engaged in uniform practices with respect to the Class Members. *Id.* 19:18-19. Because Plaintiff's allegations present common questions that will likely generate common answers, see [*Dukes, 564 U.S. at 350*](#), and these issues can be fairly resolved for all Class Members at once, the commonality requirement is satisfied.

iii. Typicality

Typicality requires a showing that the named plaintiff is a member of the class [*8] he represents and that his claims are "reasonably co-extensive with those of absent class members," but not necessarily "substantially identical." [*Hanlon, 150 F.3d at 1020*](#); see [*Fed. R. Civ. P. 23\(a\)\(3\)*](#). The test of typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." [*Ellis v. Costco Wholesale Corp., 657 F.3d 970, 984 \(9th Cir. 2011\)*](#) (quoting [*Hanon v. Dataproducts Corp., 976 F.2d 497, 508 \(9th Cir. 1992\)*](#)) (internal quotation marks omitted). The typicality and commonality requirements somewhat overlap. See [*Gen. Tel. Co. Sw. v. Falcon, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 \(1982\)*](#).

Here, Plaintiff alleges that he was employed by Defendant as a non-exempt driver and was subject to the same unlawful employment practices as every other California Class Member. *Mot.* 20:6-9. Further, like all the other FCRA Class Members, Plaintiff was subjected to Defendant's practice concerning background checks. *Id.* 20:5-6. Plaintiff further asserts that his and the Class Members' claims arise from the same course of conduct by Defendant, involve the same issues, and are based on the same legal theories. *Id.* 20:11-13. Accordingly, Plaintiff's claims are typical of those of the Class Members, and the typicality requirement is satisfied.

iv. Adequacy

The final requirement of [*9] [Rule 23\(a\)](#) is that "the representative parties will fairly and adequately protect the interests of the class." [Fed. R. Civ. P. 23\(a\)\(4\)](#). The Ninth Circuit has indicated that "[t]he proper resolution of this issue requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" [In re Mego Fin. Corp. Sec. Litig.](#), 213 F.3d 454, 462 (9th Cir. 2000).

Here, the Plaintiff has no apparent conflicts of interest between him and the Class Members. *Mot.* 20:21-22. Furthermore, Plaintiff has demonstrated commitment to this action and has devoted time to assisting counsel, providing documents and information, and participating in the investigation of this action. *Id.* 20:25-21:1. In addition, Plaintiff's counsel have extensive experience handling wage and hour cases, know the applicable law, and are committed to representing the Classes. See *Nordrehaug Decl.* ¶ 26, Ex. 2. Adequacy is therefore satisfied.

v. Predominance and Superiority

Having concluded that the Classes satisfy the [Rule 23\(a\)](#) factors, the Court now turns to [Rule 23\(b\)\(3\)](#). [Rule 23\(b\)\(3\)](#) provides that a class may be certified where common questions of law or fact predominate over individual [*10] questions and a class action is the superior method for adjudicating the controversy as a whole. The predominance aspect specifically "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." [Amchem](#), 521 U.S. at 623. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." [Hanlon](#), 150 F.3d at 1022 (internal quotation marks omitted).

In this case, Plaintiff alleges that Defendant's policies for non-exempt drivers were common to all California Class Members, and Defendant's background check policies were common to all FCRA Class Members. See *Mot.* 21:25-22:4. Claims based on this type of commonly applied policy are generally sufficient for purposes of satisfying the requirements of [Rule 23\(b\)\(3\)](#). See, e.g., [Wright v. Linkus Enters., Inc.](#), 259 F.R.D. 468, 473 (E.D. Cal. 2009) (finding predominance, "despite the existence of minor factual differences between individual class members," where the case involved "alleged policies that required class members to work without compensation, meal and rest periods, and/or reimbursement for expenses"); [In re Wells Fargo Home Mortg. Overtime Pay Litig.](#), 527 F. Supp. 2d 1053, 1065-68 (N.D. Cal. 2007) ("Plaintiffs have submitted evidence [*11] of [] uniform policies . . . such as training, recruiting and job descriptions. Accordingly, plaintiffs have made a strong showing that, as a general matter, common questions . . . predominate over individual variations."). As such, the Court concludes that common questions similarly predominate here.

As for superiority, requiring dozens of California Class Members and thousands of FCRA Class Members to litigate their claims separately would

be inefficient and costly, resulting in duplicative and potentially conflicting proceedings. See [*Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 \(9th Cir. 1978\)](#) ("Numerous individual actions would be expensive and time-consuming and would create the danger of conflicting decisions as to persons similarly situated."). Class Members could face difficulty finding legal representation and could lose incentive to bring their claims if forced to do so in isolation. See [*In re Napster, Inc. Copyright Litig.*, No. C 04-1671 MHP, 2005 U.S. Dist. LEXIS 11498, 2005 WL 1287611, at *8 \(N.D. Cal. June 1, 2005\)](#) (finding superiority in part because "many small composers individually lack the time, resources, and legal sophistication to enforce their copyrights"). A class action would thus be the superior method for adjudicating this action.

In short, the [*12] Court concludes that both the predominance and superiority requirements of [*Rule 23\(b\)\(3\)*](#) are satisfied.

C. Conclusion

Plaintiff has met the requirements for class certification under [*Rule 23*](#). Therefore, the Court **CERTIFIES** the California Class and the FCRA Class (with its Subclasses) for settlement purposes only. The Court also **APPOINTS** Blumenthal | Nordrehaug | Bhowmik LLP as Class Counsel and **APPOINTS** Plaintiff Alcala as Class Representative for these Classes.

III. Preliminary Approval of the Proposed Class Action Settlement

The next step is to determine whether the settlement reached is "fair, reasonable, and adequate" under [*Rule 23\(e\)*](#). See [*Fed. R. Civ. P. 23\(e\)\(2\)*](#).

A. Legal Standard

The approval of a class action settlement is a two-step process under [*Rule 23\(e\)*](#) in which the court first determines whether a proposed class action settlement deserves preliminary approval. See [*In re*](#)

[*Am. Apparel, Inc. S'holder Litig.*, No. CV 10-6352 MMM \(CGx\), 2014 U.S. Dist. LEXIS 184548, 2014 WL 10212865](#) 2014 U.S. Dist. LEXIS 184548, at *5 ([*C.D. Cal. July 28, 2014*](#)). "At the preliminary approval stage, a court determines whether a proposed settlement is within the range of possible approval and whether or not notice should be sent to class members." [*True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 \(C.D. Cal. 2010\)](#) (internal quotation marks omitted). Preliminary approval amounts to a finding that the terms of the proposed settlement warrant consideration [*13] by members of the class and a full examination at a final approval hearing. See *Manual for Complex Litigation* (Fourth) § 13.14 (2004). Preliminary approval is appropriate if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." [*Ma v. Covidien Holding, Inc.*, No. SACV 12-2161 DOC, 2014 U.S. Dist. LEXIS 13296, 2014 WL 360196, at *4 \(C.D. Cal. Jan. 31, 2014\)](#); see also [*Eddings v. Health Net, Inc.*, No. CV 10-1744 JST \(RZx\), 2013 U.S. Dist. LEXIS 9185, 2013 WL 169895, at *2 \(C.D. Cal. Jan. 16, 2013\)](#).

After notice is given to the class, preliminary approval is followed by a review of the fairness of the settlement at a final fairness hearing, and, if appropriate, a finding that it is "fair, reasonable, and adequate." [*Fed. R. Civ. P. 23\(e\)\(2\)*](#); see also [*Lane v. Facebook, Inc.*, 696 F.3d 811, 818 \(9th Cir. 2012\)](#); [*Hanlon*, 150 F.3d at 1027](#). In making this determination, the district court must

balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the 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 [*14] of a governmental participant; and the reaction of the class

members to the proposed settlement.

Hanlon, 150 F.3d at 1026; see also *Staton*, 327 F.3d at 959; *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that the list of factors is "by no means an exhaustive list").

The district court must approve or reject the settlement as a whole. See *Hanlon*, 150 F.3d at 1026 ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness."). The court may not delete, modify, or rewrite particular provisions of the settlement. See *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1026. The district court must be cognizant that the settlement "is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027. Because it is provisional, courts grant preliminary approval of a class action settlement where the proposed settlement does not disclose grounds to doubt its fairness and lacks "obvious deficiencies." *In re Vitamins Antitrust Litig., No. MISC 99-0197(TFH)*, 2001 U.S. Dist. LEXIS 25071, 2001 WL 856292, at *4 (D.D.C. July 25, 2001) (quoting *Manual for Complex Litigation* (Third) § 30.41 (1999)).

B. Overview of the Settlement Agreement

Under terms of the Settlement, Defendant agrees to pay a non-reversionary maximum gross sum of \$400,000 (the "Gross Settlement Amount"). *Settlement* ¶ I.Q. This figure includes all payments to the Class Members, fees for [*15] Class Counsel (not to exceed \$133,333), Class Counsel's costs (not to exceed \$15,000), an incentive award for Plaintiff as Class Representative (not to exceed \$10,000), administration costs (not to exceed \$30,000), and PAGA penalties of \$10,000, of which \$7,500 will be paid to the Labor and Workforce Development Agency ("LWDA"), and \$2,500 will remain part of the Net Settlement Amount for distribution to PAGA aggrieved

employees. *Id.* ¶¶ I.V—W, III.B.1-4.

The Net Settlement Amount, which is estimated to be at least \$201,667, will be distributed to the Class Members, with 50 percent being allocated to the FCRA Class and 50 percent being allocated to the California Class. *Id.* ¶ III.C.1. The FCRA Class proceeds will be subdivided, with 75 percent allocated to the Two Year FCRA Subclass and the remaining 25 percent allocated to the Five Year FCRA Subclass. *Id.* For the FCRA Class, the Settlement share for each FCRA Subclass Member will be the Net Settlement Amount allocated to each Subclass divided by the number of participating Subclass Members. *Id.* ¶ III.C.2. Any individual member who is a member of both the Two Year FCRA Subclass and the Five Year FCRA Subclass will be considered a member [*16] of the Two Year FCRA Subclass. *Id.* For the California Class, the Settlement share for each California Class Member will be distributed by dividing the amount pro rata among participating California Class Members based on each Member's number of compensable pay periods. See *id.* ¶ III.C.3. Any undeliverable or uncashed checks for California Class Members will be paid to the California State Controller's Office, in the Class Member's name, to be held as unclaimed property for the benefit of the affected Class Member. See *Stip.* 2:14-3:8. Any undeliverable or uncashed checks for FCRA Class Members will be paid to the National Consumer Law Center, a non-profit organization involved in FCRA advocacy. *Settlement* ¶ III.E.13. No funds will revert to Defendant.

In return, the Class Members will release Defendants from "all claims alleged or that could have been alleged based on the facts in the operative Complaint which occurred during the applicable class periods." *Id.* ¶ III.F.1. In exchange for the incentive award of \$10,000, Plaintiff Alcalá will be releasing a broader array of claims than the Class Members. He is generally releasing "any and all claims, known or unknown, suspected or unsuspected, [*17] that [he] had, now has, or may

hereafter claim to have against Defendant and Released Parties" that occurred during the class period, with "Released Parties" defined as Meyer Logistics, Inc. and its predecessors, successors, assignees, or other affiliates of Defendant who could be held jointly liable with Defendant or Meyer Distributing, Inc. *Id.* ¶¶ I.Z., III.F.2. Plaintiff will also release all rights afforded under [California Civil Code § 1542](#), which applies to all claims stated or that could have been stated based on the facts alleged in the FAC. *Id.* ¶ III.F.3. Additionally, Class Counsel will release any claim to costs and attorneys' fees against Defendant arising from this action. *Id.* ¶ III.F.4.

For taxation purposes, the Settlement shares for each FCRA Class Member are statutory penalties under the FCRA and therefore will not be subject to wage withholdings; however each FCRA Class Member will be responsible for any further federal, state, or local taxes owing on their Settlement shares. *See id.* ¶ III.C.4.a—b. The Settlement shares for each California Class Member will be taxed such that one-fifth of the Settlement share for each California Class Member will be treated as wages and subject to wage withholdings, [*18] and four-fifths will be treated as interest and penalties and will not be subject to wage withholdings. *See id.* ¶ III.C.4.c—d. All such taxation and withholdings will be paid from the Net Settlement Amount. *See id.* ¶ III.C.4. Defendant's share of payroll taxes will remain the separate responsibility of Defendant. *See id.* ¶ I.P.

C. Analysis of Settlement Agreement

i. Fair and Honest Negotiations

In general, evidence that a settlement agreement is arrived at through genuine arms-length bargaining with a private mediator supports a conclusion that the settlement is fair. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."); [Sarabi v. Weltman, Weinberg & Reis Co., L.P.A.](#),

[No. CV 10-1777 AJB \(NLSx\)](#), 2012 U.S. Dist. LEXIS 125415, 2012 WL 3809123, at *1 (S.D. Cal. Sept. 4, 2012) (holding that a settlement should be granted preliminary approval after the parties engaged in extensive negotiations); [Aarons v. BMW of N. Am., LLC](#), No. CV 11-7667 PSG (CWx), 2014 U.S. Dist. LEXIS 118442, 2014 WL 4090564, at *10 (C.D. Cal. Apr. 29, 2014) (declining to apply a presumption but considering the arms-length nature of the negotiations as evidence of reasonableness).

Here, the evidence supports the conclusion that the settlement is fair and honest. The parties have extensively negotiated and continue to contest liability for their respective [*19] positions. *Mot.* 10:4-12. However, based on the recommendation of Mark Rudy, a well-respected mediator experienced in complex wage-and-hour matters, the experience of Class Counsel, and the uncertainties of continued litigation, the parties agreed that this case was well-suited for settlement. *See id.* 10:13-11:12.

The time and effort spent on settlement negotiations, as well as mediation with Mark Rudy, argue in favor of preliminary approval of the Settlement, as they suggest that there was no collusion. *See Hanlon*, 150 F.3d at 1029. Class Counsel conducted extensive investigation and retained an expert to prepare a damages valuation prior to mediation. *See Mot.* 10:18-21. There is no indication that the negotiations were dishonest or collusive in any way, and the discovery conducted in this case suggests that the parties were well informed and had sufficient information to assess the merits of their claims. *See Glass v. UBS Fin. Servs., Inc.*, CV 06-4068 MMC, 2007 U.S. Dist. LEXIS 8476, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007) (reasoning that the parties' having undertaken informal discovery prior to settling supports approving the class action settlement). Additionally, "the Settlement includes a modified background check disclosure [*20] form . . . , and the Parties request confirmation by Court order that the current disclosure form complies with the FCRA," showing a good-faith effort by Defendant to prevent further violations. *Mot.* 15:6-9. The

Court is therefore satisfied that the Settlement is the product of fair and honest negotiation.

ii. Settlement Amount

To evaluate whether a settlement falls within the range of possible approval, "courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007).

Here, Plaintiff estimates that Defendant's maximum liability through the miscalculation of overtime wages for the California Class is approximately \$1,065; for the meal and rest period claims, \$600,972; and for the expense reimbursement claims, \$47,212. *Mot.* 12:2-5. The California Class Settlement amount of approximately \$200,000, before deductions, then represents more than 30 percent of the calculated damages estimated by Plaintiff, which is well within the range of possible approval. See *Brown v. CVS Pharmacy, Inc., No. CV 15-7631 PSG (PJWx)*, 2017 U.S. Dist. LEXIS 182309, 2017 WL 3494297, at *4 (C.D. Cal. Apr. 24, 2017) (approving settlement that represented 27 percent of possible recovery); [*21] *Glass v. UBS Fin. Servs., Inc., CV 06-4068 MMC*, 2007 U.S. Dist. LEXIS 8476, 2007 WL 221862, at *4 (N.D. Cal. Jan. 26, 2007) (approving an overtime wage settlement that represented 25 to 35 percent of the estimated damages); see also *Rigo v. Kason Indus., Inc., No. CV 11-0064 MMA (DHBx)*, 2013 U.S. Dist. LEXIS 99357, 2013 WL 3761400, at *5 (S.D. Cal. July 16, 2013) ("[D]istrict courts have found that settlements for substantially less than the plaintiff's claimed damages were fair and reasonable, especially when taking into account the uncertainties involved with the litigation.").

As to the FCRA Class, the FCRA provides for statutory damages of \$100 to \$1,000 per willful violation. *15 U.S.C. § 1681n*. Here, Plaintiff represents that the gross settlement amount for the Two Year FCRA Subclass is \$150,000 for a class

of 641, which correlates to \$234 per person. *Mot.* 9:17-19. By the Court's calculation, this means that members of the Five Year FCRA Subclass will receive approximately \$38.20 per person.¹ These figures are well beyond or within the range of what has been approved in recent FCRA settlements. See *Pietras v. Sentry Ins. Co.*, 513 F. Supp. 2d 983, 985 (N.D. Ill 2007) (approving two FCRA settlements, one that settled for \$32 per class member and another for \$20 per class member); *Bailes v. Lineage Logistics, LLC, No. 15-CV-02457-DDC-TJJ*, 2016 U.S. Dist. LEXIS 110943, 2016 WL 4415356, at *6 (D. Kan. Aug. 19, 2016) (approving an FCRA settlement for \$149,205 for a class of 3,430, which correlates to \$43.50 per person); see also *Serrano v. Sterling Testing Sys., Inc.*, 711 F. Supp. 2d 402, 418 (E.D. Pa. 2010) (indicating the [*22] per-member recovery in a FCRA action can be significantly below the statutory limit of \$1,000 considering the attendant risks of litigation).

Furthermore, the Settlement confers a benefit on FCRA Class Members who would face significant risk of no recovery and ongoing litigation expenses if forced to proceed with litigation. *Mot.* 13:21-15:4. Given that "the risk of continued litigation balanced against the certainty and immediacy of recovery from the Settlement" is a relevant factor, *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (E.D. Cal. 2010) (citing *In re Mego*, 213 F.3d at 458), this reality also favors preliminary approval.

In short, given the ongoing risks of litigation, in addition to the relative value of the Classes' recovery, the Court concludes that the Settlement amount is within the range of approval.

¹ The \$150,000 represents 75 percent of the settlement proceeds for the entire FCRA Class, and therefore the settlement fund for the Five Year FCRA Subclass is \$50,000. Since Plaintiff estimates that the entire FCRA Class is composed of 1,950 individuals, the Court assumes that there are 1,309 members in the Five Year FCRA Subclass. Fifty-thousand dollars divided by 1,309 members equals approximately \$38.20.

iii. Attorneys' Fees and Costs

When approving attorneys' fees in common fund cases, courts in the Ninth Circuit have discretion to apply the percentage-of-the-fund method or the lodestar method to determine reasonable attorneys' fees. See [*Powers v. Eichen*, 229 F.3d 1249, 1256 \(9th Cir. 2000\)](#); [*In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944-45 \(9th Cir. 2011\)](#) (finding that when a settlement establishes a common fund for the benefit of a class, courts may use either method to gauge the reasonableness of a fee request, but encouraging courts to employ a second method as a cross-check [*23] after choosing a primary method). If employing the percentage-of-the-fund method, the "starting point" or "benchmark" award is 25 percent of the total settlement value. See [*Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 \(9th Cir. 2002\)](#); [*Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 \(9th Cir. 1993\)](#). A court may exceed the benchmark but must explain its reasons for so doing. See [*Powers*, 229 F.3d at 1255-57](#). Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award. [*Vizcaino*, 290 F.3d at 1050](#). To determine attorneys' fees under the lodestar method, a court must multiply the reasonable hours expended by a reasonable hourly rate. See [*In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294 n.2 \(9th Cir. 1994\)](#). The court may then enhance the lodestar with a "multiplier," if necessary, to arrive at a reasonable fee. *Id.*

Here, Class Counsel will request up to \$133,333 for attorneys' fees, which amounts to one-third of the Gross Settlement Amount, and \$15,000 for litigation costs. *Settlement* ¶ III.B.2. Because this amount is greater than the 25 percent "benchmark" established in this Circuit, the Court **ORDERS** Class Counsel to submit a brief justifying the upward departure from the benchmark under the [*Vizcaino*](#) factors. See [*Vizcaino*, 290 F.3d at 1048-50](#) (examining (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of

the work; (4) [*24] the contingent nature of the fee and the financial burden carried by plaintiffs; and (5) awards made in similar cases). In addition, Class Counsel is further instructed to provide the requested hourly rate and hours expended in this case so that the Court can calculate the lodestar value and use it to cross-check the reasonableness of the fees and costs award. In its brief, Class Counsel should explain whether a multiplier should be applied and, if so, why the proposed multiplier is appropriate in this case. Finally, Class Counsel must submit a detailed summary of its costs and expenses for the Court's consideration.

iv. Service Awards

"Incentive awards are fairly typical in class action cases." [*Rodriguez*, 563 F.3d at 958](#). When considering requests for incentive awards, courts consider five principal factors:

- (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;
- (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

See [*Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 \(N.D. Cal. 1995\)](#). Further, courts [*25] also typically examine the propriety of an incentive award by comparing it to the total amount other class members will receive. See *Staton*, 327 F.3d at 975.

Here, Plaintiff seeks a service award of \$10,000, in addition to his individual settlement payment. *Settlement* ¶ III.B.1. He claims that an award of \$10,000 is well within the accepted range, citing to numerous California decisions where a \$10,000 service award was deemed reasonable. See *Nordrehaug Decl.* ¶ 29. Even so, the Court notes that this award seems high in relation to the potential recovery for each Class Member, but it

will determine the reasonableness of the requested service award when ruling on Plaintiff's motion for final approval. As such, Plaintiff is **ORDERED** to submit a declaration outlining his efforts expended and risks taken on behalf of the Classes.

v. Administration Costs

The Settlement provides that the parties will pay KCC Class Action Services, LLC \$30,000 to administer the Settlement. See *Settlement* ¶ III.B.4. This request is reasonable considering the size of the two proposed Classes, one with 77 members and the other with 1,950 members, and the costs and expenses associated with administering the notices and distributing the [*26] awards and tax documentation to the claimants. See [*Ching v. Siemens Indus., No. 11-cv-04838-MEJ, 2014 U.S. Dist. LEXIS 89002, 2014 WL 2926210, at *2 \(N.D. Cal. June 27, 2014\)*](#) (approving an estimated \$15,000 claims administrator fee for sixty-eight claims); [*Ozga v. U.S. Remodelers, Inc., No. C 09-05112 JSW, 2010 U.S. Dist. LEXIS 91196, 2010 WL 3186971, at *2 \(N.D. Cal. Aug. 9, 2010\)*](#) (granting \$10,000 to the claims administrator for 156 claims).

vi. PAGA Penalty

The parties have agreed to a PAGA penalty of \$10,000. *Settlement* ¶ III.B.3. Seventy-five percent (\$7,500) will go to the LWDA and twenty-five percent (\$2,500) will remain part of the Net Settlement Amount for distribution to PAGA aggrieved employees. See *id.*; [*Cal. Lab. Code § 2699\(i\)*](#) (providing that 75 percent of civil penalties recovered by aggrieved employees should be distributed to the LWDA). This PAGA allocation represents 1.25 percent of the \$400,000 gross settlement amount, which falls within the zero to two percent range for PAGA claims approved by courts. See, e.g., [*In re M.L. Stern Overtime Litig., No. CV 07-0118 BTM \(JMAx\), 2009 U.S. Dist. LEXIS 31650, 2009 WL 995864, at *1 \(S.D. Cal.*](#)

[*Apr. 13, 2009\)*](#) (approving PAGA settlement of 2 percent); [*Hopson v. Hanesbrands, Inc., No. CV 08-0844 EDL, 2008 U.S. Dist. LEXIS 86342, 2008 WL 3385452, at *1 \(S.D. Cal. Apr. 13, 2009\)*](#) (approving a PAGA settlement of 0.3 percent); [*Nordstrom Comm'n Cases, 186 Cal. App. 4th 576, 589, 112 Cal. Rptr. 3d 27 \(2010\)*](#) (approving settlement of wage and hour class action claims and PAGA claims under which no money was allocated to the [*27] PAGA claims). Therefore, the Court finds that the settlement of the claims for penalties under PAGA is reasonable.

vii. Remaining Funds

The Settlement provides that any undeliverable or uncashed checks for FCRA Class Members will be paid to the National Consumer Law Center, a non-profit organization involved in FCRA advocacy, as *cy pres*. *Settlement* ¶ III.E.13. As for the undeliverable or uncashed checks for California Class Members, they will be paid to the California State Controller's Unclaimed Property Fund in the name of the Class Member. See *Stip.* 2:14-3:8.

The Ninth Circuit requires all *cy pres* distributions to (1) address the objectives of the underlying statutes; (2) target the plaintiff class; and (3) provide reasonable certainty that any member will be benefitted. See [*Naschin v. AOL, LLC, 663 F.3d 1034, 1036 \(9th Cir. 2011\)*](#) (emphasizing that whether a *cy pres* remedy is fair, adequate and reasonable depends upon whether the award "account[s] for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members.").

The Court is satisfied that the *cy pres* distribution of uncashed checks for the FCRA Class to the National Consumer Law Center meets these standards. The National [*28] Consumer Law Center is a non-profit organization that provides "policy analysis, advocacy, litigation, expert witness services, and training for consumer advocates throughout the United States." *Our Story*, National Consumer Law Center,

<https://www.nclc.org/about-us/our-story.html> . (last visited June 3, 2019). Among other issues, the Center focuses on "worker protections, including accurate credit reports and employment background checks[.]" *Employment*, National Consumer Law Center, <https://www.nclc.org/issues/employment-2.html> . (last visited June 3, 2019). Because this organization shares in the objectives of the FCRA and bears a sufficient relationship to the FCRA Class and its members, the Court approves the proposed *cy pres* distribution to the National Consumer Law Center. See [*Hofmann v. Dutch LLC*, CV 14-02418 GPC JLB, 2017 U.S. Dist. LEXIS 30566, 2017 WL 840646, at *3 \(S.D. Cal. Mar. 2, 2017\)](#) ("A *cy pres* award meets the objectives of the underlying statute when the *cy pres* recipient's mission and the statute's goals have a non-tenuous connection."); [*Dennis v. Kellogg Co.*, 697 F.3d 858, 866 \(9th Cir. 2012\)](#) (noting that there must be sufficient relation between the charities selected for *cy pres* distribution and the interests of the silent class members); see also [*Feist v. Petco Animal Supplies, Inc.*, No. 3:16-cv-01369-H-MSB, 2018 U.S. Dist. LEXIS 197186, 2018 WL 6040801, at *6 \(S.D. Cal. Nov. 16, 2018\)](#) [*29] (approving *cy pres* distribution of a class action settlement to the National Consumer Law Center where the plaintiff brought a class action against his employer for procuring consumer reports for employment purposes in violation of the FCRA).

D. Notice to Class Members

Before the final approval hearing, the court requires that adequate notice of the settlement be given to all Class Members. [*Federal Rule of Civil Procedure 23*](#) provides:

For any class certified under [*Rule 23\(b\)\(3\)*](#) . . . the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. . . . The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the

definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under [*Rule 23\(c\)\(3\)*](#).

[*Fed. R. Civ. P. 23\(c\)\(2\)\(B\)*](#). "Notice is satisfactory if it 'generally describes the terms of the [*30] settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" [*Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 \(9th Cir. 2004\)](#) (quoting [*Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 \(9th Cir. 1980\)](#))).

Plaintiff has provided a proposed Notice of Class Action Settlement. See *Settlement*, Ex. A ("Notice"). It sets forth in clear language: (1) the nature of the action and the essential terms of the Settlement; (2) the meaning and nature of the Classes; (3) Class Counsel's application for attorney fees and the proposed service award for Plaintiff; (4) the calculation and distribution of the Net Settlement Amount; (5) information concerning the release; (6) how to dispute the total number of pay periods worked during the applicable Class Period; (7) how to opt out of the Settlement; (8) how to object to the Settlement; (9) the Court's procedure for final approval of the Settlement; and (10) how to obtain additional information regarding this case and the Settlement. See generally *id.*

Within fifteen calendar days after the Court issues this order, Defendants will provide the Settlement Administrator with the Class List, including each Member's name, last known address, telephone number, social security number, the dates during which they were employed by Defendants, [*31] and the number of pay periods they worked during the applicable Class Period. *Settlement* ¶ III.E.3.a. Within fifteen days of receiving this information,

the Settlement Administrator will mail the Class Notice to all Members, which will include the Class Member's estimated settlement share, via first-class U.S. Mail, using the most current mailing address. *Id.* ¶ III.E.3.b.

If any Class Notice is returned as undeliverable, the Settlement Administrator will within ten calendar days of the returned packet, search for a more current address for the Class Member and re-mail the Class Notice. *Id.* ¶ III.E.3.c. This inquiry will include a skip-trace or other search using the name, address, and/or Social Security Number of the Member. *Id.*

Any Class Member who does not want to participate in the Settlement or objects to the settlement must submit a notice by mail, postmarked within sixty calendar days of the date of the mailing. *Id.* ¶ III.E.4. If the number of Class Members who opt out exceeds five percent of the combined Classes, Defendant will have the right to rescind the Settlement Agreement within seven calendar days of receiving notice from the Settlement Administrator. *Id.* ¶ III.E.5. If [*32] Defendant exercises its right to terminate, Defendant will be responsible for all costs incurred by the Settlement Administrator, and the parties will be in the same legal posture as prior to the Settlement. *Id.*

Having reviewed the Class Notice, the Court finds it satisfactory.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Plaintiff's motion for preliminary approval of class action settlement. The Court **PRELIMINARILY APPROVES** the Settlement, **APPOINTS** KCC Class Action Services, LLC as the Settlement Administrator, and **APPROVES** the proposed Class Notice. The final approval hearing is set for **November 18, 2019 at 1:30 PM.**

At least thirty days before the final approval hearing and in addition to the motion for final approval of class action settlement, the Court

ORDERS Plaintiff to file:

- A memorandum justifying Class Counsel's award of attorneys' fees and costs that includes declarations supporting the reasonableness of each attorney's requested hourly rate, itemized billing statements showing hours worked, hourly rates, expenses incurred thus far, and expenses to be incurred in the future. The memorandum should explain in detail why the upward departure from the benchmark percentage [*33] rate is warranted. The memo should also explain whether a multiplier should be applied to the lodestar value for the attorneys' fees and, if so, why the proposed multiplier is appropriate in this case; and
- A memorandum justifying the incentive award for the named Plaintiff, including a detailed description of Plaintiff's efforts in pursuit of this case, and supporting declaration.

IT IS SO ORDERED.

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Exhibit 11



Neutral

As of: May 18, 2022 12:05 AM Z

Bernal v. Graham Packaging Pet Techs. Inc.

United States District Court for the Eastern District of California

May 5, 2021, Decided; May 5, 2021, Filed

CASE NO. 1:20-CV-1045 AWI EPG

Reporter

2021 U.S. Dist. LEXIS 86393 *

SUAVECITA BERNAL, individually, and on behalf of other members of the general public similarly situated, Plaintiff, v. GRAHAM PACKAGING PET TECHNOLOGIES INC., et al., Defendants

Subsequent History: Dismissed by, Without prejudice, in part, Dismissed by, in part [Bernal v. Graham Packaging Pet Techs., Inc., 2021 U.S. Dist. LEXIS 101750 \(E.D. Cal., May 28, 2021\)](#)

Counsel: [*1] For Suavecita Bernal, individually, and on behalf of other members of the general public similarly situated, Plaintiff: Jonathan Sing Lee, Molly S. DeSario, Robert J. Drexler, LEAD ATTORNEYS, Capstone Law APC, Los Angeles, CA.

For Graham Packaging Pet Technologies Inc., a Delaware corporation, Graham Packaging Company, L.P., a Delaware limited partnership, Graham Packaging Company, Inc., a Delaware corporation, GEC Packaging Technologies, LLC, a Delaware limited liability company, Defendants: Jason E. Murtagh, LEAD ATTORNEY, Buchanan, Ingersoll & Rooney LLP, San Diego, CA; Natalie Nola Peled, Buchanan Ingersoll & Rooney, PC, San Diego, CA.

Judges: Anthony W. Ishii, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: Anthony W. Ishii

Opinion

**ORDER ON REQUEST FOR DISMISSAL
AND APPROVAL OF SETTLEMENT**

(Doc. No. 17)

This is a labor related dispute between Plaintiff Suavecita Bernal and her former employer Graham Packaging, Inc., *et al.* Bernal alleges multiple violations of the California Labor Code, the California Business & Professions Code, and one claim under [California Labor Gov. Code § 2698](#) a.k.a. the [Private Attorney General Act \("PAGA"\)](#) based on violations of other Labor Code provisions. The parties have filed a stipulation [*2] with the Court in which they explain a settlement has been reached and request that the Court dismiss all of Plaintiff's claims and approve the settlement for purposes of PAGA.

In relevant part, the parties represent that they signed a non-PAGA settlement agreement whereby all of Plaintiff's individual claims (be they alleged, known, or undiscovered) have settled for approximately \$25,000.00, inclusive of attorney's fees. See Doc. No. 14. No payment of any kind appears to have been agreed with respect to the PAGA cause of action. However, the parties state that Plaintiff has agreed to waive her ability to recover in her capacity as an affected employee under PAGA. See id. The parties request that the Court approve the settlement, dismiss Plaintiff's PAGA claim with prejudice with respect to her individual capacity as an affected employee, and dismiss the PAGA claims of all other potential claimants without prejudice. See id.

PAGA actions are in the nature of *qui tam* claims in which a private party acts as a proxy for the State of California. [*Sakkab v. Luxottica Retail N. Am.*, 803 F.3d 425, 435-36 \(9th Cir. 2015\)](#). In relevant part, PAGA requires that a court "review and approve any settlement of any civil action filed pursuant to [Cal. Labor Code § 2699]." [*Cal. Lab. Code § 2699\(l\)\(2\)*](#). Federal District [*3] Courts often review PAGA settlements for approval. E.g. [*Eisenacher v. Vitas Hospice Servs.*, 2021 U.S. Dist. LEXIS 65065 \(N.D. Cal. Apr. 2, 2021\)](#); [*Maciel v. Bar 20 Dairy, LLC*, 2020 U.S. Dist. LEXIS 156961 \(E.D. Cal. Aug. 28, 2020\)](#); [*Callahan v. Brookdale Senior Living Communities*, 2020 U.S. Dist. LEXIS 153378 \(C.D. Cal. May 20, 2020\)](#); [*Hudson v. Libre Tech. Inc.*, 2020 U.S. Dist. LEXIS 84576 \(S.D. Cal. May 12, 2020\)](#). However, there is no established standard for evaluating PAGA settlements. [*Mejia v. Walgreen Co.*, 2021 U.S. Dist. LEXIS 56150, *8 n.3 \(E.D. Cal. Mar. 23, 2021\)](#); [*Eisenacher*, 2021 U.S. Dist. LEXIS 65065 at *4](#); [*Maciel*, 2020 U.S. Dist. LEXIS 156961 at *13](#).

Here, despite the parties' stipulation, it does not appear to the Court that the PAGA claims have been "settled" as that term is traditionally understood. There is no payment provided for the PAGA cause of action and there are no meaningful terms that address PAGA other than to dismiss the cause of action without prejudice as to all potential claimants except Plaintiff. What the parties have addressed is merely Plaintiff's ability to recover based on her status as an aggrieved employee, i.e. an individual capacity matter. Therefore, it appears that what has happened is that Plaintiff and Defendant have agreed to settle all of the numerous individual claims alleged or potentially possessed by Plaintiff, and as a result, Plaintiff wants to completely end this case and no longer act as California's proxy for the PAGA claim. In other words, the stipulation is actually a request that the Court utilize [*§ 2699\(l\)\(2\)*](#) to permit Plaintiff to dismiss her PAGA cause of action (without prejudice to all other potential PAGA claimants) in the absence of any recovery [*4] or any substantive terms relating to PAGA and in light of

the actual settlement of the remainder of Plaintiff's individual claims.

There is nothing inappropriate about Plaintiff settling her non-PAGA individual claims. Further, the Court is unaware of any requirement that an unwilling Plaintiff continue to maintain a PAGA claim or of any prohibition against a party simply dismissing lawsuits that include PAGA claims pursuant to [*Rule 41\(a\)*](#) in the absence of a settlement that substantively addresses a PAGA cause of action. Nevertheless, the parties' stipulation cites no relevant case law in which a court has indicated that it is required to view the settlement of all private claims and the essential abandonment of a PAGA claim without any recovery as a "PAGA settlement" for purposes of [*§ 2699\(l\)\(2\)*](#). Cf. [*Reyes-Aguilar v. Wells Fargo Bank, N.A.*, 2020 U.S. Dist. LEXIS 199973, *2 n.1](#) (finding that approval of a settlement under [*§ 2699\(l\)\(2\)*](#) was unnecessary where the plaintiff had stipulated that she had no valid PAGA claim). In the absence of authority and additional explanation/information from the parties, the Court will not grant the parties' stipulated request to approve the settlement. Simply put, it does not appear that there is actually a settlement of a PAGA cause of action as [*5] envisioned by [*§ 2699\(l\)\(2\)*](#); there is merely the settlement of all potential individual capacity claims and a desire to dismiss the entire case.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. The parties' stipulated request for approval of a purported PAGA settlement (Doc. No. 17) is DENIED without prejudice;
2. The parties may file an additional stipulated request for approval of a settlement that is supported by relevant authority and that addresses the Court's concerns as expressed above.¹

¹ If this case has truly settled, and if a [*Rule 41\(a\)*](#) dismissal appears

IT IS SO ORDERED.

Dated: May 5, 2021

/s/ Anthony W. Ishii

SENIOR DISTRICT JUDGE

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appropriate, the parties remain free to file a stipulation for dismissal under [Rule 41\(a\)](#).

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Attorneys for Defendant
BENIHANA INTERNATIONAL, INC.

(Additional Counsel on Following Page)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

JUSTIN LIE, individually and on behalf of
himself and all others similarly situated,

Plaintiff,

v.

BENIHANA INTERNATIONAL, INC., a
Delaware Corporation; and DOES 1-50,
inclusive,

Defendants.

Case No. 21-CIV-00153

[PROPOSED] ORDER

ASSIGNED FOR ALL PURPOSES TO
JUDGE NANCY FINEMAN, DEPT. 4

Hearing Date: July 5, 2022
Time: 2:00 p.m.
Dept.: 4 CR N

Complaint Filed: Jan. 12, 2021
First Amd. Compl. Filed: Dec. 5, 2021
Second Amd. Comp. Filed: Jan. 18, 2022

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7 Attorneys for Plaintiff JUSTIN LIE,
on behalf of himself and all other similarly situated
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[PROPOSED] ORDER

On July 5, 2022, Plaintiff Justine Lie's ("Lie") and Defendant Benihana International, Inc.'s ("Benihana") Joint Motion to Approve PAGA Settlement and Dismissal of PAGA Action ("Joint Motion") came regularly for hearing at 2:00 p.m. in Department 4 CR N of the above captioned Court, the Honorable Nancy Fineman, presiding.

The Court, having considered the evidence proffered in support of the Joint Motion, having read and considered the supporting authorities, and having heard and considered the arguments of counsel, and good cause appearing therefore, hereby orders as follows:

The Joint Motion is GRANTED [IN FULL/IN PART] as follows:

(1) The PAGA Settlement and Stipulation between Benihana and Lie (collectively, the "Parties") and the payment described therein resolving Lie's individual claims for relief under the California Private Attorneys General Act (California Labor Code section 2698, *et seq.*) is approved;

(2) The above-captioned action is hereby dismissed *with* prejudice as to Lie's individual claims;

(3) The above-captioned action is hereby without prejudice as to the Aggrieved Employees' representative PAGA claims; and

(4) All Parties in the above-captioned actions will bear their own respective fees and costs as expressly provided for in the PAGA Settlement and Stipulation.

Dated: _____

By: _____

Honorable Judge Nancy Fineman
Judge of the Superior Court

4863-5667-9969.1 / 062447-1174

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10 Attorneys for Defendant
BENIHANA INTERNATIONAL, INC.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SAN MATEO

16 JUSTIN LIE, individually and on behalf of
himself and all others similarly situated,

17 Plaintiff,

18 v.

19 BENIHANA INTERNATIONAL, INC., a
20 Delaware Corporation; and DOES 1-50,
inclusive,

21 Defendants.
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27
28

Case No. 21-CIV-00153

PROOF OF SERVICE

ASSIGNED FOR ALL PURPOSES TO
JUDGE NANCY FINEMAN, DEPT. 4

Hearing Date: July 5, 2022

Time: 2:00 p.m.

Dept.: 4 CR N

Complaint Filed: Jan. 12, 2021

First Amd. Compl. Filed: Dec. 5, 2021

Second Amd. Comp. Filed: Jan. 18, 2022

1 **PROOF OF SERVICE**

2 I am a resident of the State of California, over the age of eighteen years, and not a
3 party to the within action. My business address is Treat Towers, 1255 Treat Boulevard, Suite 600,
4 Walnut Creek, California 94597. On May 31, 2022, I served the within document(s):

5 **JOINT NOTICE OF MOTION AND MOTION TO APPROVE**
6 **PAGA SETTLEMENT AND DISMISSAL OF PAGA ACTION**

7 **DECLARATION OF CHAD GREESON IN SUPPORT OF**
8 **JOINT MOTION TO APPROVE PAGA SETTLEMENT AND**
9 **DISMISS PAGA ACTION**

10 **DECLARATION OF CHRISTINA LUCIO IN SUPPORT OF**
11 **JOINT MOTION TO APPROVE PAGA SETTLEMENT AND**
12 **DISMISS PAGA ACTION**

13 **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF JOINT**
14 **MOTION TO APPROVE PAGA SETTLEMENT AND**
15 **DISMISS PAGA ACTION**

16 **APPENDIX OF FEDERAL CASES CITED IN SUPPORT OF**
17 **JOINT NOTICE OF MOTION AND MOTION TO APPROVE**
18 **PAGA SETTLEMENT AND DISMISSAL OF PAGA ACTION**

19 **[PROPOSED] ORDER**

20 ☐ by facsimile transmission at or about _____ on that date. This document was
21 transmitted by using a facsimile machine that complies with California Rules of
22 Court Rule 2003(3), telephone number . The transmission was reported as complete
23 and without error. A copy of the transmission report, properly issued by the
24 transmitting machine, is attached. The names and facsimile numbers of the person(s)
25 served are as set forth below.

26 ☐ by placing a true copy of the document(s) listed above for collection and mailing
27 following the firm's ordinary business practice in a sealed envelope with postage
28 thereon fully prepaid for deposit in the United States mail at Walnut Creek,
California addressed as set forth below.

☐ by depositing a true copy of the same enclosed in a sealed envelope, with delivery
fees provided for, in an overnight delivery service pick up box or office designated
for overnight delivery, and addressed as set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the
address(es) set forth below.



2 Based on a court order or an agreement of the parties to accept service by e-mail or
3 electronic transmission, I caused the documents to be sent to the persons at the e-
4 mail addresses on the attached service list on the dates and at the times stated thereon.
5 I did not receive, within a reasonable time after the transmission, any electronic
6 message or other indication that the transmission was unsuccessful. The electronic
7 notification address of the person making the service is gcamacho@littler.com.

8 James R. Hawkins
9 Christina M. Lucio
10 Sheila Gonzales
11 Nicole Miccolis
12 James Hawkins APLC
13 9880 Research Drive, Suite 200
14 Irvine, CA 92618
15 P: 949.387.7200 / F: 949.387.6676
16 James@Jameshawkinsaplc.com
17 Christina@Jameshawkinsaplc.com
18 sheila@jameshawkinsaplc.com
19 nicole@jameshawkinsaplc.com

VIA LWDA PAGA FILING PORTAL

CALIFORNIA LABOR &
WORKFORCE DEVELOPMENT
AGENCY
ATTN: PAGA ADMINISTRATOR
1515 Clay Street, Suite 801
Oakland, CA 94612

20 I am readily familiar with the firm's practice of collection and processing
21 correspondence for mailing and for shipping via overnight delivery service. Under that practice it
22 would be deposited with the U.S. Postal Service or if an overnight delivery service shipment,
23 deposited in an overnight delivery service pick-up box or office on the same day with postage or
24 fees thereon fully prepaid in the ordinary course of business.

25 I declare that I am employed in the office of a member of the bar of this court at
26 whose direction the service was made. Executed on May 31, 2022, at Walnut Creek, California.

27 

28 Gina Camacho

4864-5986-3330.1 / 062447-1174