

ORDER ON SUBMITTED MATTER

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

NORMAJEAN FERLAND,

Plaintiff,

v.

COMPREHENSIVE SPINE AND SPORTS
CENTER, et al.,

Defendants.

Case No.: 21CV375218

**ORDER CONCERNING PLAINTIFF'S
MOTION FOR PRELIMINARY
APPROVAL OF CLASS/PAGA
SETTLEMENT**

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff NormaJean Ferland alleges that Defendant Navani Pain Management Inc. dba Comprehensive Spine and Sports Center required employees to work off-the-clock, failed to provide compliant meal and rest periods, failed to reimburse employees for business expenses, and committed other wage and hour violations.

Before the Court is Plaintiff's motion for preliminary approval of a settlement, which is unopposed. The Court issued a tentative ruling on May 25, 2022, stating that it was inclined to grant preliminary approval subject to the parties' agreement to amend the release to conform with *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521 (*Amaro*). No one contested the tentative ruling at the hearing on June 2, and the parties filed an appropriate

1 amended settlement agreement on June 16. The Court now issues its final order, which
2 GRANTS preliminary approval to the amended settlement.

3 **I. BACKGROUND**

4 According to the operative complaint, Plaintiff worked for Defendant in Santa Clara
5 County as an hourly, non-exempt employee from approximately September 2019 to September
6 2020. (First Amended Complaint (“FAC”), ¶ 8.) Defendant required her and other employees to
7 work off-the-clock and also failed to compensate them for all recorded hours worked. (*Id.*, ¶ 15.)
8 It failed to provide compliant meal and rest periods, requiring, pressuring, or encouraging
9 employees to perform tasks that could not be completed without working through breaks, or
10 simply denying employees permission to take breaks. (*Id.*, ¶¶ 16–17.) As a result of these other
11 violations, Defendant failed to timely pay all wages upon separation of employment and to
12 provide accurate wage statements. (*Id.*, ¶¶ 18–19.) Finally, Defendant failed to reimburse
13 employees for business expenses including work attire, office supplies, and use of their personal
14 cell phones. (*Id.*, ¶ 20.)

15 Based on these allegations, Plaintiff brings the following putative class claims against
16 Defendant: (1) failure to pay minimum and straight time wages for all hours worked; (2) failure
17 to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit
18 rest periods; (5) failure to pay wages of discharged employees – waiting time penalties; (6)
19 failure to provide and maintain accurate and compliant wage records; (7) failure to indemnify
20 employees for expenditures; and (8) violation of Business & Professions Code section 17200 et
21 seq. Plaintiff also brings (9) a representative claim for PAGA penalties.

22 The parties have now reached a settlement. Plaintiff moves for an order preliminarily
23 approving the settlement of the class and PAGA claims, provisionally certifying the settlement
24 class, approving the form and method for providing notice to the class, and scheduling a final
25 fairness hearing.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

Generally, “questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court’s broad discretion.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba, supra*, 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs’ case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial court must examine the “proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*, citation and internal quotation marks omitted.)

The burden is on the proponent of the settlement to show that it is fair and reasonable. However “a presumption of fairness exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are

1 sufficient to allow counsel and the court to act intelligently; (3) counsel is
2 experienced in similar litigation; and (4) the percentage of objectors is small.”
3 (*Wershba, supra*, 91 Cal.App.4th at p. 245, citation omitted.) The presumption does not permit
4 the Court to “give rubber-stamp approval” to a settlement; in all cases, it must “independently
5 and objectively analyze the evidence and circumstances before it in order to determine whether
6 the settlement is in the best interests of those whose claims will be extinguished,” based on a
7 sufficiently developed factual record. (*Kullar, supra*, 168 Cal.App.4th at p. 130.)

8 **B. PAGA**

9 Labor Code section 2699, subdivision (1)(2) provides that “[t]he superior court shall
10 review and approve any settlement of any civil action filed pursuant to” PAGA. The court’s
11 review “ensur[es] that any negotiated resolution is fair to those affected.” (*Williams v. Superior*
12 *Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA
13 go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-
14 five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC*
15 (2014) 59 Cal.4th 348, 380.)

16 Similar to its review of class action settlements, the Court must “determine independently
17 whether a PAGA settlement is fair and reasonable,” to protect “the interests of the public and the
18 LWDA in the enforcement of state labor laws.” (*Moniz v. Adecco USA, Inc.* (2021) 72
19 Cal.App.5th 56, 76–77.) It must make this assessment “in view of PAGA’s purposes to
20 remediate present labor law violations, deter future ones, and to maximize enforcement of state
21 labor laws.” (*Id.* at p. 77; see also *Haralson v. U.S. Aviation Servs. Corp.* (N.D. Cal. 2019) 383
22 F. Supp. 3d 959, 971 [“when a PAGA claim is settled, the relief provided for under the PAGA
23 [should] be genuine and meaningful, consistent with the underlying purpose of the statute to
24 benefit the public”], quoting LWDA guidance discussed in *O’Connor v. Uber Technologies,*
25 *Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O’Connor*).)

26 The settlement must be reasonable in light of the potential verdict value. (See *O’Connor,*
27 *supra*, 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential
28 verdict].) But a permissible settlement may be substantially discounted, given that courts often

1 exercise their discretion to award PAGA penalties below the statutory maximum even where a
2 claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-
3 CV-02198-EMC) 2016 WL 5907869, at *8–9.)

4 **III. SETTLEMENT PROCESS**

5 Before mediating the case, the parties exchanged documents and information. Defendant
6 produced a sampling of timekeeping and payroll records for the putative class members, as well
7 as its wage and hour policies and practices during the class period and information about the total
8 number of current and former employees. Plaintiff’s counsel used this information to evaluate
9 the probability of class certification, the likelihood of success on the merits, and Defendant’s
10 maximum monetary exposure for all of the claims at issue.

11 On July 26, 2021, the parties mediated with Lisa Klerman and were able to reach the
12 settlement now before the Court.

13 **IV. SETTLEMENT PROVISIONS**

14 The non-reversionary gross settlement amount is \$310,000. Attorney fees of up to
15 \$103,333.33 (one-third of the gross settlement), litigation costs not to exceed \$15,000, and
16 administration costs of approximately \$9,765 will be paid from the gross settlement. \$10,000
17 will be allocated to PAGA penalties, 75 percent of which will be paid to the LWDA. The named
18 plaintiff will seek an incentive award of \$7,500.

19 The net settlement, approximately \$166,901.67, will be allocated to settlement class
20 members proportionally based on their weeks worked during the settlement period. The average
21 payment will be around \$1,076.78 to each of the 155 class members. Class members will not be
22 required to submit a claim to receive their payments. For tax purposes, settlement payments will
23 be allocated 33 percent to wages and 67 percent to penalties and interest. The employer’s share
24 of taxes will be paid separately from the settlement. Funds associated with checks uncashed
25 after 180 days will be redistributed to participating class members, and any of those checks that
26 remain uncashed after another 180 days will be deposited with the State Controller’s Unclaimed
27 Property Fund. But if less than \$5,000 remains unclaimed, the unclaimed funds will be paid as a
28 *cy pres* award to the Los Angeles Trial Lawyers’ Charities (“LATLC”).

1 Under the amended settlement agreement, class members who do not opt out will release
2 “any and all claims alleged in the Litigation arising during the Settlement Period, and all claims
3 arising in connection with or related to the facts or primary rights alleged in the Litigation arising
4 during the Settlement Period, including, but not limited to,” specified wage and hour claims.
5 The PAGA release similarly encompasses “any and all claims alleged in the PAGA letter to the
6 LWDA and any amendments thereto, any and all claims alleged in the Litigation arising under
7 PAGA during the PAGA Period, and all claims arising from or related to the facts or primary
8 rights as those alleged in the Litigation arising under PAGA during the PAGA Period” As
9 amended, the releases are appropriately “tied to the *factual allegations* in the complaint, not the
10 claims or theories of liability asserted.” (*Amaro, supra*, 69 Cal.App.5th at p. 538, italics
11 original.)

12 **V. FAIRNESS OF SETTLEMENT**

13 Plaintiff’s counsel estimates that Defendant failed to pay employees for 20 minutes of
14 off-the-clock work per shift, with 60 percent of that work constituting overtime. The potential
15 liability for this theory is estimated at \$251,175. Based on a violation rate of about 24 percent,
16 the meal period claims could be worth up to \$141,838, and the rest period claims could total
17 \$615,327 based on a 100 percent violation rate. Unreimbursed expenses associated with
18 supplies, protective safety equipment, and use of personal cell phones could total \$32,472. The
19 maximum value of the core claims is thus estimated to be \$1,046,325. But Plaintiff believes
20 their realistic value is more like \$152,142.70, as discussed in more detail in counsel’s
21 declaration. Waiting time penalties could total \$385,533, wage statement penalties could be
22 worth \$236,350, and PAGA penalties have a maximum value of \$885,500. Thus, the maximum
23 potential value of the entire case is approximately \$2,553,708, with the settlement representing a
24 twelve percent recovery. Plaintiff believes a realistic recovery, including penalties, would be
25 \$402,142.70.

26 Based on this and the more detailed analysis set forth in counsel’s declaration, the Court
27 agrees that the settlement is appropriate, particularly considering the risks at class certification
28 and the portion of the maximum recovery attributable to uncertain penalties. The Court finds

1 that the settlement is fair and reasonable to the class for purposes of preliminary approval, and
2 that the PAGA allocation is genuine, meaningful, and reasonable in light of the statute's
3 purposes.

4 The Court retains an independent right and responsibility to review the requested attorney
5 fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles*
6 *Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127–128.) While 1/3 of the common fund
7 for attorney fees is generally considered reasonable, counsel shall submit lodestar information
8 before the final approval hearing in this matter so the Court can compare the lodestar information
9 with the requested fees.

10 **VI. PROPOSED SETTLEMENT CLASS**

11 Plaintiff requests that the following settlement class be provisionally certified:

12 All persons who worked for Defendant in California as an hourly-paid or non-
13 exempt employee during the Settlement Period [from January 14, 2017 through
14 September 26, 2021].

15 **A. Legal Standard for Certifying a Class for Settlement Purposes**

16 Rule 3.769(d) of the California Rules of Court states that “[t]he court may make an order
17 approving or denying certification of a provisional settlement class after [a] preliminary
18 settlement hearing.” California Code of Civil Procedure Section 382 authorizes certification of a
19 class “when the question is one of a common or general interest, of many persons, or when the
20 parties are numerous, and it is impracticable to bring them all before the court”

21 Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence:
22 (1) an ascertainable class and (2) a well-defined community of interest among the class
23 members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On*
24 *Drug Stores*)). “Other relevant considerations include the probability that each class member
25 will come forward ultimately to prove his or her separate claim to a portion of the total recovery
26 and whether the class approach would actually serve to deter and redress alleged wrongdoing.”
27 (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of
28

1 establishing that class treatment will yield “substantial benefits” to both “the litigants and to the
2 court.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

3 In the settlement context, “the court’s evaluation of the certification issues is somewhat
4 different from its consideration of certification issues when the class action has not yet settled.”
5 (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the
6 settlement-only context, the case management issues inherent in the ascertainable class
7 determination need not be confronted, and the court’s review is more lenient in this respect. (*Id.*
8 at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or
9 overbroad class definitions require heightened scrutiny in the settlement-only class context, since
10 the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

11 **B. Ascertainable Class**

12 A class is ascertainable “when it is defined in terms of objective characteristics and
13 common transactional facts that make the ultimate identification of class members possible when
14 that identification becomes necessary.” (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980
15 (*Noel*.) A class definition satisfying these requirements

16 puts members of the class on notice that their rights may be adjudicated in the
17 proceeding, so they must decide whether to intervene, opt out, or do nothing and
18 live with the consequences. This kind of class definition also advances due
19 process by supplying a concrete basis for determining who will and will not be
20 bound by (or benefit from) any judgment.

21 (*Noel, supra*, 7 Cal.5th at p. 980, citation omitted.)

22 “As a rule, a representative plaintiff in a class action need not introduce evidence
23 establishing how notice of the action will be communicated to individual class members in order
24 to show an ascertainable class.” (*Noel, supra*, 7 Cal.5th at p. 984.) Still, it has long been held
25 that “[c]lass members are ‘ascertainable’ where they may be readily identified ... by reference to
26 official records.” (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on
27 another ground by *Noel, supra*, 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178
28 Cal.App.4th 966, 975-976 [“The defined class of all HD Package subscribers is precise, with

1 objective characteristics and transactional parameters, and can be determined by DIRECTV's
2 own account records. No more is needed."].)

3 Here, the class members are readily identifiable based on Defendant's records, and the
4 settlement class is appropriately defined based on objective characteristics. The class is
5 numerous, ascertainable, and appropriately defined.

6 **C. Community of Interest**

7 The "community-of-interest" requirement encompasses three factors: (1) predominant
8 questions of law or fact, (2) class representatives with claims or defenses typical of the class, and
9 (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, supra*, 34
10 Cal.4th at pp. 326, 332.)

11 For the first community of interest factor, "[i]n order to determine whether common
12 questions of fact predominate the trial court must examine the issues framed by the pleadings
13 and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.*
14 (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also examine evidence of any conflict
15 of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court*
16 (2003) 113 Cal.App.4th 195, 215.) The ultimate question is whether the issues which may be
17 jointly tried, when compared with those requiring separate adjudication, are so numerous or
18 substantial that the maintenance of a class action would be good for the judicial process and to
19 the litigants. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104–1105
20 (*Lockheed Martin*).) "As a general rule if the defendant's liability can be determined by facts
21 common to all members of the class, a class will be certified even if the members must
22 individually prove their damages." (*Hicks, supra*, 89 Cal.App.4th at p. 916.)

23 Here, common legal and factual issues predominate. Plaintiff's claims all arise from
24 Defendant's wage and hour policies and practices applied to the similarly-situated class
25 members.

26 As to the second factor,

27 The typicality requirement is meant to ensure that the class representative is able
28 to adequately represent the class and focus on common issues. It is only when a

1 defense unique to the class representative will be a major focus of the litigation,
2 or when the class representative's interests are antagonistic to or in conflict with
3 the objectives of those she purports to represent that denial of class certification is
4 appropriate. But even then, the court should determine if it would be feasible to
5 divide the class into subclasses to eliminate the conflict and allow the class action
6 to be maintained.

7 (*Medraza v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations,
8 brackets, and quotation marks omitted.)

9 Like other members of the class, Plaintiff was employed by Defendant as an hourly
10 employee and alleges that she experienced the violations at issue. The anticipated defenses are
11 not unique to Plaintiff, and there is no indication that Plaintiff's interests are otherwise in conflict
12 with those of the class.

13 Finally, adequacy of representation "depends on whether the plaintiff's attorney is
14 qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the
15 interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The class
16 representative does not necessarily have to incur all of the damages suffered by each different
17 class member in order to provide adequate representation to the class. (*Wershba, supra*, 91
18 Cal.App.4th at p. 238.) "Differences in individual class members' proof of damages [are] not
19 fatal to class certification. Only a conflict that goes to the very subject matter of the litigation
20 will defeat a party's claim of representative status." (*Ibid.*, internal citations and quotation marks
21 omitted.)

22 Plaintiff has the same interest in maintaining this action as any class member would
23 have. Further, she has hired experienced counsel. Plaintiff has sufficiently demonstrated
24 adequacy of representation.

25 **D. Substantial Benefits of Class Certification**

26 "[A] class action should not be certified unless substantial benefits accrue both to
27 litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120,
28 internal quotation marks omitted.) The question is whether a class action would be superior to

1 individual lawsuits. (*Ibid.*) “Thus, even if questions of law or fact predominate, the lack of
2 superiority provides an alternative ground to deny class certification.” (*Ibid.*) Generally, “a
3 class action is proper where it provides small claimants with a method of obtaining redress and
4 when numerous parties suffer injury of insufficient size to warrant individual action.” (*Id.* at pp.
5 120–121, internal quotation marks omitted.)

6 Here, there are many class members, and it would be inefficient for the Court to hear and
7 decide the same issues separately and repeatedly for each class member. Further, it would be
8 cost prohibitive for each class member to file suit individually, as each member would have the
9 potential for little to no monetary recovery. It is clear that a class action provides substantial
10 benefits to both the litigants and the Court in this case.

11 **VII. NOTICE**

12 The content of a class notice is subject to court approval. (Cal. Rules of Court, rule
13 3.769(f).) “The notice must contain an explanation of the proposed settlement and procedures
14 for class members to follow in filing written objections to it and in arranging to appear at the
15 settlement hearing and state any objections to the proposed settlement.” (*Ibid.*) In determining
16 the manner of the notice, the court must consider: “(1) The interests of the class; (2) The type of
17 relief requested; (3) The stake of the individual class members; (4) The cost of notifying class
18 members; (5) The resources of the parties; (6) The possible prejudice to class members who do
19 not receive notice; and (7) The res judicata effect on class members.” (Cal. Rules of Court, rule
20 3.766(e).)

21 Here, the notice describes the lawsuit, explains the settlement, and instructs class
22 members that they may opt out of the settlement or object. The gross settlement amount and
23 estimated deductions are provided. Class members are given 45 days to request exclusion from
24 the class or submit a written objection to the settlement. The notice directs class members that
25 they may appear at the final fairness hearing to make an oral objection without filing a written
26 objection. Notice will be provided in both English and Spanish. Class members’ estimated
27 settlement payments and workweek information is provided on a separate workweek dispute
28 form.

1 At the Court's direction, the notice was modified to instruct class members that they may
2 request to be excluded from the class by simply providing their name, without the need to
3 provide their Social Security number or other identifying information. The notice was also
4 modified so that class members' estimated payments and workweek information is displayed in
5 bold within a box set off from the rest of the text on the first page of the notice.

6 Regarding appearances at the final fairness hearing, the notice was further modified to
7 instruct class members as follows:

8 Hearings before the judge overseeing this case are again being conducted in
9 person. However, remote appearances are still permitted, and are offered with the
10 assistance of a third-party service provider, CourtCall. If that remains the case at
11 the time of the final fairness hearing, class members who wish to appear at the
12 final fairness hearing remotely should contact class counsel to arrange an
13 appearance through CourtCall, at least three days before the hearing if possible.

14 Any CourtCall fees for an appearance by an objecting class member shall be paid
15 by class counsel.

16 Turning to the notice procedure, the parties have selected ILYM Group, Inc. as the
17 settlement administrator. The administrator will mail the notice packet within 30 days of
18 preliminary approval, after updating class members' addresses using the National Change of
19 Address Database. Any returned notices will be promptly re-mailed to any forwarding address
20 provided, or any more current address located through a skip trace.

21 These notice procedures are appropriate and are approved.

22 **VIII. CONCLUSION**

23 For the foregoing reasons, the Court GRANTS Plaintiffs' motion for preliminary
24 approval. The final approval hearing will take place on **November 3, 2022** at 1:30 p.m. in Dept.

25 1. The following class will be preliminarily certified for settlement purposes:

26 All persons who worked for Defendant in California as an hourly-paid or non-
27 exempt employee during the Settlement Period [from January 14, 2017 through
28 September 26, 2021].

1 Before final approval, Plaintiff shall lodge any individual settlement agreement she may
2 have executed with Defendant for the Court's review.

3 **IT IS SO ORDERED.**

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5 Date: June 21, 2022

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8 The Honorable Sunil R. Kulkarni
9 Judge of the Superior Court
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