Justin F. Marquez, Esq. (SBN 262417)
justin@wilshirelawfirm.com
Benjamin H. Haber, Esq. (SBN 315664)
benjamin@wilshirelawfirm.com
Arrash T. Fattahi, Esq. (SBN 333676)
afattahi@wilshirelawfirm.com
WILSHIRE LAW FIRM
3055 Wilshire Blvd., 12th Floor
Los Angeles, California 90010
Telephone (213) 381-9988
Facsimile: (213) 381-9989

Attorneys for Plaintiff

FILED
MAR 06 2023
K. BIEKER CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
By ______ Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF CONTRA COSTA

RAUL FRIAS-ESTRADA, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

TREK RETAIL CORPORATION, a Wisconsin corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No.: MSC20-01916

CLASS ACTION

[*Assigned to:* Hon. Edward G. Weil, Dept. 39]

ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT

FINAL APPROVAL HEARING
Date: February 16, 2023
Time: 9:00 a.m.
Dept: 39

This matter coming before the Court on Plaintiff Raul Frias-Estrada's ("Plaintiff") Motion for Final Approval of Class Action Settlement (the "Final Approval Motion"), and after review and consideration of the parties' fully-executed Settlement Agreement and First Amendment to Settlement Agreement (collectively, the "Settlement") and the papers in support of the Final Approval Motion, due and adequate notice having been given to the Class, and the Court having reviewed and considered the Settlement, all papers filed, the record, proceedings in the above-entitled action ("Litigation" or "Action"), and all oral and written comments received regarding the Settlement, and good cause appearing therefor, is hereby granted.

I. Court's February 16, 2023 Order

The Court issued its ruling granting Plaintiff's Final Approval Motion on February 16, 2023, which is included below in full:

Plaintiff Raul Frias-Estrada moves for final approval of his class action and PAGA settlement with defendant Trek Retail Corporation. The motion is **granted**.

A. Background and Settlement Terms

The original complaint was filed on September 21, 2020, raising claims under PAGA and a class action on behalf of non-exempt employees, alleging that defendant violated the Labor Code in various ways, including failure to pay minimum wage, failure to pay overtime, failure to provide meal and rest breaks, failure to provide proper wage statements, and failure to reimburse employee expenses.

The settlement would create a gross settlement fund of $675,000. The class representative payment to the plaintiff would be $10,000. Attorney's fees would be $225,000 (one-third of the settlement). Litigation costs would not exceed $15,000. The settlement administrator's costs (Phoenix) are estimated at $10,000. PAGA penalties would be $10,000, resulting in a payment of $7,500 to the LWDA. The net amount paid directly to the class members would be about $405,000. The fund is non-reversionary. There are an estimated 491 class members. Based on the estimated class size, the average net payment for each class member is approximately $826.

The entire settlement amount will be deposited into a trust account for the benefit of the class within 14 days after final approval of the settlement. The proposed settlement would certify a class of "all persons who worked for any Defendant in California as an hourly-paid or non-exempt employee during the Settlement Period." The settlement period is September 22, 2016, through December 1, 2021. The class members will not be required to file a claim. Class members may object or opt out of the settlement. (Aggrieved employees cannot opt out of the PAGA portion of the settlement.) Funds would be apportioned to class members based on the number of workweeks worked during the class period.

Various prescribed follow-up steps will be taken with respect to mail that is returned as undeliverable. Checks undelivered or uncashed 180 days after mailing will be voided, and will be paid to a cy pres beneficiary, Los Angeles Trial Lawyers' Charities. The president of that organization, Steven Vartazarian, attests that the organization will "allocate the award to specific charitable efforts specifically related to employment and professional development and monitor those charitable efforts to ensure the cy pres funds are indeed utilized for the earmarked purposes." Counsel Marquez attests that he and his firm have "no interest, financial or otherwise" in the proposed cy pres recipient.

The settlement contains release language covering "any and all wage-related claims that were alleged in the Litigation or which could have been alleged in the Litigation based on the facts asserted in the Litigation arising during the Settlement Period[.]" Under recent appellate authority, the limitation to those claims with the "same factual predicate" as those alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ["A court cannot release claims that are outside the scope of the allegations of the complaint." "Put another way, a release of claims that goes beyond the scope of the allegations in the operative complaint' is impermissible." (*Id.*, quoting *Marshall v. Northrop Grumman Corp.* (C.D. Cal.2020) 469 F.Supp.3d 942, 949.)

Informal discovery was undertaken, resulting in the production of substantial documents, including sick pay policies. The matter settled after arms-length negotiations, which included a session with an experienced mediator on October 1, 2021.

Counsel also has provided an analysis of the case, and how the settlement compares to the potential value of the case, after allowing for various risks and contingencies. This included an estimate of class claims at a maximum of about $5.7 million ($2.5 million of which would be PAGA penalties), but with a "realistic" maximum of $794,845.

The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code,§ 2699(e)(2) [PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory."])

The proof of service of the moving papers attests that the LWDA was notified of the proposed settlement.

Since preliminary approval was granted, the administrator has mailed notices to 536 class members. Four packets were returned by the post office. No objections have been received, and only two class members timely requested to opt out (and one more untimely).

B. Legal Standards

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801, including "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 state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction ... to the proposed settlement." (See also *Amaro v. Anaheim Arena Mgmt., LLC, supra*, 69 Cal.App.5th 521.)

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in *Moniz v.*

Adecco USA, Inc. (2021) 72 Cal.App.5th 56, provided guidance on this issue. In Moniz, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees[.]" (*Id.*, at 64-65.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "[t]he court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that Neary does not always apply, because "[w]here the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

Attorney fees

Plaintiffs seek one-third of the total settlement amount as fees, relying on the "common fund" theory, or $225,000. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id.*, at 505.)

Accordingly, plaintiffs have provided information concerning the lodestar fee amount.

They estimate the lodestar at $138,875, which would result in an implied multiplier of about 1.6. They based this amount on a total of 249 hours, at hourly rates ranging from $[]. No adjustment from the [] fee is necessary. The attorney's fees are reasonable and are approved.

The requested representative payment of $10,000 for the named plaintiff was deferred until this final approval motion. Criteria for evaluation of such requests are discussed in Clark v. American Residential Services LLC (2009) 175 Cal.App.4th 785, 804-807. Plaintiff has provided a declaration in support of his request. He points out that he executed a broader release than the class as a whole, but do not identify any particular claims of value that they may have. He also risks damage to his reputation and more difficulty in obtaining employment. He estimates that he spent at least 40 hours on the matter. The representative payment is approved.

Litigation costs of $15,000 are reasonable and are approved.

The settlement administrator's costs of $10,000 are reasonable and are approved.

C. Discussion and Conclusion

The moving papers sufficiently establish that the proposed settlement is fair, reasonable, and adequate to justify final approval. The allocation of PAGA penalties among the aggrieved employees (based on pay periods), is reasonable.

The motion is granted.

Counsel are directed to prepare an order reflecting this entire tentative ruling and the other findings in the previously submitted proposed order and a separate judgment.

The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented, to be determined in consultation with the Department's clerk. Plaintiffs' counsel are to submit a compliance statement one week before the compliance hearing date. Five percent of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court. Pursuant to Code of Civil Procedure § 384(b), after the settlement is completely implemented, the judgment must be amended to reflect the amount paid to the cy pres recipient.

II. <u>Other Findings From Previously Submitted Proposed Order, With Modifications</u>

Pursuant to the February 16, 2023 Order

Additionally, pursuant to the Court's February 16, 2023 Order, IT IS HEREBY ORDERED that:

1. Other than the defined terms set forth in this Order, the Court, for purposes of this Order, adopts all defined terms as set forth in the Settlement filed in this case.

2. The Court has jurisdiction over all claims asserted in the Action, Plaintiff, all members of the Settlement Class, and Defendant Trek Retail Corporation ("Defendant").

3. The Court finds that the Settlement appears to have been made and entered into in good faith and hereby approves the settlement subject to the limitations on the requested fees and enhancements as set forth below.

4. Plaintiff and all Participating Class Members shall have, by operation of this Final Order and Judgment, fully, finally, and forever released, relinquished, and discharged Defendant and the Released Parties from all released claims as set forth in the Settlement.

5. Plaintiff, the State of California, and all Participating PAGA Members shall have, by operation of this Final Order and Judgment, fully, finally, and forever released, relinquished, and discharged Defendant and the Released Parties from all released PAGA claims as set forth in the Settlement.

6. The Parties shall bear their own respective attorneys' fees and costs, except as otherwise provided for in the Settlement and approved by the Court.

7. Solely for purposes of effectuating the settlement, the Court finally certified the following Class: "All persons who worked for Defendant in California as an hourly-paid or non-exempt employee during the Settlement Period."

8. The Settlement Period is September 22, 2016 through December 1, 2021.

9. The PAGA Period is September 22, 2019 through December 1, 2021.

10. No Settlement Class Members have objected to the terms of the Settlement.

11. Two Class Members have validly requested exclusion from the Settlement. The excluded Class Members are Richard P. Grice and Scott B. Miner.

12. The Notice provided to the Class conforms with the requirements of California

Rules of Court 3.766 and 3.769, and constitutes the best notice practicable under the circumstances, by providing individual notice to all Class Members who could be identified through reasonable effort, and by providing due and adequate notice of the proceedings and of the matters set forth therein to the Class Members. The Notice fully satisfies the requirements of due process.

13. The Court finds the Settlement Amount, the Net Settlement Amount, and the methodology used to calculate and pay the Net Settlement Payments to each Participating Class Member are fair and reasonable and authorizes the Settlement Administrator to pay the Net Settlement Payments to the Participating Class Members in accordance with the terms of the Stipulation.

14. The Court approves the Settlement and finds that it is fair, reasonable, and adequate, and worthy of final approval.

15. The Court also finds the PAGA Settlement is fair and reasonable, and that Plaintiff provided notice of the proposed Settlement to the Labor and Workforce Development Agency (LWDA) and will fully and adequately comply with the notice requirements of California Labor Code section 2699(1). The Court hereby approves the PAGA Settlement.

16. Defendant shall pay the total of S675,000.00 to resolve this litigation. No later than fourteen (14) calendar days following the date on which the Court grants Final Approval, Defendant shall deposit this amount and employer taxes into an account established by the Settlement Administrator. Thereafter, compensation to the Participating Class Members shall be disbursed pursuant to the terms of the Settlement (i.e., within 21 calendar days of the Final Effective Date).

(a) From the Settlement Amount, $7,500.00 shall be paid to the California Labor and Workforce Development Agency, representing approximately 75% of the penalties awarded under the terms of the Settlement Agreement pursuant to the Labor Code Private Attorneys General Act of 2004, California Labor Code section 2698, *et seq.*

(b) From the Settlement Amount, $10,000.00 shall be paid to the named Plaintiff, Raul Frias-Estrada for his service as class representative and for his agreement to release claims.

(c) From the Settlement Amount, $9,250.00 shall be paid to the Settlement Administrator, Phoenix Settlement Administrators.

///

17. The Court finds that Los Angeles Trial Lawyers' Charities is approved as the designed *cy pres* beneficiary and shall receive unpaid residue in accordance with the terms of the Settlement Agreement.

18. The Court hereby confirms Justin F. Marquez, Benjamin H. Haber, and Arrash T. Fattahi of Wilshire Law Firm, PLC as Class Counsel.

19. From the Settlement Amount, Class Counsel is awarded $225,000.00 for their reasonable attorneys' fees and $15,000.00 for their reasonable costs incurred in the Action. The fees and costs shall be distributed to Class Counsel as set forth in the Settlement, with the modification that five percent (5%) of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court. The Court finds that the fees are reasonable in light of the benefit provided to the Class.

20. Notice of entry of this Final Approval Order and Judgment shall be given to Class Members by posting a copy of the Final Approval Order and Judgment on Phoenix Settlement Administrators' website for a period of at least sixty (60) calendar days after the date of entry of this Final Approval Order and Judgment.

21. Without affecting the finality of this Final Judgment in any way, this Court retains continuing jurisdiction over the implementation, interpretation, and enforcement of the Settlement with respect to all Parties to this action, and their counsel of record.

22. Plaintiff's Motion for Final Approval of Class Action Settlement is hereby granted and the Court directs that judgment shall be entered in accordance with the terms of this Order.

23. The Court sets a compliance hearing for October 12, 2023 at 9:00 a.m. Plaintiffs' counsel shall submit a compliance statement one week before the compliance hearing date.

IT IS SO ORDERED.

DATE: 3/3/23

Hon. Edward G. Weil
Judge of the Contra Costa County Superior Court

PROOF OF SERVICE

Frias-Estrada v. *Trek Retail Corporation, et al.*
MSC20-01916

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Ashley Narinyans, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12^{th} Floor, Los Angeles, California 90010. My electronic service address is anarinyans@wilshirelawfirm.com.

On **March 1, 2023**, I served the foregoing **AMENDED ORDER GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT,** on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

Jennifer N. Lutz, Esq. (SBN 190460)
jlutz@pettitkohn.com
Rio F. Schwarting, Esq. (SBN 323363)
rschwarting@pettitkohn.com
Michelle Guerrero
mguerrero@pettitkohn.com
Kimberly Wood
kwood@pettitkohn.com
PETTIT KOHN INGRASSIA LUTZ & DOLIN PC
11622 El Camino Real, Suite 300
San Diego, California 92130
Telephone: (858) 755-8500
Facsimile: (858) 755-8504

Attorneys for Defendant Trek Retail Corporation

(X) **BY UPLOAD:** I hereby certify that the documents were uploaded by my office to the State of California Labor and Workforce Development Agency Online Filing Site.

(X) **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the email addresses listed above using File & ServeXpress.

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

Executed on **March 1, 2023,** at Los Angeles, California.

Ashley Narinyans	*/s/ Ashley Narinyans*
Type or Print Name	Signature