Rivera v. Copenhagen Sausage Garden, LLC, et al. Case No. 22CV04059
Hearing Date: February 6, 2024
Motion for Preliminary Approval of Class Action Settlement

PROPOSED TENTATIVE

On December 19, 2022, plaintiff Juan Rivera (hereafter, plaintiff of Mr. Rivera) filed a first amended class and representative action complaint against defendants Copenhagen Sausage Garden, LLC, and Aarmark Beer Gardens (hereafter, defendants), on behalf of others similar situated and aggrieved employees, raising the following causes of action: 1) failure to pay minimum wages in violation of Labor Code[1] sections 1194, 1197, 1182.12 and IWC wage order No. 5-2001 (Cal.Code Regs., tit. 8, § 11050, which governs restaurant workers) (hereafter, Wage Order No. 5); 2) failure to provide meal periods in violation of sections 226.7, 512, Civil Code section 3287, and Wage Order No. 5); 3) failure to provide rest periods in violation of sections 226.7, 512, and Wage Order No. 5; 4) failure to provide appropriate wage statements in violation of sections 201-203; 5) waiting time penalties in violation of section 201-203; 6) failure to reimburse business expenses in violation of sections 2802 and 2804; 7) a violation of Business & Professions Code, section 17200, et seq., [unfair/unlawful business practices]; and 8) and civil penalties in violation of the Private Attorney General Act (hereafter, the PAGA), based on violations of sections 203 and 226 (i.e., minimum wage and meal and rest period claims). Plaintiff was employed by defendants between February 2022 and March 2022 as a nonexempt, hourly paid worker. Plaintiff in the operative pleading seeks certification of six (6) subclasses, involving a minimum wage subclass, a meal period subclass, a rest period subclass, an expense reimbursement subclass, a wage statement subclass, and waiting time subclass, and expense reimbursement subclass. The first four subclasses involve former and past workers employed for four years before the filing of the complaint on October 14, 2022; the wage class subclass goes back one year before the filing of the complaint; and the waiting time subclass goes back there years before the filing of the complaint. Defendants have not filed an answer.

On June 15, 2023, following a full-day of mediation before mediator Phillip Cha, the parties agreed to a nonreversionary gross settlement amount of $350,000. Only one class is proposed – "All current and former non-exempt employees who worked for Defendants in California at any time from October 14, 2018, through June 15, 2023 (the 'Class Period')[,]" which consists of 278 current and former employees. The settlement provides for attorney's fees of $116,666.67 (33.3333% of the gross settlement); up to $15,000 for litigation costs; $7,500 for class-action administrative costs; a $7,500 incentive award to Mr. Rivera; and $40,000 in PAGA penalties (of which 75% or $30,000 will go to the state and 25% or $10,000 reverts back to the class as all are aggrieved employees). The net settlement amount is $163,333.33, with $10,000 for the PAGA class reversion, meaning the total settlement amount paid to the class is $173,333.33. The average payout for each class member/aggrieved employee will be $623.5 ($173,333.33 divided by 278 equals $623.50 (approximately)).

[1] All further statutory references are to the Labor Code unless otherwise indicated.

On January 3, 2024, plaintiff filed a motion requesting preliminary approval of the proposed class settlement and asking for preliminary certification of a single settlement class, as defined above, with 278 putative class members proposed. While noting the average payout as above, plaintiff explains in greater detail that the net settlement amount will actually be calculated and distributed as follows: 1) ten percent of the net settlement amount will be designated "waiting time amount" and will be paid in equal amounts to all 278 class members whose employment ended at any time from October 14, 2019 to June 15, 2023; 2) ten percent of the net settlement amount will be designated "wage statement amount" and will be paid to all the 278 class members who were employed by defendants between October 14, 2021 and June 15, 2023, "based on their proportionate number of pay periods worked during that pay period"; and 3) the remaining 80 percent of the net settlement amount will be distributed to all 278 "proportionately based on the number of workweeks worked during the class period (i.e., October 14, 2018 through June 15, 2023). Additionally (irrespective of any opt out of the class settlement), all aggrieved employees (and one assumes this is the same as the putative class) employed during October 14, 2018 and June 15, 2023 (the PAGA period) will receive a portion of the $10,000 PAGA amount "based on their proportioned number of pay periods worked for defendants during this period.

Attached to the noticed motion are the following documents: a memorandum of points and authorities; a declaration from plaintiff's attorney Tuvia Korobkin from Abrahamson Labor Group, which includes the "Settlement Agreement," the proposed notices to the sent to the putative class members, a notice of estimated settlement award, an October 12, 2022 letter to the Labor and Workforce Development Agency describing the nature of the allegations suffered by aggrieved employees for purposes of PAGA, with confirmation that the letter was received from the Director of the PAGA Unit on behalf of the Labor and Workforce Development Agency, as well as confirmation letter dated December 29, 2022, concerning submission of the first amended complaint; a declaration from Lisa Mullins, President of the ILYM Group, Inc., a professional class action services provider; and a declaration from Mr. Rivera, explaining why the $7.500 enhancement is warranted.

A) <u>What are the General Standards for Approvals of a Class Action Settlement?</u>

The general rules for class action precertification settlements are governed by California Rules of Court rule 3.769. "Rule 3.769 of the California Rules of Court [CRC] sets forth the procedures for settlement of class actions in California. (See also Code Civ. Proc., § 581, subd. (k).) A two-step process is required. First, the court preliminarily approves the settlement and the class members are notified as directed by the court. [CRC, rule 3.769(c)-(f).] 'The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.' [CRC, rule 3.769(f).] Second, the court conducts a final approval hearing to inquire into the fairness of the proposed settlement. [CRC, rule 3.769(g).] If the court approves the settlement, a judgment is entered with provision for continued jurisdiction for the enforcement of the judgment. [CRC, rule 3.769(h).]" (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118.)

A party to the settlement must move for "preliminary approval of the settlement." (CRC 3.769(c).) After the hearing, the court makes an order approving or denying "certification of a

provisional settlement class." (CRC 3.769(d).) If the court grants preliminary approval, it must set a final approval hearing, and provide for notice to be given to the class. (CRC 3.769(e).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (CRC 3.769(f).) At the final approval hearing, "the court must conduct an inquiry into the fairness of the proposed settlement." (CRC 3.769(g).) If the court approves the settlement agreement, it enters judgment accordingly. (CRC 3.769(h).) (See *Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.)

This is of course is a ***preliminary approval***, not a final approval. Nevertheless, precertification settlements in class actions should be scrutinized. (*Cho v. Seagate Technology Holdings, Inc.* (2009) 177 Cal.App.4th 734, 743.) This is accomplished through careful review by the trial court; precertification settlements are routinely approved where they are found fair, adequate and reasonable. (*Ibid;* see also *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 240 [precertification settlements in class action suits should be scrutinized more carefully].) "'Due regard,' . . . 'should be given to what is otherwise a private consensual agreement between the parties. The inquiry "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." [Citation.] . . . .' " (*7–Eleven Owners, supra,* 85 Cal.App.4th at p. 1145, quoting from *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802; see *Roos v. Honeywell Internat., Inc.* (2015) 141 Cal.App.4th 1472, 1481- 1482, overruled on another ground in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 269.)) The test is not whether the maximum amount is secured, but whether the settlement is reasonable under all the circumstances. For example, a trial court does not abuse its discretion in approving a settlement when it finds that the settlement was achieved at arm's length negotiation; the fact the case was vigorously litigated; plaintiff was represented by experienced counsel; the number of class members who objected or opted out was very small; and plaintiff faced considerable risk in proceeding to trial. (*Cho, supra,* at p. 745.)

The proponents have the burden to show the settlement is fair, although a presumption of fairness exists where the settlement is reached through arm's length bargaining; investigation and discovery are sufficient to allow counsel and the court to act intelligently; and counsel is experienced in similar litigation; and the percentage of objectors is small. (*Dunk, supra, at p.* 1802.) This is only an initial presumption; a trial court's ultimate approval of a class action settlement will be vacated if the court "is not provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." In short, the trial court may not determine the adequacy of a class-action settlement "without independently satisfying itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 408.)

The court undoubtedly gives considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's-length transaction entered without self-dealing or other potential misconduct.

While an agreement reached under these circumstances presumably will be fair to all concerned, particularly when few of the affected class members express objections, in the final analysis it is the court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement. (*Munoz, supra*, 186 Cal.App.4th at p. 408, fn. 6.)

The court's gatekeeping function in the class action context differs from its role in reviewing PAGA settlements. In class actions, courts have a fiduciary duty to protect the interests of absent class members, whose individual claims for wrongfulness will be discharged. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129 [court acts as guardian of rights of absentee class members].) A PAGA representative action, however, is "not akin to a class action"; it "is a species of *qui tam* action." As our high court has recently reiterated, PAGA suits exhibit virtually none of the procedural characteristics of class actions. (*Estrada v. Royalty Carpet Mills, Inc*. (Jan. 18, 2024, S274340) ___ Cal.5th ____ [Typ. opn. at p. 10.].) In that regard, when reviewing a PAGA settlement, courts do not consider the value of individuals' claims for damages because a PAGA settlement does not release those claims. (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73 87 [PAGA claims have no individual component]; *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 197-198 [PAGA damages limited to civil penalties].) "The state's interest in such an action is to enforce its laws, not to recover damages on behalf of a particular individual." (*Huff, supra,* 23 Cal.App.5th at p. 760.) Instead of focusing on fair recovery for individual claims, the goal of PAGA enforcement is to achieve "maximum compliance with state labor laws." (*Huff*, at p. 756.)

That being said, Labor Code section 2699, subdivision (l) requires the following for PAGA settlement assessments. First, for cases filed on or after July 1, 2016, the aggrieved employee or representative shall, within 10 days following commencement of a civil action pursuant to this part, provide the Labor and Workforce Development Agency (LWDA), with a file-stamped copy of the complaint that includes the case number assigned by the court. (Subd. (l)(1)). Second, "the 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 agency at the same time that it is submitted to the court*." (Subd. (l)(2), italics added.) Third, "a copy of the superior court's judgment in any civil action filed pursuant to this part and any other order in that action that either provides for or denies an award of civil penalties under this code shall be submitted to the agency within 10 days after entry of the judgment or order." And fourth, " [it]ems required to be submitted to the [LDWA] under this subdivision or to the Division of Occupational Safety and Health pursuant to paragraph (4) of subdivision (b) of Section 2699.3, shall be transmitted online through the same system established for the filing of notices and requests under subdivisions (a) and (c) of Section 2699.3." Courts under this scheme consider (1) whether the statutory requirements of notice to the LDWA have been satisfied, and (2) whether the settlement agreement is fair, reasonable, and adequate, as well as meaningful and consistent with PAGA's public policy goals, which include "augmenting the state's enforcement capabilities,

encouraging compliance with Labor Code provisions, and deterring noncompliance." (*Kang v. Wells Fargo Bank, N.A.*, 2021 WL 5826230, *15 (N.D. Cal. Dec. 8, 2021); see *Gilmore v. McMillan-Hendryx Incorporated* (E.D. Cal., Jan. 20, 2022, No. 1:20-CV-00483-HBK) 2022 WL 184004, at *2.)

Until recently, no published California appellate case explored the standard a trial court should employ in evaluating a PAGA settlement. (See *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 75 ["[N]either the Legislature nor any published California authority has provided a definitive answer to this question. [] We do so now."]; see also *Flores v. Starwood Hotels & Resorts Worldwide* (C.D. Cal. 2017) 253 F.Supp.3d 1074, 1075.) In *Moniz*, despite the differences between class and PAGA actions, the appellate court determined that "a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Moniz, supra,* 72 Cal.App.5th at 76.) The *Moniz* court also indicated: "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." (*Ibid*.) "Given PAGA's purpose to protect the public interest, we also agree with the LWDA and federal district courts that have found it appropriate to review a PAGA settlement to ascertain whether a settlement is fair *in view of PAGA's purposes and policies*." (*Ibid.,* italics added.) "We therefore hold that a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable and adequate in view of the PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Ibid.*) Put another way: "We emphasize that in any case involving a proposed PAGA settlement, the trial court must review the settlement for fairness and 'scrutinize whether, in resolving the action, a PAGA plaintiff has adequately represented the state's interests, and hence the public interest.'" (*Shaw v. Superior Court of Contra Costa County* (2022) 78 Cal.App.5th 245, 263, citing *Moniz*.) Once approved, 75% of civil penalties recovered go to the state, while 25% go to the PAGA class.

With these legal standards in mind, the court will identify three documents plaintiff must provide; explore whether the class action and PAGA settlements are fair, adequate, reasonable; examine whether preliminary certification of the class action and representative class is appropriate; explore whether the proposed class notice procedures appear sound; assess whether attorney's fees, costs, and settlement administrator appoint and its costs are appropriate; and examine whether any class representative enhancement as requested is justified. The court will conclude with a summary of its conclusions.

B) Preliminary Matters: Three Documents Plaintiff Must Furnish to the Court

Plaintiff should file a notice of settlement that comports with California Rules of Court rule 3.1385 at least before the final approval hearing.

Plaintiff should also file, before final approval, a copy of (or its verbatim contents) of the attorney-fee agreement with plaintiff as mandated by CRC 3.769(b) ["any agreement, express or implied, that has been entered into with respect to the payment of attorney's fees or the submission for the approval of attorney's fees must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action"].) CCR 3.769(b) requires that any attorney fee agreement, express or implied, that has been entered into with respect to payment of attorney's fees or the submission of an application for the approval of attorney's fees must be set forth in full in any application for approval of the of the settlement that has been certified as a class action.

It appears plaintiff has not complied with the dictates of section 2699, subdivision (l)(2) – at least as of this writing. Although plaintiff has filed the complaint with LWDA (there is an email confirmation of this), he has not submitted a copy of the ***settlement agreement*** with the LDWA (or at least has failed to present an email confirmation of the submission), which must be done (in terms utilized by the statute) "*at the same time that it is submitted to the court*." (§ 2699, subd. (l)(2).) The court will expect plaintiff's counsel to come prepared to show compliance with this requirement *before or at the February 6, 2024 hearing*. The point is to give the LWDA as much time to object (or not) as possible. Of course, the court also expects that should a final judgment ultimately be entered, plaintiff will send that judgment will be sent to the LWDA, as required per section 2699, subdivision (l)(3).

C) Are the Class Action and PAGA Settlements Fair, Adequate and Reasonable?

As noted, the amount of the gross settlement is $350,0000. Subtracted from this are the following amounts: 1) up to $15,000 for court costs; 2) court-approved attorney fees of $116,666.67; 3) $40,000 for the PAGA award ($30,000 to the state, and $10,000 to "aggrieved" employees, which means the putative class); 4) estimated administrative costs of the class action process of $7,500; and 5) a $7,500 enhancement award for the class representative, Mr. Rivera. This leaves a net settlement amount of $173,333.33. The net settlement amount is split into four categories. The amount for each in the end will depend on the number of workweeks an individual class member worked during the relevant time frame.

In determining whether the class settlement is fair, adequate and reasonable a trial court's broad discretion is exercised through several well-recognized factors. The list, which is not exhaustive and should be tailored to each case, includes 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. (*Roos, supra*, at 241 Cal.App.4th at pp. 1481-1482.) The most important factor is the strength of the case for

plaintiffs on the merits, balanced against the amount offered in settlement. While the court "must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case," it must eschew any rubber stamp approval in favor of an independent evaluation. (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles, supra,* 186 Cal.App.4th at pp. 407–08.)

The settlement amount is nonreversionary, and the evidence shows that both sides engaged in a rigorous arms-length negotiation, culminating in a settlement following mediation. Class counsel appear experienced wage and hour attorneys. There is no evidence of collusion, particularly as the settlement was the result of a neutral mediation, with the mediator also experienced in wage and hour class action settlements. The settlement amount will be funded in two payments – the initial payment of $100,000 made no later than 30 days following preliminary approval, with a second payment of $250,000 made than thirty days after final approval. This seems reasonable. Plaintiffs' counsel has been involved in a number of class action suits, as detailed in the briefing and the individual declarations. There are no objections to the settlement.

Counsel informs the court, through the declaration of Mr. Tuvia Korobkin, that counsel engaged in multiple discussions and conducted extensive discovery prior to mediation. Defendants produced a class list, with hire and termination dates, employee locations, and other information; and sanctioned a sampling of timekeeping and payroll records for putative class members during the appropriate class period, including wage and hour policies. Plaintiff hired an expert to analyze "and extrapolate" the data, which allowed plaintiff to asses the merits of the claims. According to Mr. Korobkin, it was estimated that the maximum value of the lawsuit as to all claims was $2,273,846, broken down as follows: for failure to pay minimum wages, $135,404; for meal and rest period violations, $317,196 and $424,666 respectively; as for the reimbursement claims, $42,980; for itemized wage statement violations, $280,700; for waiting time penalties, $511,500; and for PAGA penalties, $561,400. Mr. Korobkin declares that defendants had a number of defenses to these claims, and given the risks associated with the litigation, and after extensive investigation, plaintiff's counsel discounted defendant's realistic exposure to the following: $44,006 for minimum wage claims; $78,506 for meal violations and $76,440 for rest period violations; to $10,745 for reimbursement claims; to $63,859 to wage statement violations; to $83,119 for waiting time penalties; and to $88,421 for PAGA claims (leaving defendant's realistic liability at $445,096, with $350,000 representing approximately 78% of the amounting consisting defendant's realistic exposure). Class counsel is experienced, and details the inherent risks of any continued litigation, including the continuing need for resources. In light of these concerns, given the efforts expended and the documents reviewed, the assessments appear reasonable. (*Clark v. American Residential Services, LLC* (2009) 175 Cal.App.4th 785, 801) Accordingly, the court finds the amount of the gross settlement ($350,000), in light of these attestations, ruminations, and assessments, to be fair and reasonable.

The fairness of the PAGA settlement amount *itself* (separate and apart from its inclusion into the *overall fairness* of the $350,000 class action settlement amount), requires a different analysis. The class action parties have separately agreed to designate $40,000 of the settlement amount for PAGA penalties, and plan to distribute 75% to the state ($30,000) and 25% ($10,000) to the 278 aggrieved employees on a proportionate basis, based on the number of payroll periods,

during the "PAGA period." This is all well and good as far as it goes, but plaintiff overlooks the published California appellate case law noted above -- *Moniz* -- which has clarified the appropriate standard this court must apply when examining the fairness of PAGA awards; it emphasized this court's duty to determine fairness of a PAGA settlement by examining its ability to remediate present labor law violations, deter future ones, and maximize enforcement of existing state labor laws. (*Moniz, supra,* 72 Cal.App.5th at p. 77-78.)[2] *Moniz* made it very clear: " . . . [W]e also agree with the LWDA and federal district courts that have found it appropriate to review a PAGA settlement to ascertain whether a settlement is fair *in view of PAGA's purposes and policies*." (*Id.* at p. 77, italics and underscore added.) There is no indication in either the settlement agreement or the briefing that defendants will alter their past labor practices. In fact, defendants seem to eschew any wrongdoing, as reflected in paragraph 12 of the settlement agreement.[3] And while it seems arguable that the $40,000 amount itself is sufficient to ensure defendants' future compliance with existing state labor laws (i.e., by sending $30,000 to the state) – in line with the purposes of PAGA – plaintiff fails to address the point ***entirely.*** The court expects counsel to address the application of *Moniz* at the hearing for purposes of establishing whether the $40,000 PAGA settlement amount is reasonable, ***keeping in mind the purposes of PAGA.*** The court offers comments in footnote 4 to facilitate counsel's discussion.[4]

D) Is Preliminary Certification Appropriate for the Class Action Claims?

Class action certification questions are essentially procedural and involve an assessment of whether there is a common or general interest between numerous people. The burden is on the proponent to show an ascertainable class with a well-defined community interest, meaning predominant common questions of law or fact, class representatives with claims or defenses typical of class, and class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

---

[2] Plaintiff relies exclusively on a 2011 federal district court case law – *Chu v. Wells Fargo Inv., LLC* (N.D. Cal. 2011), 2011 WL 67645 at page 1, which approved a PAGA payment of $7,500 from $6.9 million settlement. (See p. 9 of motion.) The case law has evolved since 2011 – and plaintiff should look to *Moniz*, not *Chu.*

[3] This paragraph provides in relevant part that "Defendants deny liability as to matters alleged in the Action. Nothing in this Settlement shall operate to be construed as an admission of any liability of that class certification is appropriate in any context other than Settlement. . . ." And in Paragraph 13, defendants insist further than nothing in the settlement can be disclosed or publicized.

[4] ***To facilitate the discussion at the hearing, the court offers the following points to consider.*** The Settlement Agreement contains no representation that defendants have or will change their past labor practices as a result of this litigation. It would seem, then, that if the settlement does not serve the purpose of remediation it must serve the purpose of deterrence. That usually occurs when the amount allocated is significant. (See *Manuel Perez and Macario Perez v. All AG, Inc.* (E.D. Cal., July 23, 2021, No. 118CV00927 DADEPG) 2021 WL 3129602, at *3—referring to the "substantial amount of penalties to be paid . . .") Is $40,000 enough for this purpose? There is apparent conflicting authority that suggests "in wage and hour class action cases that settle, which are the overwhelming majority of such cases, very little of the total settlement is paid to PAGA penalties in order to maximize payments to class members." (*Magadia v. Wal-Mart Assocs*. (N.D. Cal. 2019) 384 F. Supp. 3d 1058, 1101 (reversed on other grounds by 999 F.3d 668 (9th Cir. 2021)); see also *Smith v. Am. Greetings Corp*. (N.D. Cal.) 2016 U.S. Dist. LEXIS 66247 (granting final approval of class action settlement allocating $37,500 of $4 million settlement to PAGA); *Willner v. Manpower Inc.*, (N.D. Cal.) 2015 U.S. Dist. LEXIS 80697 (granting final approval of a class settlement allocating $65,655 of $8.75 million settlement to PAGA). Some courts have held that no part of the settlement must necessarily be allocated and distributed to the LWDA. (See, e.g., *Nordstrom Commissions Cases* (2010) 186 Cal.App.4th 576, 589 (affirming a settlement allocating $0 of $6.4 million settlement to PAGA).) These cases all predate *Moniz*.

There has been a sufficient preliminary showing of numerosity, ascertainability, and predominance of commonality. The class, while large – 278 former and current employees, during a defined class period, with names obtained through existing employment records, as well as 278 aggrieved employees for PAGA purposes – is not cumbersome. It appears the claims are sufficiently similar, subject to the same policies or practices, with similar job duties and universal formula. It also appears the class representative (Mr. Rivera) has typical claims of the class/aggrieved employees as a whole. A class action appears the superior way to a fair and efficient adjudication of the lawsuit. Certification of the class seems appropriate.

E) Are the Procedures for the Claim Forms and Opt-Out Adequate?

The "Notice of Pendency of Class Action and Settlement"-- as well "Notice of Estimated Settlement Award" -- are attached as exhibits to Mr. Tuvia Korobkin's declaration. They adequately identify the nature of the lawsuit, the nature of the claims advanced, and the scope and meaning of the proposed class. They provide the nature of the class claims; who may be eligible; the gross and net settlement amounts minus the amounts for attorney's fees, costs, settlement administration expenses, and PAGA disbursement (and formula). They explain how an individual class member's award will be calculated (excluding those who opt out), how the PAGA formula will be distributed to aggrieved employees and provides a place to calculate the total amount for a specific class/representative member, including potential tax consequences. They make it clear that a form need not be submitted, and how the distribution will be calculated if no form is submitted. The instructions also indicate that a form entitled "Notice of Estimated Settlement Award" is to be sent if a class member wishes to dispute the employment information (used for calculations) in Section III of the form. They describe when the checks will be mailed, how long the class member has to cash any check, and the allocation of the amounts in the settlement for tax purposes. And they indicate that defendants are bound by the settlement agreement unless the class member affirmatively excludes himself or herself from the settlement (which is not true for the PAGA settlement amount). They inform a class member how he or she can be part of the settlement group, how he or she can be part of the settlement but object, and how he or she can opt-out. They advise of the preliminary and final approval hearings and their possible dates, and who to contact for more information. The times frames discussed in the notices and implementation procedures outlined in the order are appropriate. The notice adequately explains the options before the putative class member, including disputes and opt out procedures, under the heading "What other options do I have?" It adequately explains the nature of the release given to defendants from all causes of action. In the same lengthy paragraph, the notice references the release of PAGA claims for all aggrieved employees, to the effect that all aggrieved employees, whether they opt out or not, "shall release any right for or claim for civil penalties pursuant to the PAGA arising under the California Labor Code or Wage Orders based on the alleged failures" set forth in the complaint.

Although the notices seem adequate, plaintiff's counsel should be prepared to discuss the following concerns, as follows:

- The court is not always convinced that nonlawyers understand the differences between individual class action claims and PAGA penalties. Does the notice adequately explain these differences, and if so, where and how?

Preliminary approval will be given if these points are sufficiently addressed to the court's satisfaction at the February 6, 2024 hearing.

F) Should the Court Grant Preliminary Approval of the Settlement Administrator, Its Costs' Request, and Class Counsels' Requests for Attorney's Fees and Litigation Costs?

Plaintiff asks the court to appoint ILYM Group, Inc., as the third-party settlement/claims administrator, and asks the court to approve, and approve up to $7.500 in settlement costs. The court has read Lisa Mullins' declaration (with attached exhibits) who indicates that fees associated with current class distribution will be $6,000, and will increase only if the class number increases. While Ms. Mullins's submissions seem appropriate and reasonable. The court will preliminarily approve appointment of ILYM Group, Inc., as the settlement administrator, with costs of up to $7,500. The appropriate amount should be disclosed at the final approval hearing.

Plaintiff asks the court to appoint Abramson Labor Group generally and Tuvia Korobkin specifically as class counsel, and award attorney fees of $163,333.33 (33.3333333% of the gross settlement amount), along with a maximum of $15,000 in litigation costs.

The attorney fee amount of $163,333.33 seems reasonable. (See, e.g., *Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 578 [it is well settled that attorney fees under CCP § 1021.5 may be awarded for class action suits benefiting a large number of people]; see also *Clark, supra,* 175 Cal.App.4th at p. 791.) The court has a duty to review and approve attorney's fees, even where the parties agree on the amount. (*Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Use of the percentage method in class action matters is permissible, and there is evidence the parties intended the attorney fees would be paid out of any common fund that had been created. That appears to be the case here. Although counsel does not offer any evidence to support the lodestar method, that is not dispositive. " 'Fee awards in class action average around one-third of the recovery' regardless of 'whether the percentage method or the lodestar method is used.'" (*Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 545.) The amount requested is standard in these matters and is preliminarily approved.

The court also preliminarily approves litigation costs of up to $15,000, but will expect clear evidentiary support at the final approval hearing for the amounts actually requested.

G) Should the Court Preliminarily Grant an Enhancement for the Class Representative?

The court provisionally appoints plaintiff Mr. Rivera as the class representative, as he has satisfied the requirements for such appointment.

Class counsel asks for a class enhancement for the class of $7,500. It is established that a named plaintiff is eligible for reasonable incentive payments to compensate him or her for the expense or risk they have incurred in conferring benefit on other members of the class. (*Munoz, supra*, 186 Cal.App.4th at p. 412.) Relevant factors include actions the plaintiff has taken to protect the interests of the class, the degree to which the class had benefited from those actions, the amount of time and effort the plaintiff has expended, the risk to the class representative of commencing suit, the notoriety and personal difficulties encountered by the class representative, the duration of the litigation, and the personal benefit enjoyed by the class representative. (*Clark, supra*, 175 Cal.App.4th at p. 804.) The rationale in the end is to compensate class representatives for the expense or risk they have incurred in conferring a benefit on other members of the class. (*Id*. at p. 806.) Specificity, however, is required; further, there is no presumption of fairness in review of an incentive fee award. (*Id*. at p. 807; *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1395 [these "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit].)

Mr. Rivera has offered a declaration in support of the requested enhancement. He declares that he was aware that filing a lawsuit made him responsible for costs if he should lose. Further, he declares that he has been "actively involved in this case since I first had discussions with my attorneys at Abramson Labor Group about a potential class action back in September 2022. I have had many discussions with my attorneys throughout this case to discuss [defendants'] policies and practices, identify potentially helpful documents and witnesses, and discuss [sic] case strategy. I spent significant time searching my own documents and witnesses, and I also spent time reviewing the Settlement Agreement with my attorneys. I estimate that I have spent 30 hours on this case from the time if spoke with my attorneys regarding this case until the present."

The court is not overwhelmed by this evidentiary proffer – and more should be offered. If the average payout is $623.5, Mr. Rivera is receiving a multiplier of slightly over 12 times the average payout. Cases have expressed concern when there is a large disparity between the incentive award and recovery of class members. (*Clark v. American Residential Services, LLC, supra*, 175 Cal.App.4th at p. 806, fn. 14, citing *Alberto v. GMRI, Inc*. (2008) 252 F.R.D. 652, 669 [given a proposed $5,000 incentive award and an average $24.17 recovery (multiple of just over 20), when there was no evidence demonstrating the quality of plaintiff's representative service ; plaintiff should be prepared to present evidence of the named plaintiff's "substantial efforts" as class representative to justify the discrepancy between the award and those of the unnamed plaintiffs"].) True, the present situation is not as stark as that in *Clark v. American Residential Services, LLC, supra*, where the two class representatives requested an enhancement that amounted to "at least 44 times the average payout to a class member . . . ." (175 Cal.App.4th at p. 805; see also *Staton v. Boeing Co*. (9th Cir, 2003) 327 F.3d 938, 975 [condemning a class enhancement of $30,000 when average payout was $1,000, a multiplier of 30]; compare with *Munoz, supra*, 186 Cal.App.4th at p. 412 [noting there that class representatives would receive more than twice as much as the average payment to class members, in contrast to the multipliers of 30 and 44 in *Stanton* and *Clark*, respectively]; see also *Pauley v. CF Entertainment* (C.D. Cal., July 23, 2020, No. 2:13-CV-08011-RGK-CW) 2020 WL 5809953, at *3 [plaintiffs request of $10,000 each in class representative awards, is over thirty-five times greater than the average

recovery per unnamed class member, and provide little justification for this].) *Clark* found the declarations at issue inadequate when the declarants stated they spent "several hours" in initial consultation with counsel; had their depositions taken, with one attending a full day of mediation; and they "reviewed 'thousands of pages' of documents. (*Clark, supra*, 175 Cal.App.4th at p. 805.) The declarations were too conclusory because there was "no further quantification of the time [the class representatives spent] in commencing suit"; and did not describe the "potential stigma" that "may affect . . . future employability in this industry," along with the "potential risk of being liable for costs" if "we were unsuccessful in this lawsuit." As observed by one federal district court, "$5,000 is a presumptively reasonable award, even for settlements much larger than the one here. (*See, e.g. Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 WL 1230826, at **19* (N.D. Cal. Apr. 1, 2011) (approving $5,000 to named plaintiffs in a $27,000,000 settlement); *Hopson v. Hanesbrands Inc.* No. CV-08-0844 EDL WL 928133, at *10 (N.D. Cal. Apr. 3, 2009) (approving $5,000 incentive award in a $408,420 settlement in which the average plaintiff received $1568.44)" (*Pauley v. CF Entertainment* (C.D. Cal., July 23, 2020, No. 2:13-CV-08011-RGK-CW) 2020 WL 5809953, at *4.)

Plaintiff's declaration is similarly threadbare. As noted by *Clark*: ". . . [T]he trial court is not bound to, and should not, accept conclusory statements about 'potential stigma' and 'potential risk' in the absence of supporting evidence or reasoned argument explaining why, under the particular circumstances, an actual – not a negligible -- risk existed, or why it might be difficult to get plaintiffs to come forward to prosecute a particular case.." (*Ibid.*) Similar defects condemned by *Clark* are present here. These concerns are amplified when the court examines the number of hours Mr. Rivera worked – 30. Given the requested enhancement amount of $7,500, Mr. Rivera is asking for $250 an hour ($250 x 30 hours - $7,500). That seems high (at least without further justification).

Counsel should address these deficiencies at the hearing. The court will preliminarily approve the $7,500 enhancement award on the condition that plaintiff will be able to submit a detailed (factual) declaration justifying the $7,500 award.

In Summary:

- Plaintiff is directed to file a Notice of Settlement required by CRC 3.1385 (at least before final approval);
- Plaintiff is directed to provide the attorney fee agreement as required by CRC 3.796(b), (at least before final approval);
- Plaintiff is directed to file proof that it has submitted the settlement agreement with the LDWA (evidence should be submitted *at or before the Feb. 6 hearing*).
- Counsel should explain whether any objections have been made to the settlement (it appears not);
- The court preliminarily approves the gross settlement of $350,000, as fair, adequate, reasonable, and preliminarily certifies the class as appropriate for class action treatment, as the class of 278 is ascertainable with a well-defined community of interest, meaning there are predominant common questions of law and fact, and that plaintiff as class representative can adequately

represent the class. The court generally approves of the notice to be sent to the class and finds generally that procedures (including the opt out and release) procedures are adequately explained.

- The court preliminarily approves the appointment of ILYM Group, Inc, as the third-party settlement administrator, and preliminarily authorizes up to $7,500 for expenses in this regard.
- The court preliminarily approves the appointment Abramson Labor Group generally and Tuvia Korobkin specifically as class counsel, and preliminarily approves an award of attorney fees of $163,333.33 (33.3333333% of the gross settlement amount), along with a maximum of $15,000 in litigation costs (assuming the documents above are/will be submitted).
- With all this said, preliminary approval of the gross settlement amount is conditioned on a meaningful discussion with counsel at the February 6, 2024 hearing of the following topics:
  - The $40,000 PAGA settlement amount.
    - Plaintiff's counsel has overlooked the recent standards this court must apply for PAGA settlement approval as enunciated in *Montz v. Adeco USA Inc.* (2021) 72 Cal.App.5th 56; see *Shaw v. Superior Court of Contra Costa County* (2022) 78 Cal.App.4th 245, 263.) Plaintiff's counsel should come prepared to address these standards at the February 6, 2024 hearing.
  - The court is always concerned that the putative class understands the differences between their individual class claims and PAGA civil penalties. Does the notice adequate explain these differences?
  - The court is also concerned with the request for a $7,500 class enhancement award to Mr. Rivera. This request is approximately 12 times the average payout, and amounts to essentially $250 an hour. The declarations/explanations offered here are similar to the inadequate declarations condemned in *Clark v. American Residential Services, LLC* (2009) 175 Cal.App.4th 785, 805-806 and progeny. Counsel should come prepared to discuss at the February 6, 2024 hearing.
- If the court is satisfied with counsels' explanations, the court will preliminarily approve the settlement, all appointments, as well as the submitted notices, and sign the proposed order.

Class counsel is directed to appear at the hearing. There is a CMC on calendar as well.