PROPOSED TENTATIVE

The court detailed the factual and procedural background of these two consolidated cases in its February 20, 2024 written order, which preliminarily approved the class action and Private Attorney General (PAGA) settlements between the parties. Briefly, in a second amended complaint filed on February 13, 2024, plaintiffs Jose Valencia and Brandon Jeroue (collectively, plaintiffs or individual names) advanced a class action suit based on the first four causes of action, and PAGA representative action based on the fifth cause of action. As to the class action portion of the second amended complaint, plaintiff claimed as follows: 1) as to the first cause of action, a violation of Labor Code[1] section 2802 [failure to reimburse employees of all business-related expenses]; 2) as to the second cause of action, violations of sections 510, 1174, 1198, and 1199 , as well as the "applicable IWC Wage Order," for failure to pay earned regular, minimum, overtime, and reporting time pay wages; 3) as to the third cause of action, a violation of section 226 for failure to provide accurate itemized wage statements; and 4) as to the fourth cause of action, violations of Business and Professions Code, section 17200 [a UCL cause of action].) Plaintiff Mr. Valencia was employed by defendant as a truck driver from July 2016, and worked as a hourly, non-exempt employee. Plaintiff Mr. Jeroue was also employed as a nonexempt employee truck driver from March 27, 2020, until November 29, 2021. Two classes were identified as follows: "All current and former non-exempt employees of Defendant in the State of California, who worked as a truck driver, at any time during the period of time from March 8, 2018, through the present, in the State of California (the 'Driver Class' or 'Driver Class Members')"; and 2) "All current and former non-exempt employees of Defendant in the State of California who received 'Base Pay,' at any time during the period of March 8, 2021, through the present (the 'Wage Statement Class' or Wage Statement Class Members'"). As for the PAGA representative action, in the fifth cause of action, plaintiffs allege civil penalties, based on violations of sections 201, 202, 203, 204, 226, 510, 558, 1174, 1198, 1199, 2802, and 2698, as well as the "applicable IWC Wage Orders." It alleges a representative action for all aggrieved employees (by reference to the subclasses defined above) from January 20, 2021, to the present.

After a supplemental declaration was filed by attorney Kristen Agnew on February 27, 2024, and after an oral colloquy by Ms. Agnew with the court addressing the court's concerns as detailed in the preliminary approval tentative written order, the court preliminarily approved the following in a signed order on February 27, 2024. It allowed the filing of a second amended complaint; preliminarily approved the gross settlement of $565,000, as fair, reasonable, and adequate, including the $50,000 PAGA settlement (of which 75% goes to the state, while 25% goes to the aggrieved employees); conditionally certified both subclasses ("the Driver Class Members" and "Wage Statement Class"); preliminarily appointed Diversity Law Group and Polaris Law Group as class counsel, as well as a maximum of $183,333.33 for attorney's fees and $20,000 in litigation costs; preliminarily appointed Phoenix Settlement Administrators as the

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

settlement administrator, with maximum costs of $10,000; and an enhancement award of $10,000 each for plaintiffs (for a total of $20,000).

Plaintiffs now seek final approval. The court will initially discuss three preliminary matters; detail the general standards for approval of a class action settlement and determine whether the gross settlement is fair, reasonable, and adequate; discuss the general standards for a PAGA settlement and determine whether the PAGA settlement is fair, reasonable and adequate; examine the propriety of the class certifications, the settlement administrator's fees and costs, counsel's attorney's fees and litigation costs, the class representatives' enhancement awards, and assess the class certification efforts, notices, class procedures and disbursement time frames. The court will conclude with a summary of its conclusions.

A) Preliminary Matters

The court in its preliminary approval directed plaintiff's counsel to submit the following documents: 1) a notice of settlement that comports with CRC 3.1385; 2) a copy (or the verbatim contents) of the attorney-fee agreement with plaintiff, as mandated by CRC 3.769(b); and 3) proof that plaintiffs have complied with section 2699, subdivision ((l)(2), showing that he has submitted a copy of the settlement agreement with the LWDA. Plaintiff's counsel has complied with Items 1, 2 and 3.

The court will want oral assurances by counsel at the final approval hearing of future compliance with section 2699, subdivision (l)(3), which requires a copy of this court's judgment or that provides for civil penalties to be submitted with the LWDA within 10 days after entry of the judgment or order.

B) General Standards for Approval of a Class Action Settlement

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.)

Final approval involves the same factors as involved in the preliminary approval process, although the court's scrutiny *is more rigorous and thorough*. (*Cho v. Seagate Technology Holdings, Inc*. (2009) 177 Cal.App.4th 734, 743; see also *Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 240.) " '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* (2000) 85 Cal.App.4th 1135, 1145, quoting from *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) 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, including review of the mediator's declaration; 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.)

As was true for preliminarily approval, the proponents of a final approval 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; 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.)

1. Is the Class Action Settlement Fair, Adequate and Reasonable?

As noted, 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; counsel is experienced in similar litigation; and the percentage of objectors is small. (*Dunk, supra*, at p. 1802.) The most important factor in the fairness calculation 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* (2010) 186 Cal.App.4th 399, 407-408 (*Munoz*).) To perform this balance, the trial court must have "a record which allows 'an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.' " (*Munoz, supra,* at p. 409; see *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 801; *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 120.)

Here, it is reported that private mediation between the parties occurred with Francis J. Orman III, an experienced wage and hour mediator, on October 2, 2023, which led to the settlement agreements at issue here. (Kristin Agnew's Dec.,¶ 2.) In connection with the mediation, defendant provided number "data points regarding the scope of the class and range of potential damages and penalties at issue," such as the number of non-exempt drivers, the number of employees with "base pay" wages, the number of aggrieved employees, the number of pay periods worked by both non-exempt drivers and alleged aggrieved employees, the average hourly rate of pay, the number of wage statements and revised wage statements, and the number of wage statements reflecting defendant's change in policies. Plaintiffs' counsel performed "comprehensive damages analysis," including a review of the applicable law as applied to the specific facts, including an assessment of possible defenses. Based on this data, defendant's estimated total exposure for both class and PAGA claims was $5,443,782.40, assuming multiple PAGA penalties for different Labor Code violations (i.e., "stacked" PAGA penalties). Alternatively, without stacking, the realistic maximum liability for defendant was $3,518,482.40. (Kristen Agnew's Dec.,¶¶ 4, 5, and 6.)[2] Also factored into this calculus are class counsels' estimations made at the preliminary hearing approval hearing, to the effect that defendant's realistic liability was far less than the maximum liability discussed and closer to approximately

[2] These figures comport with those provided at the preliminary approval hearing. According to Ms. Agnew's declaration submitted at that time, defendant's maximum liability for 1) off-the-clock wage claims (unpaid wages) was $297,920.48; 2) failure to pay reporting time was $1,191,681.92; and 3) reimbursement claims (as 363 drivers worked 19,756 pay periods) of $592,680. For class action purposes involving Wage Statement Members, defendant's maximum liability was $130,600. (Defendant's total maximum liability for class action claims: $2,212,882.4).) For the representative PAGA claims, Ms. Agnew contended, that defendant's maximum liability, should the court apply the standard penalty of $100 per pay period, with pay periods numbering 13,056, would be $1,305,600; alternatively, if the court "stacked" the penalties (i.e., award multiple PAGA penalties for different Labor Code violations in the same period), defendant's maximum liability would $3,230,990 (constituting the aggregate of the following maximum estimation of defendant's liability: $652,800 each for unpaid wages based on off-the-clock, reporting time, and reimbursement penalties, $135,300, 300 for wage statement violations, and $1,137,500 for section 204 violations [failure to pay wages at least twice a month].) Defendant's total maximum liability for both class action and the PAGA claims would be $5,443,872.40 ($2,212,882.4 plus $3,230,990).

$2,212,882.40, should the matter actually go to trial. The settlement amount of $565,000 is approximately 25% of this perceived realistic liability, generally considered a reasonable amount for settlement purposes. (See, e.g. *In re Mego Financial Corp. Securities Litigation* (9th Cir. 2000) 213 F.3d 454, 459 [a settlement amount of almost $2 million was roughly one-sixth of the potential recovery, which, given the difficulties in proving the case, is fair and adequate].)

According to class counsel, they are experienced and "fully understand the inherent risks and uncertainty involved," and the possible outcomes of potential trial. "Because settlement provides immediate and substantial relief, without the attendant risks and delay of continued litigation," class counsel "believe that the settlements warrant" final approval. Mr. Larry Lee details his experience in his declaration. He has been practicing employment law for over 20 years, and has worked as class counsel in both state and federal courts, as listed in paragraphs 5 and 6 of his declaration. The same is true for Mr. William Marder, who has practiced as an employment litigator since 1994, as detailed in paragraphs 5, 6, 7, 8, 9, 10, and 11 of his declaration. Ms. Agnew has been an employment law litigator since 2009, and details is her experience in this area in paragraphs 7, 8, 9, 10, 11, 12, and 13.

The settlement administrator (Phoenix Settlement Administrators, through the declaration of Lluvia Islas, a case manager,) declares that no notices of objection have been received, no pay period disputes have been lodged and one opt out been presented, all with deadlines of May 28, 2024. (Lluvia Islas Dec., ¶¶ 8 to 10.))

These factors all favor a presumption of fairness. Accordingly, the court finds the class action gross settlement of $565,000.00 to be fair, adequate and reasonable.

2. General Standards for PAGA Settlement

The PAGA settlement is $50,000 of the $565,000 gross settlement amount, with $37,500 going to the state (75%), and $12,500 going to the aggrieved employees (25%). This is the statutory division for PAGA settlements. Procedurally, section 2699, subdivision (l)(2) provides that the "the superior court shall review and approve 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." (See also *Correia v. NB Baker Electric, Inc.* (2019) 32 Cal.App.5th 602, 615.) The proposed settlement was served on the LWDA). No objection from the LWDA has been lodged.

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." 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, "[] section 2699, subdivision (l)(2) requires the trial court to review and approve any PAGA settlement," and in so doing, the court "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) When evaluating the fairness, adequacy, and reasonableness of a PAGA penalty, courts compare the potential penalty amount (its verdict value, as some courts refer to it) with the actual recovery under the settlement. (See *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 87 ["In estimating the potential recovery in the case to evaluate the fairness of the settlement, the trial court assumed one violation [ ] per employee"].) There is no express or even baseline percentage of recovery required. Under the express terms of the PAGA, a verdict value is not guaranteed even if the plaintiff prevails, as courts have discretion to lower the amount of penalties based on the circumstances of a particular case. (§ 2699(e)(2).)

Because many of the factors used to evaluate class action settlements bear on a settlement's fairness—including the strength of the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the settlement amount—these factors can be useful in evaluating the fairness of a PAGA settlement. (*Moniz, supra*, 72 Cal.App.5th at 76.) However, "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 [emphasis added].) The *Moniz* court cited with approval the federal district court case of *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, which explains this standard as follows:

> "[I]if the settlement for the Rule 23 class is robust, the purposes of PAGA may be concurrently fulfilled. By providing fair compensation to the class members as employees and substantial monetary relief, a settlement not only vindicates the rights of the class members as employees but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA. Likewise, if the settlement resolves the important question of the status of workers as employees entitled to the protection of the Labor Code or provides substantial injunctive relief, this would support PAGA's interest

> in augmenting the state's enforcement capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance."
>
> (*Id*. at 1134-35 (internal quotations to LWDA's responsive brief omitted.)

However, when "the compensation to the class amounts is relatively modest when compared to the verdict value, the non-monetary relief is of limited benefit to the class, and the settlement does nothing to clarify [aggrieved workers' rights and obligations], the settlement of the non-PAGA claims does not substantially vindicate PAGA." (*Id*. at 1135.) Thus, while the case law defining what the elements of the review are to evaluate a PAGA settlement in light of its goals to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws is still developing in California state court, the federal district courts suggest that a sufficiently "robust" settlement amount is enough to fulfill that obligation.

With this background, the court is once again troubled by plaintiffs' briefing. Despite the court's detailed tentative offered for preliminary approval, in which these standards were discussed, plaintiffs' counsel in the final approval briefing ignores *Moniz* and thus the appropriate standards this court must apply to assess the reasonableness of the PAGA settlement. This is so even though the court directed counsel to address *Moniz* and progeny at the preliminary approval hearing, which Ms. Agnew did on February 27, 2024, as reflected in the minute order of that date; and even though class counsel asks the court for final approval. The court is perplexed by class counsel's reluctance to acknowledge, let alone cite to and address, *Moniz* and progeny, even after court directives. It is worth reiterating that trial courts are ***required*** to review a PAGA settlement to ascertain whether it is fair, adequate, and reasonable through the prism of ***PAGA's purposes and policies***, for a PAGA claim is " 'legally and conceptually different' " from an employee's individual claim for damages and statutory penalties. Appellate courts have been clear: "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, supra*]*; see also LaCour v. Marshalls of California, LLC* (2023) 94 Cal.App.5th 1172, 1195 ["We went on to hold [in *Moniz*] that trial courts 'should evaluate . . . PAGA settlement[s] to determine whether [they are] 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***"], bold and italics added.) While the factors associated with the class action settlement are relevant, plaintiff's counsel continues to make no effort to incorporate the standards enunciated in *Moniz* into the calculus. The court's acceptance of oral argument on this point at the hearing on preliminary approval does not alleviate the moving party from supporting its request in this separate motion for final approval. The court is perplexed why counsel would again ignore an issue that was so clearly brought to its

attention. This alone is reason to deny the motion. (See *Quantum Cooking Concepts, Inc. v. LV Associates, Inc*. (2011) 197 Cal.App.4th 927, 934.)

The court is nevertheless sensitive to the potential implications from a denial, even without prejudice. Accordingly, the court (again) directs plaintiffs' counsel to appear at least by Zoom at the final approval hearing, and to address the following issues:

First, counsel should explain why he/she/they continue to ignore *Moniz* and progeny despite its detailed mention in the preliminary approval order. The court observes that under the heading "State Cases" in the motion's "Table of Authorities" the most recent published Court of Appeal case cited is from 2014. Is counsel relying on rote, antiquated briefing? The court notes with a twinge of irony that class counsel asks the court to rely on their expertise in determining whether the settlement amount is fair, adequate and reasonable, and yet at the same time consistently overlooks case law in their briefing that seems to undermine any claimed expertise.

Second, as reflected in Subpart B(2), of the settlement agreement, defendant denies "all wrongdoing whatsoever. This Agreement is not a concession or admission, and will not be used against Defendant as an admission or indication with regard to any claim of any fault, concession, or omission by Defendant . . ." This is not language that assures the court of defendant's future compliance with California wage and hour laws.

Third, counsel should explain whether the settlement amounts at issue are themselves sufficient to ensure defendants' ***future compliance with existing state labor laws*** (in line with the purposes of PAGA). Is $50,000 itself substantial for this purpose? If not, it may be argued that the *class* settlement amount of $565,000 is sufficiently robust for this purpose. A settlement of this amount ***may*** serve the purpose of future deterrence, at least as to this employer. Plaintiff's counsel, however, completely ignores this issue in briefing, and further explanation is required. The final approval hearing is intended to be ***more***, not less, rigorous, and further explanations are required.

Approval of the settlement (commensurate with the remaining portions of this order) will be given ***only*** if the court is satisfied with counsel's oral explanations as to why counsel overlooked *Moniz* and progeny, which the court clearly identified in the preliminary approval tentative, and how in fact the PAGA settlement here furthers the law enforcement purposes of PAGA.

3. Preliminary Certification of Class

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.)

The court previously found there to be a sufficient showing to certify the class for purposes of settlement. There is no reason to revisit that conclusion here.

4. Settlement Administrators' Fees/Costs

The court preliminarily approved the appointment of Phoenix Settlement Administrators as the third-party settlement administrator, and at that time authorized up to $10,000 in costs/fees. Plaintiffs ask for $10,000 in fees and costs, and have attached billing statements (invoices) to the declaration of Lluvia Islas, a case manager for Phoenix Settlement Administrators, explaining the amounts in question. The amounts at issue appear reasonable. The court finally approves appointment of Phoenix Settlement Administrators as the settlement administrator and its request of $10,000 for fees/costs.

5. Class Counsel's Request for Attorney's Fees and Litigation Costs

Counsel asks the court to approve class fees of $188,333.33, along with litigation costs of $16,754.98. As noted above, CRC 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. Also as noted above, plaintiffs have satisfied this requirement.

On the merits, the attorney fee request appears 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 common fund cases is permissible, although there must be evidence that 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. Further, the method is permissible when the amount is certain or easily calculable sum, as it is here. (*Dunk v. Ford Motor Co., supra,* at p. 1809.) The court generally "double checks" the reasonableness of the fees requested under the lodestar method. (See, e.g., *Lafitte v. Robert Half Internat., Inc*. (2016) 1 Cal.5th 480, 504 [no abuse of discretion in court's decision

to double check reasonableness of contingency method by looking to lodestar method for determining attorney's fees].)

The amount seems justified under the percentage method (common fund). .33333334 (i.e., 1/3) of the gross settlement amount is standard fare. Here, .33333333 of the $565,000 amounts to approximately $188,333.33, the requested amount.

The amount also seems justified by use of the lodestar method, based on the number of hours spent multiplied by the hourly rate, with a reasonable (a middle-of-the road) modifier of 2.1, given the complexity of the case and counsels' contingent risk (as permitted under California law). (*Amaral v. Cintas Corp. No. 2*, (2008) 163 Cal. App. 4th 1157, 1217; see *Syed v. M-I, L.L.C.* (E.D. Cal., July 27, 2017, No. 112CV01718DADMJS) 2017 WL 3190341, at *7 [a lodestar multiplier is, therefore, approximately 2.15, which is on the lower end of multipliers which are typically approved in class action settlements, citing 4 NEWBERG ON CLASS ACTIONS § 14.7, which concluded that courts typically approve percentage awards based on lodestar cross-checks of 1.9 to 5.1 or even higher]; see generally *Yes in My Back Yard v. City of Culver City* (2023) 96 Cal.App.5th 1103, 1124 [" The court applied a more modest 1.25 multiplier to the lodestar solely for the work done on the merits of the case, after rejecting YIMBY's request for a 3.0 multiplier"]; see generally *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 489 ["once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier" to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.' [Citation.]"].)

According to the evidentiary proffer, Attorney Kristen Agnew performed 130.60 hours, while attorney Larry Lee performed 26.90 hours, plus three (3) additional hours anticipated for final approval, for a total of 160.5 hours. Mr. Lee indicates he bills at $900 an hour, while Ms. Agnew indicates she bills at $800 an hour. While the court acknowledges that these hourly billing rates are common in the Los Angeles area, that is not the hourly billing rate in this area. The court will apply an hourly billing rate of $550. The unadorned lodestar method amounts to a total $88,275. The court, however, will apply a positive multiplier of 2.1 -- a not unreasonable number under the circumstances in light of the authority noted above, given the size of the class and the risks associated with it -- meaning use of the lodestar method would amount to attorney fees of $185,3775, which amounts to a rough cross-check of the percentage method amount discussed above.

The court approves the appointment of Diversity Group and Polaris Group as class counsel, and approves of the attorney fee requests of $188,333.33 as reasonable. The court also approves of the fee sharing split between Diversity Law Group and Polaris Law Group, meaning

Diversity Group will receive fees of 65% ($122,416.66), while Polaris Law Group (through Mr. Marder) will receive 35% ($65,916.67).

Class Counsel requests costs in the amount of $16,75.98, as discussed in Kristen Agnew's declaration (¶ 23) and detailed in Exhibit B to Ms. Agnew's declaration; this amount includes a mediation fee, expert fees, and filing and service fees. The expenses appear reasonable. The court approves of the cost sharing agreement (65% to Diversity and $35% Polaris) as applicable to fee sharing, discussed above.

6. Enhancements for Class Representative

Each plaintiff (Mr. Valencia and Mr. Jeroue) requests a $10,000 class enhancement, for a total of $20,000. 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. (*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].) Similarly, a PAGA plaintiff who prevails in or settles a case on behalf of the LWDA generally seeks an "incentive" or "service" payment that is paid from the penalties that the defendant must pay to the LWDA. These payments are non-statutory creations of the court similar to the "incentive" or "service" payments that are paid to class representatives. (*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393-1395.)

Courts have expressed concern when there is a large disparity between an incentive award and the recovery of individual class members through a class enhancement. (*Clark, 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 aware and an average $24.17 recovery (a 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"]; see also *Stanton 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].)

The court expressed reservations about the evidentiary proffer made at the preliminary approval hearing after examining both of plaintiffs' declarations. The court observed at the preliminary approval hearing that the two declarations read exactly the same, and were in the end threadbare with regard to supporting facts. The court conditionally approved the $10,000 class enhancement for each plaintiff only on the condition that each plaintiff provided a more robust evidentiary showing.

Each plaintiff has provided a new declaration, seemingly tailored to each plaintiff's specific input. Mr. Jeroue declares that he made it a priority "to be actively involved because I wanted to do everything I can to assist my attorneys in prosecuting the case. I also understood it was my duty as a Class Representative to represent the best interests of the class, know about the lawsuit, help my attorneys, and keep updated on the case." In this regard, he invested "a lot of personal time and energy while" the lawsuit was pending. He 1) met with attorneys from both law firms; 2) spent time on the phone with attorneys, getting updates and providing information (there were approximately 13 phone calls), each lasting about 30 minutes; 2) spent time looking for documents, including wage statements, employee handbooks, and text messages, Company's policies and procedures, estimated costs incurred by employees maintaining their work gear; 3) reviewed documents, such as the "PAGA Notice and complaint," as well as the Settlement Agreement and the declarations. Further, he was concerned "by the attention [of] a publicly filed lawsuit" filed against a former employer, mindful that prospective employers might "find out that I sued the Company, and this could hurt my employability."

Mr. Valencia declares that he did not make the "decision to file a class action lightly. I was concerned by the attention that a class action lawsuit would attract in the workplace and the reputational harm that may result, including the perception that I am difficult to work with. I was also mindful that filing a class action lawsuit could jeopardize my employment status," for my current or prospective employer might find out that I sued the Company, and there is risk of facing retaliation and strained relationships with colleagues and supervisors." He also made it a priority to be actively involved in the lawsuit because he "wanted to everything I could to assist my attorneys in prosecutor this case." He understands his duty to the class as a whole. Further, he declares that he invested a lot of personal time and energy, meeting with attorneys from both law firms, spending time on the phone to "get updates" and to "provide them with information," and has spent "approximately twenty phone calls with my attorneys," lasting about 35 minutes each. He spent time looking for documents, including wage statements, employee handbooks, text messages, policies and procedures, costs incurred for maintaining their work gear, reviewed

documents, such as the PAGA Notice, the Complaint, and the Settlement Agreement, and in making the declarations. He spent "approximately sixteen hours in this case . . . ."

Counsel observes that both plaintiffs provided a broader general release and waiver than all other class members. According to counsel, this is "more extensive release than that provided by the Class at large . . . ." (Motion, p. 18.)

The evidentiary showing appears a little more robust in the new declarations when compared with the old declarations. Even with this, however, based on a Net Settlement of $279,911.69, with the average recovery of each class member is claimed to be $748.43, the class enhancement for each amounts to an approximate multiplier of 13.3. While certainly not as high as other multipliers as discussed in the cases above, it is not insignificant – and thus gives the court some pause. Further, as to Mr. Jeroue, who declares he spent up to 30 hours with all aspects of the lawsuit, he is receiving approximately $333 an hour. Mr. Valencia is receiving a higher hourly rate, as he claims to have spent 16 hours in total, meaning he is receiving $625 an hour. At the same time, the court acknowledges the risks associated with lawsuit, including the possible payment of costs, and understands the potential stigma in the work community that may be associated with the lawsuit. The court also acknowledges the size of the lawsuit, the number of overall class members and aggrieved employees, and the scope of the release at issue (the named plaintiffs v. the overall class), and acknowledges there are no objections made to the class enhancement requests. The court is (and remains) concerned that class enhancements are routinely approved with near Procrustean uniformity. Still, on the record before the court, and taking into account the totality of evidence, the court finds that while the enhancements may be high (particularly with regard to Mr. Valenzuela), they are nevertheless reasonable, and will approve both enhancements.

7. Class Certification Efforts, Notices, Class Procedures, and Class and PAGA Time Frames and Disbursements

Plaintiffs ask the court to approve the class action procedures contemplated by the settlement agreement, including all efforts to date, all notices, as well as class and PAGA time frames and disbursement provisions. The gross nonreversionary settlement amount is $565,000, with a Net Settlement Amount of $279,911.69, arrived at after the following subtractions: a PAGA settlement of $50,000 (with $37,500 to the LWDA and $12,500 sent to the aggrieved employees); attorney's fees of $188,333.33; litigation costs of $16,754.98; fees/costs of $10,000 to Phoenix Settlement Administrators; and $20,000 class enhancement ($10,000 for each plaintiff). There were a total of 413 present and former employees on the mailing list provided by defendant, and the class action notices (i.e., the "Notice of Class Action Settlement," (Notice) in both English and Spanish, attached as Exhibit A to the declaration of Lluvia Islas, were sent by mail on April 12, 2024. The Notice documents describe with reasonable clarity the rights and

options of all class members/aggrieved employees (if they did nothing, what happens if a class member opts out, and what happens if the class member objects); explains the deadlines for each course of action; and describes what the class action is about, why there is a settlement, the terms of the settlement, how to determine the individual class member's payments, how payments are made, what to do if the information is inaccurate, the nature of the release, how attorneys will be paid, the nature of the final approval hearing, and class counsel's and the settlement administrator's number and addresses for further information. Eighteen (18) Notices were returned, and skip-trace attempts were made to locate the new addresses; 13 out of 18 new addresses were obtained, and Notices were re-mailed. Five (5) notices remain undeliverable. The class currently consists of 375 members, with 1 opt-out (making the class at 374 members), no objections, and no disputes about pay periods. All deadlines were May 28, 2024.

From the $50,000 PAGA Settlement, $37,500 will go the state, and $12,500 will go to all aggrieved employees who worked during the PAGA period. There are 264 aggrieved employees. There is overlap with class action members, and of the 264 aggrieved employees, only 38 are PAGA only aggrieved employees. Aggrieved employees worked a total of 11,371 pay periods during the PAGA period. The highest individual PAGA payment to be paid is approximately $75.85; the lowest individual PAGA payment is $1.10; while the average PAGA payment is $47.35. (Lluvia Islas's Dec., ¶ 13.)

From the Net Settlement Amount of $279,911.69, there are 374 class members. They have worked collectively a total of 22,185 pay periods during the class period; 20,831 pay periods were for the Driver Class, while 1,354 pay periods are of the Wage Statement Class. Pursuant to the settlement agreement, class members will receive a proportionate share of the Net Settlement, based on the number of pay period each worked during the class period. The highest gross payout under these calculations will be $2,245; the lowest payout under these calculations will be $12.62; and the average payout will be $748.43. (Lluvia Islas's Dec., ¶ 112.)

The settlement administrator will be responsible for issuing to plaintiffs, class members, and all others all appropriate tax forms.

The court determines these efforts, all notices and procedures, as well as the calculations and disbursements seem fair, adequate, and reasonable.

Finally, to the extent there are uncashed checks from the settlement funds (both class action and PAGA) after 180 days of the mailing, the amount will be distributed to the Legal Aid at Work, as a *cy près* recipient. There are not conflicts by counsel with the proposed *cy près* recipient. The court determines the *cy près* provisions are fair, adequate, and reasonable, and the recipient is appropriate. (See generally *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 716 [recognizing the equitable doctrine of c*y près* doctrine in the class action context as the best

alternative for the court is to award damages in a way that benefits as many of the class members as possible, despite the probability that some class members will not benefit whereas some nonmembers will].)

There is one matter not addressed in the evidentiary proffer. Counsel should inform the court how long after final approval it will take to disburse all checks to class members and aggrieved employees.

8. Summary of Court's Conclusions

- The court directs plaintiff's class counsel to appear at least by Zoom at the final approval hearing, in Department 2, on June 25, 2024, at 8:30 a.m., in Santa Maria. Counsel should address the following issues with the court as to the reasonableness of the $50,000 PAGA settlement:
    - Why counsel continue to ignore *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, despite its detailed mention in the court's preliminary approval order, despite the fact the court directed counsel to appear at the preliminary approval hearing and discuss *Moniz* and progeny, and despite the fact counsel asks for the court's final approval of the PAGA settlement amount in its most recent submissions. The court observes that in counsels' final approval motion, under the heading "State Cases" in the "Table of Authorities[,]" the most recent published Court of Appeal case cited is from 2014. Is counsel relying on rote, antiquated briefing? The court also notes that class counsel asks the court to rely on their expertise in determining whether the settlement amounts are fair, adequate and reasonable; *consistent* failure to cite and discuss ***all*** relevant case law that frames ***all*** issues and dictates the nature of the court's inquiries does not foster confidence in counsels' claimed expertise.
    - Second, as reflected in Subpart B(2), of the Settlement Agreement, defendant denies any and all claims, and notably denies "all wrongdoing whatsoever. This Agreement is not a concession or admission, and will not be used against Defendant as an admission or indication with regard to any claim of any fault, concession, or omission by Defendant . . ." This is not language that assures the court of defendant's future compliance with California wage and hour laws, which is part of the PAGA assessment calculus.
    - Third, counsel should explain whether the settlement amounts at issue are themselves sufficient to ensure defendants' ***future compliance with existing state labor laws*** (in line with the purposes of PAGA). Is $50,000 itself substantial for this purpose? If not, is the *class* settlement amount of $565,000 sufficiently robust for this purpose? A settlement of this amount ***may*** serve the purpose of future deterrence, at least as to this employer. Plaintiff's counsel, however, completely ignores this issue in briefing, and further explanation is required. A final approval hearing is intended to be more, *not less*, rigorous, and all of these topics must be explored.

- The court wants assurances that counsel will comply with section 2699, subdivision (l)(3), which requires counsel to submit the final approval order with the LWDA should final approval be given.
- Finally, counsel should explain to the court the timing mechanisms for disbursements following final approval.
- If (*and only if*) counsel's explanations satisfy the court, will the court then determine, commensurate with written portions of this order, that the overall gross settlement of $565,00 is fair, reasonable and adequate, including the $50,000 PAGA settlement (with $37,500 going to the state and $12,500 going to aggrieved employees); finally approve certification of the class, appointment of class counsel, the two class representatives, and the settlement administrator; finally approve attorney's fees of $188,333.33 (including the fee sharing split), litigation costs of $16,754.9 (including the costs' allocation split), settlement administrator costs of $10,000, and class enhancements totaling $20,000 ($10,000 for each plaintiff); finally approve the class certification efforts, notices, procedures, and disbursement time frames; and sign the proposed order/judgment.