Related Case:

Alvino, et al. v. Eat Sweet Farms, LLC 24CV00180

Proposed Tentative

On January 18, 2022, in Case No. 22CV00203, plaintiff Eduardo Aquino Rodriguez (plaintiff) filed a class action and representative action complaint against defendants Eat Sweet Farms, LLC, and JDB Pro, Inc. (dba Central West Produce) (collectively, defendants), alleging nine class action causes of action (failure to pay minimum wages, failure to pay overtime wages, failure provide meal and rest periods, failure to pay vested vacation time, failure to reimburse business expenses, failure to timely pay final wages, failure to provide accurate itemized wage statements and a violation of Business and Professions Code, section 17200, et seq. [UCL]); as well as eight representative causes of action for civil penalties under the Private Attorney General Act (hereafter the PAGA) (failure to pay minimum wages, failure to pay overtime wages, failure to provide meal and rest breaks, failure to pay vested vacation time, failure reimburse business expenses, failure to timely pay final wages, and failure to provide accurate, itemized wage statements). According to the operative pleading, plaintiff was employed by defendants from 2014 to 2021, and filed this lawsuit on his own behalf and those similarly situated as a class action and on behalf of aggrieved employees per PAGA. The class is defined as "all current and former nonexempt employees employed by Defendants in California during the Relevant Time Period [defined as four years before the filing of this action]." Plaintiff seeks six (6) subclasses (based on meal break, rest break, vested vacation, unreimbursed expenses, waiting time, and wage statement penalties subclass). The PAGA representative action for aggrieved employees includes all civil penalties for plaintiff and all other similarly situated current and former aggrieved employees in California against whom one or more of the violations occurred, pursuant to Labor Code[1] section 2699, et seq. Defendants have not filed an answer to the operative pleading.

Meanwhile, on March 15, 2024, in *Alvino, et al. v. Eat Sweet Farms, LLC*, Case 24CV00180, plaintiffs Carlos Perez Alvino and Maurillo Ponce Nicolas filed a first amended class and representative complaint against defendant Eat Sweet Farms, LLC, for failure to pay wages and/or overtime pay (violations of §§ 510, 1184); failure to reimburse expenses (§ 2802); violation of section 226(a); civil penalties for violation of section 203; UCL cause of action; and civil penalties under the PAGA. Defendant filed an answer on May 15, 2024.

Both cases were assigned to this court. Notices of Related Case were filed on May 17, 2024 in each matter.

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

On June 20, 2024, in Case No. 22CV00203, plaintiff filed a motion for preliminary approval of the settlement, totaling $2,150,000, reached in the class and representative action, following a formal, full-day mediation conducted by mediator Mr. Michael Strauss, Esq., a "highly experienced and respected class action mediator in California." Plaintiff asks the court to preliminarily approve the certification of the class, which consists of current and former non-exempt employees employed by defendants in California at any time during the "Class Period," which is between January 18, 2018, and May 24, 2024. The class action settlement contemplates a $2,150,000 gross nonreversionary settlement amount, of which $100,000 is earmarked as a PAGA settlement (75% or $75,000 shall be paid to the state via the Labor and Workforce Development Agency (LWDA), and 25% or $25,000 will be distributed to the aggrieved employees). The gross settlement amount is reduced as follows: 1) $716,666.67 for attorney's fees; 2) up to $30,000 in litigation costs; 3) settlement administration costs of $92,000; and 4) an enhancement payment to plaintiff of $10,000, leaving a net class settlement amount of $1,201,333. This net amount will be distributed to all class members who do not opt out. The actual payment will be calculated on a pro-rata basis, according to the number of weeks worked during the class period (totaling 504,00 work weeks), at a value of $4.265873 per work week ($4.265873 times 504,000 equals the settlement amount of $2,150,000). No average payment to the class has been provided.

Attached to the noticed motion are the following documents: a memorandum of points and authorities; a declaration from attorney Brian Mankin, along with a copy of the "Class Action and PAGA Settlement Agreement and Release" between the parties (Exhibit A), which in turn has as attachments the notices to be sent to the putative class members and aggrieved employees; a copy of the settlement administrative estimate costs submitted by Rust Consulting, the third party administrator; and a copy of the email confirmation from the LWDA indicating receipt of the settlement and other documents. Also submitted were the declarations of Kristina Bei Carlson, plaintiff's counsel; and a declaration from plaintiff to support the $10,000 enhancement request.

The court will detail the legal standards that govern and frame the court's inquiry in the present context; discuss four preliminary matters; assess whether the class action and PAGA settlements are fair, adequate, and reasonable; determine whether preliminarily certification of the class is appropriate; assess whether the notice, and the opt-out and disbursement procedures, are reasonable and appropriate; assess whether the requested attorney's fees, litigation costs, and third party settlement costs are reasonable; and assess whether the class enhancement request is appropriate. The court will conclude with a detailed summary of its conclusions, including a list of items plaintiff's counsel will have to address either at the preliminary hearing and/or before final approval.

A) What are the General Standards for Approvals of a Class Action Settlement?

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 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 3.769(f).] Second, the court conducts a final approval hearing to inquire into the fairness of the proposed settlement. [CRC 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 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 For Fair Franchising v. Southland Corp.* (200) 85 Cal.App.4th 1135, 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, adequate, and reasonable, 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*. (2024) 15 Cal.4th 582, 599].) 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, section 2699, subdivision (l) requires the following for PAGA settlements. First, the aggrieved employee or representative shall, within 10 days following commencement of a civil action pursuant to this part, provide 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 the reasonableness of 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*, 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.

B) Preliminary Matters: Three Documents (Two of Which Need to Be Provided Before the Final Approval Hearing) And A Required Explanation

Plaintiff should file a notice of settlement in this case that comports with CRC 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"].) This provision 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 settlement that has been certified as a class action.

With that, it appears via the declaration of Mr. Brian Mankin that concurrently with the present motion, counsel filed a copy of the proposed settlement, as well as the proposed motion and exhibits, with the LWDA, as required by section 2699, subdivision (l)(2). Exhibit D, attached to Mr. Mankin's declaration, is an email confirmation of the submission. Of course, the court also expects that should a final judgment ultimately be entered, plaintiff will send that judgment to the LWDA, as required per section 2699, subdivision (l)(3).

Finally, an explanation should be given by plaintiff's counsel of what impact the present settlement, and its approval, will have on the related case No. 24CV00180. For example, will the plaintiffs in the latter case opt out, and what impact will the PAGA resolution here have on

any PAGA claims advanced in Case No. 24CV00180? These explanations are not dispositive here, but will help the court manage that case in the future.

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

As noted, the amount of the nonreversionary gross settlement is $2,150,000. As also noted above, this amount will be reduced by 1) a $100,000 PAGA settlement (with 75% going to the LWDA and 25% going to the aggrieved employees, which appears to be the same as the proposed class); 2) attorney's fees of $716,666.67 (1/3rd of the settlement amount); 3) up to $30,000 in litigation costs; 4) settlement administration costs of $92,000; and 5) an enhancement payment to the plaintiff of $10,000, leaving a net settlement amount of $1,201,333, from which the putative class members will be paid.

As explained above, 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 court makes the following initial observations about the nature of the evidence presented to aid the court in this inquiry. Case law makes it clear that that an informed evaluation of a proposed settlement cannot be made by the trial court without an understanding of the amount that is in controversy and the realistic range of outcomes in the litigation. (*Clark v. American Residential Services, LLC* (2009) 175 Cal.App.4th 785, 801; see *Munoz, supra*, 186 Cal.App.4th at p. 409 [while an express statement of the maximum amount is not required, there must be a record that is sufficient developed to allow the court to understand the amount in controversy and the realistic ranges of outcomes of the litigation].) Thus, while a court must receive 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 is reasonable, *the court need not determine* the maximum potential recovery for each released claim. That being said, the court finds it useful when counsel provides in concrete numerical terms what counsel feels is the maximum value of the lawsuit, broken down into its constituent parts. Counsel has

not done this in the present evidentiary proffer here, relying on generic descriptions rather than concrete representations.[2] This is not fatal at the preliminary approval stage, under the circumstances and for the reasons discussed in more detail below. However, *for the final approval hearing*, the court directs counsel to provide such concrete numbers, including the perceived maximum value of the lawsuit, the perceived maximum value of each category of damages, including penalties, counsels' thought process in reducing the values for purposes of the settlement, along with the ultimate average payout to each putative class member under the negotiated disbursement formula (a point that becomes particularly relevant, as will be seen, with regard to the enhancement calculus). These assessments are useful in determining the fairness, adequacy, and overall reasonableness of the settlement, as part of the court's duty at the final approval hearing, as the inquiry is intended to be more rigorous than that for the preliminary approval. Critically, the court wants to understand more fully, no later than the final approval hearing, how the parties determined the collective value of the Labor Code and UCL violations at issue were $4.265873 per work week, which was part of the calculation (a figure multiplied the number of workweeks) to establish the final settlement amount of $2,150,000.

Nevertheless, for our immediate purposes, the court finds sufficient information in the record to allow the court to make a ***preliminary*** determination about the amount in controversy and the realistic range of outcomes in the litigation in order to determine whether the settlement amount is fair, adequate, and reasonable. Plaintiff's counsel observes that the maximum potential value of the lawsuit "stretched into the 8-figures" (again, oddly, omitting to tell the court whether the amount is closer to $99 million or $10 million, see fn. 2, *ante*); still, based on the information provided, it appears the amount in controversy (including class and PAGA claims) was somewhere between $20 to $25 million,[3] leaving the court to determine whether the actual settlement is within the ballpark of reasonableness under all the circumstances. (*Wershba*,

---

[2] An example from plaintiff's current evidentiary proffer reveals why the court desires a more detailed numerical representation. On page 17 of the Memorandum of Points and Authorities, counsel explains that defendants' liability "had a maximum value in the eight figures," a statement supported by Brian Mankin's declaration, to the effect that "the theoretical maximum potential damages stretched into the 8-figures . . . ." Is it closer to $10 million or to $99 million? The court is not informed. One ponders: Why not just provide the overall numbers as a baseline working yardstick, rather than using vague, ill-defined descriptions? While the court must work "in the ballpark" of reasonableness, it does not want to be confronted with any vagaries indicative of "hiding the ball."

[3] The court is providing an educated estimate in this regard, based on the less than complete but arguably minimally sufficient information provided by counsel in the present proffer. This circles back to the point the court made in footnote 2, *ante*, about the court's need for a more complete record at the final approval hearing. If the court's estimates at this time and for preliminary approval are in the "ballpark," then it makes sense for the matter to proceed, ultimately awaiting a more complete record from counsel at the final approval hearing. ***However*, if the court's preliminary estimate is not "in the *ballpark*"**, ***and the maximum potential liability of defendants is in reality closer to $99 million than $10 million***, ***it would be in plaintiffs' counsel's best interest to inform the court of this at the preliminary approval hearing, to continue the matter, and to submit additional briefing on the subject***. The court will want to see these numbers before final approval in any event, and if it turns out that they are significantly different from the court's preliminary estimate made here, ***the court will not give final approval***. Counsel should therefore proceed cautiously; they are placed on notice that final approval will not be forthcoming should they present numbers at final approval that substantially vary from the estimates made here.

supra, 91 Cal.App.4th at pp. 246, 250; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.43, 55.) We start with the declaration of attorney Brian Mankin, who declares that prior to mediation, it was determined that there were 17,000 proposed class members, who worked 504,000 workweeks and 2,520,000 shifts during the class period, with approximately 206,420 wage statements during the PAGA period (the same as the class period). "From these metrics," opines counsel, when factoring in claim certification probabilities and liability probabilities, "we formulated detailed damages models to value the claims in preparation for mediation and reach a realistic resolution." (Dec. of Brian Mankin, ¶ 26.) Plaintiff's counsel, based on expert data analysis, made the following specific determinations:

- As for rest breaks, plaintiff alleged that defendants failed to separately compensate for *all* rest periods during the workweek, and further, implemented "rounding practices [that] resulted in an underpayment during the instances when Defendants separate paid rest breaks." The court will assume the value of this claim as worth approximately $ 6,000,000, based on the numbers provided. These contentions were countered by defendants "vehement[ly] on the merits and the propriety of class certification," raising several defenses, meaning appropriate risk reductions from the maximum potential was made.
- As for meal break claims, based on mediation analysis and investigation, including expert review of timekeeping data, plaintiff's counsel estimated that 12.1% of pay periods had at least one meal violation, although defendants raised "numerous arguments against this claim, including compliant written polices and valid meal waivers"; it also argued that class mechanism was inappropriate because an individualized assessment was required. The court will estimate the value of this claim somewhere in the range of $2.5 million.
- As for failure to reimburse business expenses, plaintiff calculated potential violations in approximately 50,400 workweeks, meaning the court will estimate the value of this claim at approximately $2.5 million. Defendants argued to plaintiff that its employees were not required, and actually discouraged from incurring business expenses, for defendant provided all tools and equipment.
- As for waiting time penalties and wage statement violations, including the failure to accurately state all applicable hourly rates and total hours worked; "some of these claims were derivative of the claims" noted above, meaning they only had merit if the claims for unpaid wages or meal/rest breaks were successful. The court will assume, again based on the numbers provided and the fact the claims were derivative, that the value of this claim is approximately $2.5 million. Again, defendant advanced a "variety of defenses," namely that the wage statements were legally complete, and if not, amounted to only technical violations, and there was no knowing and intentional injury committed.

- Likewise, according to Mr. Mankin, the "PAGA penalties," viewed separately from the individual class claims, has a "value in eight figures" (and the court will estimate this value at $12 million based on the numbers provided). (See Brian Mankin's Dec., ¶ 32.)[4] Again, defendants argued meaningfully that the violations, if any, were not willful, substantially reducing the overall civil penalty amount.

Underscoring this, plaintiffs' counsel opined that the ultimate final settlement amount was secured only after both sides engaged in a rigorous arms-length negotiation, culminating in a mediation settlement with an experienced wage and hour mediator. There is no evidence of collusion. Class counsel appears to be experienced wage and hour attorneys, as detailed in the declarations of both Brian Mankin and Kristina Bui Carlson. Plaintiffs' counsel have been involved in a number of class action suits, as detailed in the briefing and the individual declarations. There appear to be no objections to the settlement. (The court will want an oral update by counsel on this point at the hearing.).

Further, counsel informs the court, through the declaration of Mr. Mankin in particular and Ms. Carlson generally, that prior to the mediation counsel, the parties "exchanged thousands of pages of documents and information that allowed both sides to conduct significant investigation regarding the facts of the case and calculate the potential damages and evaluate potential risk, including policies and procedures pertaining to each claim alleged, and statistics relating to the number of current and former employees, number of shifts, weeks worked and other things. Defendants also provided its written policies and practices and a robust sampling of payroll and timekeeping members for Class Members. This information enabled both parties to take a deep dive into the claims. Additionally, during this process, Plaintiff and counsel analyzed, researched, and investigated potential issues, including matters related to the calculation of damages, trial, and appellate issues and risks." Further, in preparation for mediation, Mr. Mankin and Ms. Carlson "formulated a damages model and risk analysis based upon detailed data obtained through informal discovery and information exchanges," as well as expert analysis. In this assessment, "while counsel believed that there was a possibility of certifying the claims, we recognized the potential risk, expense, and complexity posed by litigation . . . ."

Finally, in counsel's view, the "settlement will result in a fair payment to each Class Member based on the percentage of weeks worked during the Calls Period and other factors set forth in the Settlement Agreement." Counsel has "diligently investigated the claims and

[4] The court's preliminary overall numbers, assessing the approximate value of the lawsuit, are based on the following: 1) Class Action Claims of $6 million, plus $2.5 million, plus $2.5 million, plus $2.5 million, which equals $13 million; and 2) PAGA claims of $12 million, leaving the potential value of the lawsuit for preliminary purposes at approximately $25,000,000.

defenses on behalf of Class Members and worked to achieve a resolution of the claims to maximize the recovery by avoiding further expenditures . . . ." Of course, the "settlement amount represents a compromise figure, taking into account the various risks surrounding class certification and the merits of Defendants' asserted defense."

" 'The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.' [Citation.]" (*7–Eleven Owners for Fair Franchising, supra,* 85 Cal.App.4th at p. 1150.) "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial." (*Wershba,* 91 Cal.App.4th at p. 246.) Class counsel is experienced, and details the inherent risks of any continued litigation, expended and the documents reviewed, the assessments appear reasonable. (*Clark, supra,* 175 Cal.App.4th at p. 801) While the court at the final approval hearing will want counsel to provide written information about ***the average payout of each class member*** (as well as other more concrete numbers as detailed above), the court finds there is sufficient information in the record to determine ***preliminarily*** that the gross settlement of $2,150,000, in light of these estimates made, to be fair, adequate, reasonable.

One further point must be addressed separately – the fairness of the PAGA settlement amount of $100,000 (distinct from its inclusion into the *overall fairness* of the $2.15 million class action settlement amount). As noted, the parties have agreed to designate $100,000 of the settlement amount for PAGA penalties, and plan to distribute 75% to the state ($75,000) and 25% ($25,000) to the aggrieved employees on a proportionate basis, based on the number of payroll periods, during the "PAGA period." Plaintiffs' counsel provides few details, relying on the fact that trial courts have wide latitude to reduce civil penalties based on facts and circumstances, with courts trying to avoid arbitrary awards. Plaintiff's counsel emphasizes that defendant's claims about lack of willfulness was strong, noting that the more realistic assessment would not involving "stacking."

This uncertainty goes only so far, however, as counsel has overlooked (and failed to even cite to) *Moniz* and progeny, as detailed above; *Moniz* clarified and refined the appropriate standard this court must apply when examining the fairness of PAGA settlements. The *Moniz* court emphasized a trial court's duty to determine the 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.) *Moniz* made it crystal 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 for future purposes. In fact, defendants seem to eschew any wrongdoing, as

reflected in Item 13.1 of the settlement agreement, which includes a no publicity clause in Item 13.2.[5] And while it seems arguable that the $100,000 amount itself is sufficient to ensure defendants' future compliance with existing state labor laws – in line with the purposes of PAGA – plaintiff fails to address the point ***entirely.*** The court expects counsel to address *Moniz's* import at the hearing for purposes of establishing whether the $100,000 PAGA settlement amount is reasonable, ***keeping in mind the purposes of PAGA.*** The court offers the following comments in the accompanying footnote to facilitate this discussion.[6]

D) Is Preliminary Certification Appropriate for the Class Action?

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.)

There has been a sufficient preliminary showing of numerosity, ascertainability, and predominance of commonality. The class is very large – apparently as great as 17,000 members during a defined class and representative period, with names obtained through existing employment records, as well as the same or similar number of aggrieved employees for PAGA purposes. It appears the claims are sufficiently similar, subject to the same policies or practices, with similar job duties and universally administered formula. It also appears the class representative plaintiff has typical claims of the class/aggrieved employees as a whole. A class

---

[5] Item 13.1 provides in relevant part defendant does not admit any liability, and the settlement "will have no bearing on, and will not be admissible in connection with, any litigation (except for proceedings to enforce or effectuate the Settlement and this Agreement)." Item 13.2 provides in relevant part that class counsel shall not "advertise or have any other public communication about this settlement." These items arguably undermine efforts to ensure future compliance with California's wage and hour laws. Plaintiff's counsel should explain at the hearing how these provisions impact the fairness of the PAGA determination pursuant to *Moniz* and progeny.

[6] ***To facilitate the discussion at the hearing, the court offers the following points for counsel 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 the settlement does not serve the purpose of deterrence. Deterrence can occur, however, when the aggregate 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 $100,000 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*.

action appears the superior way to a fair and efficient adjudication of the lawsuit (in fact, likely the only way). Assuming counsel provides explanations to the court's concerns detailed above, certification of the class seems appropriate.

E) Are the Procedures for Claims. Objections, and Opt-Outs Adequate? Are the Notice and Disbursement Time-Frames Reasonable?

Attached to Mr. Mankin's declaration is the settlement agreement consummated by the parties; attached to the settlement agreement, in turn, is the 12-page notice to be sent to the putative class members and aggrieved employees.[7] The notice is entitled "Court Approved Notice of Class Action Settlement and Hearing Date for Final Court Approval" (hereafter, Notice). It describes the nature of the lawsuit (including the recovery for a class member v. an aggrieved employee per PAGA); as well as the recipients' legal rights and options. There is a place on the form that indicates the recipient's individual PAGA and class action award, and what action a member/employee can take if the calculations are erroneous. It describes the legal rights and options of each recipient (i.e., what happens if nothing is done, the option to opt-out and what must be done for that with proposed deadline date, and the option to object, and the response deadlines). The Notice then takes the recipient step-by-step through the approval process, with 11 headings, using clear, nontechnical language, as follows: 1) What is the Action About?; 2) What Does It Mean That The Action Has Settled?; 3) What Are the Important Terms of the Proposed Settlement (including gross settlement, court-approved deductions, net settlement, taxes owed, opt-outs, approval process, the class administrator, the class member release and the PAGA releases (separately explained); 4) What Are the Important Terms of Proposed Settlement? (including the nature of the releases contemplated between the class and representative PAGA actions, which are described effectively; 5) How Will the Group Get Paid?; 6) How Do I Opt-Out of the Class Settlement?; 7) How Do I Object?; 8) Can I Attend the Final Approval Hearing; 9) How Can I Get More Information (including plaintiffs' counsels' and the settlement administrator's contact information); 10) What If I Lose My Settlement Check?; and 11) What If I Change My Address?

These descriptions outline the nature of the class claims; who may be eligible; the gross and net settlement amounts (i.e., minus attorney's fees, litigation costs, settlement administration expenses, enhancements, and PAGA disbursement (and formulae)). They explain how an individual class member's award will be calculated (excluding those who opt out and what happens if there is an objection), and how the PAGA amounts will be distributed to aggrieved employees. The Notice makes it clear that a form need not be submitted for payment. And they indicate that defendants are bound by the settlement agreement unless the class member affirmatively excludes himself or herself from the settlement (making it clear that the recipient

[7] It appears Exhibits A and B to the settlement agreement seem to be duplicative 12-page notices.

will not be able to opt out of PAGA settlement distribution). The Notice informs the recipient 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; advises of the preliminary and final approval hearings and their possible dates, and who to contact for more information. The notice adequately explains the options before the putative class member, including disputes and opt out procedures, under the heading. It explains the nature of the releases involved for the class action separately from the PAGA settlement; and where to contact counsel for more information. All tax information is adequately described. The Notice seems adequate.

While the estimate from Rust Consulting indicates there will be a "Spanish Translation" of the Notice, the court nevertheless wants counsel to affirm orally at the preliminary approval hearing that the Notice will be sent in both English and Spanish.

The time frames and disbursement procedures contemplated by the settlement agreement seem reasonable. Within 30 days after preliminary approval, defendants will provide the administrator with the list of class members; within 14 days the calculations shall be made, and each class member will be sent notice, with skip traces to be conducted for returned notices. The settlement agreement contemplates three equal installments to be made by defendants (by January 1, 2025, July 31, 2025, and December 1, 2025. Three checks are contemplated to be distributed, and class members will have 180 days to cash the settlement checks upon receipt. The amounts for all uncashed checks will be sent to the California State Controller. All appears reasonable.

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

Plaintiff asks the court to appoint Rust Consulting as the third-party settlement administrator. Although no declaration from a representative of Rust Consulting has been submitted, Rust Consulting has provided an estimate of its services to Mr. Mankin's declaration, which is attached as Exhibit C. Given the size of the class, Rust Consulting asks for no more than $92,000 for all notices and disbursements, and this amount seems reasonable. The court approves the appointment of Rust Consulting as the third-party settlement administrator, and approves of costs of up to $92,000.

Plaintiff asks the court to appoint Lauby, Mankin, and Lauby, LLP as plaintiff's counsel, and to specifically appoint attorneys Brian Mankin and Kristina Bui Carlson. Plaintiff also asks the court to award attorney's fees of $716,666.67, which reflects .333333334 contingency of the gross settlement amount of $2,150,000. The court grants the appointment of Lauby, Mankin and Lauby, LLP, Brian Mankin, and Kristina Bui Carlson as class counsel.

The attorney fee amount (pending submission of the attorney fee agreement or its substance) of $716,666.67 also seems reasonable. (See, e.g., *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578 [it is well settled that attorney fees under Code Civ. Proc., § 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. " '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 it is preliminarily approved.

The court also preliminarily approves litigation costs of up to $30,000, but will expect clear evidentiary support at the final approval hearing for the ultimate amount claimed.

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

The court provisionally appoints plaintiff as class representatives (and representatives of all aggrieved employees), as he appears to satisfy all requirements for such appointment.

Plaintiff asks the court to preliminarily approve a class enhancement award of $10,000. It is established that a named plaintiff is eligible for reasonable incentive payments to compensate him or her for the expense or risk incurred in conferring benefits on other members of the class. (*Munoz, supra*, 186 Cal.App.4th at p. 412.) Relevant factors in making this assessment include the actions 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].)

Plaintiff has submitted a declaration in support. He declares that as class representative, he has "a duty to look out for and protect the interests of the class members as a whole. I do not believe, nor do I have reasons to believe, that my interests in this lawsuit are in conflict or

antagonistic to those of my fellow similarly situated employees." He provided "invaluable assistance to my attorneys and the putative class members in this case, including providing factual information, wage and hour documentation, wage statements, my payroll records, and personnel file for the allegations in the Class Claims Complaint and PAGA letters. I also spent numerous hours on the phone with my lawyers, including preparing for mediation, and was available on the day of mediation. I also participated in various phone calls with my lawyers to discuss litigation, facts, witnesses, and settlement strategy and reviewed the settlement documents. My efforts were instrumental in securing the favorable terms of the Settlement Agreement. . . ." Plaintiff also explains that the case "involved risks for me, such as the potential risk of having to pay Defendants' costs if we lost." Further, plaintiff observes that his signed release is broader than the other class members and aggrieved employees.

Cases have expressed concern about an enhancement when there is a large disparity between the incentive award and the average 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"].) ***Plaintiff has not provided information as to the average payout to class members, and the court will want to see this information at the final approval hearing***. However, for purposes of preliminary approval, the court finds it enough to say that a $10,000 enhancement, which amounts to only .0004651 of the gross settlement amount of $2,150,000, seems a reasonable amount under the circumstances presented, as supported by plaintiff's declaration.

In Summary:

- Plaintiffs are directed to file a Notice of Settlement as required by CRC 3.1385 (at least before final approval);
- Plaintiffs are also directed to provide the attorney-fee agreement (or its substance) as required by CRC 3.796(b) (at least before final approval).
- Counsel should explain at the hearing whether any objections have been made to the settlement (it appears no objections have been made to date);
- Counsel should also explain what impact the present settlement has on Case No. 24CV00180, which is a related case.
- The court makes the following prefatory observations about the evidentiary proffer made by plaintiff to support his claim that the gross settlement amount of $2,150,000 is fair, adequate, and reasonable.

- While the court is not required to make any formal determination about defendant's maximum potential liability in the action (i.e. the maximum value of the lawsuit), the court has found counsel's assessment of the overall value of the lawsuit (as well as counsel's assessments of the maximum value of its each constituent part) a useful yardstick by which to gauge the ultimate reasonableness of the gross settlement amount. In this case, plaintiff's counsel describes the maximum value in oddly vague, ill-defined terms, claiming as to both the class and PAGA claims that the overall liability separately involved (or was "stretched to') "8-figures," without providing concrete numbers, leaving the court at times to guess whether the maximum value is closer to $99 million or $10 million, which reflects a wide disparity. The court directs counsel to provide *before the final approval* hearing a more concrete, numerical assessment of the maximum value of the lawsuit, its constituent parts, any explanations as to why these amounts were reduced, and in the end (and perhaps most notably), why the value of all violations was reduced to approximately $4.27 per week, a figure that was multiplied by 504,000 weeks during the relevant period to obtain the settlement amount of $2,150,000.
- With these observations and conditions firmly in mind, and based on the ***limited*** information provided by counsel (and recognizing the need for this court to reasonably extrapolate general values from the limited information provided), the court has assumed the value of the lawsuit was somewhere between $20 and $25 million as a starting point in determining whether the gross settlement amount was within the "ballpark of reasonableness." ***If*** these numbers are incorrect (i.e., if the value of the lawsuit is closer to $99 million), it is incumbent on counsel to inform the court of this at the preliminary approval hearing, to ask for a continuance, and to submit additional briefing with more accurate values, for counsel will have to supply these figures before the final approval hearing in any event. In the end, if the "8 figure values" (as vaguely referenced in the briefing) are in fact closer to $99 million, rather than $10 million, plaintiffs' counsel runs the ***very real risk*** that this court will deny final approval. It is in counsel's best interest to get in front of this issue now, ***if*** it is an issue.

■ With this said (and assuming the court's extrapolations are not an issue), and again only on the condition that counsel will provide more concrete numerical values at final approval as detailed in this order, the court preliminarily finds that the gross settlement of $2,150,000 to be fair, adequate, and reasonable, and preliminarily certifies the class (consisting of a maximum number of 17,000), which while very large seems to be

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/aggrieved employees. It finds the Notice to be adequate and the timeframes for notification and disbursement to be reasonable. Counsel should confirm at the hearing that the Notice will be sent in both English and Spanish.

- The court directs counsel to address orally at the hearing the reasonableness of the $100,000 PAGA settlement, keeping in mind the purposes of the PAGA scheme, for counsel has failed to acknowledge recent case law dictating how this court must approach the inquiry when determining the reasonableness of PAGA settlements. (*Moniz v. Adecco USA Inc.* (2021) 72 Cal.App.5th 56; see also *Shaw v. Superior Court of Contra Costa County* (2022) 78 Cal.App.4th 245, 263.) Counsel should come prepared to explain why it failed to cite to the case; what impact items 13.1 and 13.2 from the settlement agreement have on the *Moniz* assessment; and the import of matters detailed in footnote 6, *ante,* of this order on this calculus. The court will approve the PAGA settlement amount *only* if counsel satisfies the court's concerns.
- If these explanations are satisfactory (and only on the condition that all documents/explanations/requirements detailed above are submitted/satisfied/presented at the final approval hearing), the court makes the following additional preliminary determinations:
  - The court preliminarily approves the appointment of Rust Consulting as the third-party settlement administrator, and preliminarily authorizes up to $92,000 for expenses in this regard.
  - The court preliminarily approves the appointment of Lauby, Mankin & Lauby, LLP, and specifically appoints attorneys Brian Mankin and Kristina Bui Carlson as class/representative counsel. The court preliminarily approves attorney's fee of $716,666.67, and up to $30,000 in litigation costs (assuming the attorney fee agreement and sufficient documents offered to detail the litigations costs are submitted at the final approval hearing).
  - The court preliminarily approves Mr. Eduardo Rodriguez as plaintiff in the class and representative action, and authorizes, preliminarily, an enhancement of $10,000. For final approval, however, the court will want a breakdown of the average payment of each class member in order to make a final determination about the reasonableness of the enhancement. before final approval is given.
  - The court will sign the proposed order submitted by plaintiff.

Counsel is directed to appear at the hearing either in person or by Zoom.