SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

PABLO SERGIO NEVAREZ,

Plaintiff,

v.

ON-TIME AIR CONDITIONING & HEATING LLC, et al.,

Defendants.

Case No.: 21CV375216

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

This is a putative class action. Plaintiff alleges that Defendant On-Time Air Conditioning & Heating LLC failed to pay employees for time worked due to time rounding and off-the-clock work. Plaintiff further alleges that Defendant failed to properly calculate the rate of overtime pay, committed meal and rest break violations, and is liable for other wage and hour violations.

Before the Court is Plaintiff's motion for preliminary approval of a settlement. The Court issued a tentative ruling on June 15, 2022, and no one contested it at the hearing on June 16. The Court now issues its final order, which GRANTS preliminary approval.

I. BACKGROUND

According to the Complaint, Plaintiff worked for Defendant in Santa Clara County as an hourly, non-exempt employee from August 2016 to August 2020. (Complaint, ¶ 7.) He alleges

that, before 2018, Defendant used a time rounding system that undercompensated employees, and also required employees to work off-the-clock, including by requiring them to work after clocking out. (*Id.*, ¶ 14.) Defendant also failed to include non-discretionary bonuses in calculating employees' rates of pay for overtime purposes. (*Id.*, ¶ 15.) Defendant regularly required employees to work through meal and rest periods, and never informed them of the right to take second meal periods. (*Id.*, ¶¶ 16–17.)

Plaintiff further alleges that Defendant failed to timely pay employees all wages owed at separation of employment, and to provide accurate itemized wage statements. (Complaint, ¶¶ 18–19.) Finally, Defendant required employees to pay for business expenses including tools and/or devices without reimbursing them. (*Id.*, ¶ 20.)

Based on these allegations, Plaintiff asserts the following putative class claims: (1) failure to pay minimum and straight time wages for all hours worked; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to pay wages of discharged employees – waiting time penalties; (6) failure to provide and maintain accurate and compliant wage records; (7) failure to indemnify employees for expenditures; and (8) violation of Business & Professions Code section 17200, et seq.

The parties have now reached a settlement. Plaintiff moves for an order preliminarily approving the settlement of the class claims and related claims under the Private Attorneys General Act ("PAGA"), provisionally certifying the settlement class, approving the form and method for providing notice to the class, and scheduling a final fairness hearing.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

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

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

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

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

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba, supra*, 91 Cal.App.4th at p. 245, citation omitted.) The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar*, *supra,* 168 Cal.App.4th at p. 130.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, reversed on other grounds, *Moriana v. Viking River Cruises* (June 15, 2022, No. 20-1573 __U.S. __ [2022 D.A.R. 6042].)

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

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. SETTLEMENT PROCESS

The parties exchanged documents and information before mediating the case. Defendant informally produced timekeeping and payroll records for the putative class, documentation of its

wage and hour policies and practices during the class period, and information regarding the total number of current and former employees. Based on this information, Plaintiff's counsel evaluated the likelihood of class certification and success on the merits, and Defendant's maximum monetary exposure for all claims.

On November 18, 2021, the parties mediated with Hon. Peter D. Lichtman (Ret.), via Zoom. They were able to reach a settlement that day.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement amount is $525,000. Attorney fees of up to $175,000 (one-third of the gross settlement), litigation costs not to exceed $20,000, and administration costs of up to $9,750 will be paid from the gross settlement. $7,500 will be allocated to PAGA penalties, 75 percent of which will be paid to the LWDA. The named plaintiff will seek an incentive award of $10,000.

The net settlement, approximately $304,625, will be allocated to settlement class members proportionally based on their weeks worked during the settlement period. The average payment will be around $477 to each of the 638 class members. Class members will not be required to submit a claim to receive their payments. For tax purposes, settlement payments will be allocated 20 percent to wages, 40 percent to penalties, and 40 percent to interest. The employer's share of taxes will be paid separately from the settlement. Funds associated with checks uncashed after 180 days will be paid to JVS SoCal as the *cy pres* recipient.

In exchange for the settlement, class members who do not opt out will release "any and [all] claims that were alleged in the Litigation or which could have been alleged in the Litigation based on the facts asserted in the Litigation arising during the Settlement Period against Defendant," including specific wage and hour claims alleged in the operative complaint. The scope of the release is appropriately tied to the factual allegations in the complaint. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 538.)

Finally, the settlement provides that Plaintiff will file a First Amended Class and Representative Action Complaint, which will add a claim for PAGA penalties based on the same facts and theories alleged in the original Complaint.

V. FAIRNESS OF SETTLEMENT

Based on discovery and investigation, Plaintiff concluded that Defendant failed to pay class members for all hours worked (including overtime wages), particularly time spent travelling to and from job sites and working during meal periods and before and after shifts; failed to have a legally compliant written rest period policy; and failed to indemnify employees for business expenses associated with work attire and work-related tools and equipment (e.g., hammer drills, impact drivers, and reciprocating saws).

Assuming that Defendant failed to pay employees for one hour of off-the-clock work per workweek, with 65 percent of that work being overtime, potential liability for that claim is $1,524,477. The claims based on the failure to properly calculate the regular rate of pay were estimated to be worth up to $25,389. Potential meal period liability is $1,093,840, and potential rest period liability is $2,386,744. The claim for business expenses could be worth $326,793.00. Thus, the maximum potential value of the core claims is $9,268,466, but Plaintiff's counsel applied various discounts (discussed in his declaration) to set the realistic value of these claims at $690,710.90. Derivative waiting time, wage statement, and PAGA penalties could total $3,166,805, but Plaintiff believes their realistic value is $360,000.

The settlement thus represents about 4 percent of the maximum value of the case ($12,435,271), or almost half of its realistic value. Based on this and the more detailed analysis set forth in counsel's declaration, the Court agrees that the settlement is appropriate, particularly considering the risks at class certification and the portion of the maximum recovery attributable to uncertain penalties. The Court thus finds that the settlement is fair and reasonable to the class for purposes of preliminary approval, and that the PAGA allocation is genuine, meaningful, and reasonable in light of the statute's purposes.

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

prior to the final approval hearing in this matter so the Court can compare the lodestar information with the requested fees.

VI. PROPOSED SETTLEMENT CLASS

Plaintiff requests that the following settlement class be provisionally certified:

> All persons who worked for Defendant in California as an hourly-paid or non-exempt employee during the Settlement Period [(from January 14, 2017 through October 16, 2021)].

A. Legal Standard for Certifying a Class for Settlement Purposes

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

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On Drug Stores*).) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class

determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

B. Ascertainable Class

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

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

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

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel*, *supra,* 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on another ground by *Noel, supra,* 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

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

C. Community of Interest

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

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

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

As to the second factor,

> The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to

divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

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

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

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

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

D. Substantial Benefits of Class Certification

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.)* "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and

when numerous parties suffer injury of insufficient size to warrant individual action." (*Id.* at pp. 120–121, internal quotation marks omitted.)

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

VII. NOTICE

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(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." (*Ibid.*) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement or object. The gross settlement amount and estimated deductions are provided. Class members are given 45 days to request exclusion from the class or submit a written objection to the settlement. The notice directs class members that they may appear at the final fairness hearing to make an oral objection without filing a written objection. Class members' estimated settlement payments and workweek information are provided on a separate Workweek Dispute Form. Notice will be provided in both English and Spanish.

The form of notice is generally adequate, but the opt-out form must be modified to instruct class members that they may request to be excluded from the class by simply providing their name, without the need to provide their Social Security number, contact information, or

other identifying information. The notice must also be modified so that class members' estimated payments and workweek information is displayed in bold within a box set off from the rest of the text on the first page of the notice.

Regarding appearances at the final fairness hearing, the notice shall be further modified to instruct class members as follows:

> Hearings before the judge overseeing this case are currently being conducted remotely with the assistance of a third-party service provider, CourtCall. If that remains the case at the time of the final fairness hearing, class members who wish to appear at the final fairness hearing should contact class counsel to arrange a remote appearance through CourtCall, at least three days before the hearing if possible. Any CourtCall fees for an appearance by an objecting class member shall be paid by class counsel.

At the June 16 hearing, the parties confirmed that they would make these requested modifications to the notice.

Turning to the notice procedure, the parties have selected Phoenix Settlement Administrators as the settlement administrator. The administrator will mail the notice packet within 40 days of preliminary approval, after updating class members' addresses using the National Change of Address Database. Any returned notices will be promptly re-mailed to any forwarding address provided, or any more current address located through a skip trace. Class members who receive a re-mailed notice shall have an additional 15 days to respond.

These notice procedures are appropriate and will be approved.

VIII. CONCLUSION

The Court GRANTS Plaintiff's motion for preliminary approval. The final approval hearing shall take place on **November 3, 2022** at 1:30 p.m. in Dept. 1. The following class is preliminarily certified for settlement purposes:

All persons who worked for Defendant in California as an hourly-paid or non-exempt employee during the Settlement Period [(from January 14, 2017 through October 16, 2021)].

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

IT IS SO ORDERED.

Date: June 16, 2022

The Honorable Sunil R. Kulkarni
Judge of the Superior Court