SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

JAVIER DIAZ, et al.,

Plaintiffs,

vs.

BGIS GLOBAL INTEGRATED SOLUTIONS US, LLC, et al.,

Defendants.

Case No.: 21CV383425

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

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiffs allege that Defendant BGIS Global Integrated Solutions US, LLC failed to provide compliant meal and rest breaks, failed to pay employees for all hours worked due to rounding and on-call practices, failed to properly pay overtime under a valid Alternative Workweek Schedule ("AWS"), and committed other wage and hour violations.

Now before the Court is Plaintiffs' motion for preliminary approval of a settlement, which is unopposed. The Court issued a tentative ruling on March 9, 2022, and no one challenged it at the hearing on March 10. The Court now issues its final order, which GRANTS preliminary approval.

I. BACKGROUND

A. Factual

Defendant operates and provides a global Data Center and IT Infrastructure Management software. (First Amended Complaint (FAC), ¶ 2.) It employed Plaintiffs and others as non-exempt employees in California. (*Id.*, ¶ 26.)

Plaintiffs allege that Defendant failed to pay employees for all hours worked due to rounding practices, on-call time paid at less than minimum wage, and other practices. (FAC, ¶ 29.) Defendant either failed to implement a proper alternative workweek or failed to properly pay overtime under a valid AWS, and thus owes Plaintiffs and putative class members unpaid overtime. (*Id.*, ¶ 30.) Defendant did not provide compliant meal and rest periods or associated premiums. (*Id.*, ¶¶ 31–32.) Plaintiffs and putative class members were not adequately reimbursed for necessary business expenses, including for cell phone and home internet use. (*Id.*, ¶ 33.) They were not provided with accurate itemized wage statements. (*Id.*, ¶ 34.) And separated employees did not receive timely payment of all wages, including vacation pay at the regular rate. (*Id.*, ¶ 35.)

Based on these allegations, Plaintiffs assert claims for (1) failure to pay minimum wages, (2) failure to pay overtime wages, (3) failure to provide meal periods, (4) failure to permit rest breaks, (5) failure to provide accurate itemized wage statements, (6) failure to pay all wages due upon separation of employment, (7) failure to reimburse necessary business expenses, (8) violation of Business & Professions Code section 17200, et seq., and (9) enforcement of PAGA.

B. Procedural

On February 16, 2021, Plaintiff Javier Diaz filed a putative class action on behalf of Defendant's non-exempt employees in state court. It was then removed to federal court, and is currently pending in the United States District Court for the Northern District of California. (*Diaz v. BGIS Global Integrated Solutions US, LLC* (N.D. Cal., Case No. 21-CV-02804-VKD) (the "Federal Action").) Plaintiffs then filed this case as a representative action under PAGA in June 2021.

After the parties reached a global settlement in principle, Plaintiffs filed an amended complaint in this action to include all the claims asserted in the Federal Action, and the parties stipulated to stay the Federal Action pending approval of the settlement.

Plaintiffs now move for an order preliminarily approving the settlement of the class and PAGA claims, provisionally certifying the settlement class, approving the form and method for providing notice to the class, and scheduling a final fairness hearing. Upon final approval of the settlement, the parties will request dismissal with prejudice of all claims asserted in the Federal Action.

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.)

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

Plaintiffs submit that after the Federal Action was removed, they conducted formal discovery and received policy documents, time records, and wage statements from Defendant. After meet and confer about discovery and the merits of the claims at issue, the parties agreed to mediate. They attended a mediation session with Hon. Carl J. West (Ret.) on September 13, 2021. The parties continued to negotiate the terms of the settlement after mediation, and finalized it in October 2021.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement amount is $1,275,000. Attorney fees of up to $425,000 (thirty-three percent of the gross settlement), litigation costs not to exceed $20,000, and administration costs of approximately $6,000 will be paid from the gross settlement. $50,000 will be allocated to PAGA penalties, 75 percent of which will be paid to the LWDA. The named plaintiffs will seek incentive award of $10,000 each.

The net settlement, approximately $766,500, will be allocated to settlement class members proportionally based on their qualifying workweeks during the class period. A 2/3 weighted ratio factor will be applied to the workweeks of "AWS Subclass" members due to the greater value of their claims (as discussed below). The average payment will be $7,902.06 to

each of the 97 class members. Class members will not be required to submit a claim to receive their payments. For tax purposes, settlement payments will be allocated 1/3 to wages, 1/3 to penalties, and 1/3 to interest. The employer's share of taxes will be paid separately from the gross settlement. Funds associated with checks uncashed after 180 days will be transmitted to the State Controller's Office Unclaimed Property Fund, in the name of the class member for whom they are designated.

In exchange for the settlement, class members who do not opt out will release "any and all claims alleged or which could have been in alleged based on facts pleaded in Named Plaintiffs' operative complaints in the State Action and Federal Action, during the Class Period, including but not limited to" specified relevant wage and hour claims. 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.) Consistent with the statute, PAGA employees will not be able to opt out of that portion of the settlement.

V. FAIRNESS OF SETTLEMENT

Plaintiffs' minimum wage and overtime claims were premised on the theories that Defendant required putative class members to work invalid Alterative Workweek Schedules (AWS) and failed to pay them daily overtime compensation, illegally rounded time punches, and required employees to work on call shifts without adequate compensation. Plaintiffs estimated that the AWS overtime claim was worth $320,040, the rounding claim was worth approximately $6,247, and the on-call claim was worth approximately $2 million. Defendant argued it had adopted a valid AWS, exempting it from overtime requirements; its rounding policy was neutral; and employees were not on call for the length of time alleged. Plaintiffs believed the AWS claims were strong, but discounted the on-call claim due to the likelihood that it would raise individualized issues of employer control.

Plaintiffs' theory of liability for meal and rest break violations was based on Defendant's lack of meal and rest policies for the majority of the class period. Plaintiffs estimated the rest period damages were worth about $1 million and the meal period damages could total $294,751. But Defendant could use time records to argue that class members received their breaks, and

Plaintiffs would have to rely on employee testimony, which would raise risks at class certification. These claims accordingly were also discounted. Plaintiffs alleged class members were required to use their personal cell phones for work, and these claims could be worth about $30,078, but Defendant could argue that the cell phone usage was optional, raising challenges for class certification.

As for penalties, the waiting time penalties were estimated at $560,280 and wage statement penalties were estimated at $156,000, with PAGA penalties totaling up to $501,300.

Plaintiffs thus estimate that the maximum value of the case is $4,868,696, but much of that value depends on uncertain penalties or claims potentially raising individual issues that would complicate class certification. Based on this analysis, the Court agrees that the $1,275,000 settlement is fair and reasonable to the class, and 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. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 504 [trial courts have discretion to double-check the reasonableness of a percentage fee through a lodestar calculation].)

VI. PROPOSED SETTLEMENT CLASS

Plaintiffs request that the following settlement class be provisionally certified:

> All current and former non-exempt employees who are or were employed by Defendant in California at any time from August 17, 2016, through November 12, 2021.

The proposed class includes the "AWS Subclass" of class members who "worked a 4 days, 10-hours or a 3 days, 12-hours alternative workweek schedule, except for those non-

exempt employees who worked a 3 days, 12-hours alternative workweek schedule and who were paid daily overtime for all hours over eight (8) in a day."

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 estimated 97 class members are readily identifiable based on Defendant's records, and the settlement class and AWS Subclass are appropriately defined based on objective characteristics. The Court finds that the settlement 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. Plaintiffs' claims all arise from Defendant's wage and hour 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, Plaintiffs were employed by Defendant as non-exempt employees and allege that they experienced the violations at issue. The anticipated defenses are not unique to Plaintiffs, and there is no indication that Plaintiffs' 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.)

Plaintiffs have the same interest in maintaining this action as any class member would have. Further, they have hired experienced counsel. Plaintiffs have 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 an estimated 97 class members. 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 informed of their qualifying workweeks as reflected in Defendant's records and whether they are a member of the AWS Subclass, and are instructed how to dispute this information. Class members are given 45 days to request exclusion from the class or submit a written objection to the settlement. The notice informs class members that they may appear at the final fairness hearing to make an oral objection without filing a written objection.

The form of notice is generally adequate, but it must be updated to reflect the correct amount of administrative fees that will be requested, and the updated net settlement amount. 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. And it must 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 or other identifying information.

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 again being conducted in person. However, remote appearances are still permitted, and are offered 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 remotely should contact class counsel to arrange an 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.

Turning to the notice procedure, the parties have selected Phoenix Settlement Administrator as the settlement administrator. The administrator will mail the notice packet within 15 business days of preliminary approval, after updating class members' addresses using the National Change of Address database. The administrator will skip-trace and re-mail all returned, undelivered mail within 5 days. Class members who receive a re-mailed notice will have at least 15 days from re-mailing to respond.

These notice procedures are appropriate and are approved.

VIII. CONCLUSION

Plaintiffs' motion for preliminary approval is GRANTED. The final approval hearing shall take place on **June 23, 2022** at 1:30 p.m. in Dept. 1. The following class is preliminarily certified for settlement purposes:

> All current and former non-exempt employees who are or were employed by Defendant in California at any time from August 17, 2016, through November 12, 2021.

The Court also preliminarily certifies the "AWS Subclass" of class members who "worked a 4 days, 10-hours or a 3 days, 12-hours alternative workweek schedule, except for those non-exempt employees who worked a 3 days, 12-hours alternative workweek schedule and who were paid daily overtime for all hours over eight (8) in a day."

Before final approval, Plaintiffs shall lodge any individual settlement agreements they may have executed with Defendant in connection with their employment for the Court's review.

IT IS SO ORDERED.

Date: March 14, 2022

The Honorable Sunil R. Kulkarni
Judge of the Superior Court