SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

FELIX AGUILAR, et al.,

Plaintiffs,

vs.

ALL SEASONS ROOFING & WATERPROOFING, INC., et al.,

Defendants.

Case No.: 20CV364524

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

This putative class and Private Attorneys General Act (PAGA) action is brought on behalf of employees of Defendant All Seasons Roofing & Waterproofing, Inc. (ASRW or All Seasons).[1] Plaintiffs allege that Defendant failed to pay prevailing wages, failed to pay workers for all hours worked, and committed a number of other wage and hour violations.

Before the Court is Plaintiffs' motion for preliminary approval of a settlement, which is unopposed. The Court issued a tentative ruling on November 30, 2021, and no one appeared at

[1] Plaintiffs allege that ASRW's President, Defendant Vladislav N. Gorshteyn, is personally liable for certain violations, and he is a party to the settlement in his individual capacity. For simplicity's sake, this order refers to "Defendant," "ASRW," or "All Seasons" in the singular, but these references include Mr. Gorshteyn where appropriate.

the December 2 hearing to contest it. The Court now issues its final order, which GRANTS preliminary approval.

I. BACKGROUND

ASRW is a general building and roofing contractor that provides services on commercial and residential construction projects throughout California. (First Amended Complaint (FAC), ¶ 4.) Plaintiffs worked for ASRW as skilled roofers: Plaintiff Felix Aguilar from 2009 to January 2020; Plaintiff Jose Martinez from 2009 to June 2019; and Plaintiff Jose Cazares from 2016 to December 2019. (*Id.*, ¶¶ 1–3.)

All Seasons has provided roofing services on "public works" construction projects as defined by Labor Code section 1720, including schools in Atherton, a care center in San Jose, and apartments in San Mateo, among others. (FAC, ¶ 12.) Public works projects are regulated by the Department of Industrial Relations, Office of Policy, Research, and Legislation, which determines the appropriate job classifications for different workers and the required rate of pay for those classifications, or "prevailing wage." (*Id.*, ¶ 13.) Plaintiffs allege that for at least the past four years, All Seasons has failed to pay its construction workers the correct minimum prevailing wage rate for all hours worked on public works jobs. (*Id.*, ¶ 14.)

In addition, Defendant fails to pay construction workers any wages, including contractually-agreed wages, for compensable time in the yard and travel time. (FAC, ¶ 15.) All Seasons required Plaintiffs and other class members to arrive at the yard between 5:00 and 6:00 a.m. each workday to receive their assignments, load and unload material, equipment, and tools, and clean up trucks, but did not pay them for those hours. (*Ibid.)* And since at least 2016, All Seasons used different time tracking systems that (1) did not allow Plaintiffs and class members to claim time for all hours worked, including shop time and travel time; (2) allowed management to edit hours, including travel time; (3) did not allow Plaintiffs and class members direct access to their timecards; and (4) allowed management to avoid paying overtime for hours worked in excess of 8 hours per day. (*Ibid.*) ASRW failed to pay overtime and maintained an illegal policy and practice of "banking" employees' actual hours worked above eight hours in a day, spreading the payment of those overtime hours over different workweeks and paying them at a regular rate

instead of the appropriate overtime or double time rate—if they were paid at all. (*Id.*, ¶¶ 18, 22.) Defendant also failed to pay for time employees spent working on punch lists at the jobsite and failed to provide second meal periods and third rest periods when employees worked for more than 10 hours in a day. (*Id.*, ¶¶ 17, 19, 20.) And since at least 2016, it combined employees' first two rest periods with a lunch break, in violation of the Labor Code's rest break requirements. (*Id.*, ¶ 20.)

As a result of these other violations, All Seasons's wage statements failed to provide the total hours worked—including roof time, yard time, and travel time—failed to indicate the rate for travel time, failed to state the net wages earned, and incorrectly stated the number of hours paid and the applicable wage rate. (FAC, ¶ 21.) And Defendant failed to pay employees all wages owed at separation. (*Id.*, ¶ 23.)

Based on these allegations, Plaintiffs assert claims for: (1) failure to pay minimum wages; (2) breach of contract by failure to pay for all hours worked; (3) failure to pay overtime and double time; (4) failure to provide meal and rest breaks; (5) failure to pay earned wages upon discharge (waiting time penalties); (6) failure to provide accurate wage statements; (7) PAGA penalties; and (8) unlawful business practices.

The parties have now reached a settlement. Plaintiffs 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

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.)

"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." (*Moniz v. Adecco United States* (Nov. 30, 2021, Nos. A159410, A160133, A159978) ___Cal.App.5th___ [2021 Cal. App. LEXIS 1005, at *26] (*Moniz*).) Thus, "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 …." (*Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971, 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

According to Plaintiffs, the parties stipulated to an informal discovery agreement and Defendant produced: (1) the class list, identifying class members, their dates of employment and their rates of pay; (2) the personnel files for the named plaintiffs; (3) the list of projects during the covered period, including job site addresses, project dates, and superintendent names for each

project; (4) time cards and time sheets under the different recordkeeping systems utilized by All Seasons during the covered period; (5) wage statements during the covered period; (6) certified payroll records during the covered period; and (7) written policies. Plaintiffs' counsel received and reviewed thousands of pages of documents from Defendant, interviewed dozens of its roofers about the allegations in the case, and performed public records research on the payment of prevailing wages on public works projects.

Following this investigation, the parties and their counsel participated in a full-day mediation with Jeffrey A. Ross, Esq. on February 4, 2021. After working late into the evening, they reached an agreement in principle. Over the following months, they addressed the treatment of additional class members who were not accounted for during the mediation and negotiated and finalized the formal settlement agreement now before the Court.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement amount is $995,000. Attorney fees of up to $328,350 (one-third of the gross settlement), litigation costs not to exceed $20,000, and administration costs estimated at $12,000 will be paid from the gross settlement. $49,750 will be allocated to PAGA penalties, 75 percent of which will be paid to the LWDA. The named plaintiffs will also seek service awards of $10,000 each, for a total of $30,000.

The net settlement, approximately $554,900, will be allocated to settlement class members pro rata based on their weeks worked during the class period, with weeks worked since April 1, 2020 given less weight to account for recent policy changes. The average settlement payment will be approximately $953 to each of the 582 class members, not including their portion of the PAGA penalties (which should be about $21.31 per class member). Class members will not be required to submit a claim to receive their payments. Settlement payments will be allocated 34 percent to wages and 66 percent to interest and penalties for tax purposes. The employer's share of payroll taxes will be paid separately from the gross settlement. Funds associated with checks uncashed after 90 days will be paid to the State Controller Unclaimed Property Fund, in the name of the class member for whom the funds are designated.

In exchange for the settlement, class members will release any and all causes of action, claims, etc. "that were alleged or which could have been alleged, arising from facts in Plaintiffs' original complaint or in the Operative Complaint, from March 2, 2016 to February 4, 2021." The release is appropriately tailored to the allegations at issue. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.)

V. FAIRNESS OF SETTLEMENT

Plaintiffs estimate that the total potential value of the action, including PAGA penalties, is $26,532,402. They value the claims for unpaid off-the clock wages at $6,087,220; the claims for prevailing wage underpayment at $96,120; the unpaid overtime claims at $1,249,482; and the meal and rest period claims at $4,164,940 each. These core claims thus have a maximum value of $15,762,702 in total. Plaintiffs estimate that the wage statement claims could be worth an additional $1,332,000 and the claims for waiting time penalties could add up to $2,429,040. PAGA penalties could be worth up to $8,133,200. The settlement thus represents about 6.3 of the value of the non-penalty claims, or 3.7 percent of the maximum value of all the claims at issue in the case. Plaintiffs further note that after this case was filed, All Seasons hired counsel and updated its written policies to comply with the law.

While on the low side of what it would approve, the Court ultimately agrees with Plaintiffs that the settlement is fair and reasonable to the class in light of the risks on the merits and at class certification, and considering the portion of the case's value dependent on uncertain penalty awards. The Court also finds that the PAGA allocation is genuine, meaningful, and fair to those impacted. (See *Moniz, supra*, 2021 Cal. App. LEXIS 1005, at *26.)

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 requests that the following settlement class be provisionally certified:

> All hourly, non-exempt, construction employees of All Seasons Roofing & Waterproofing, Inc. performing roofing work in the state of California for All Seasons Roofing & Waterproofing, Inc. at any time from March 2, 2016 to February 4, 2021.[2]

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

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[2] The proposed order submitted by Plaintiffs sets forth a different class definition, but the Court assumes this is an error.

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 582 class members are readily identifiable based on Defendant's records, and the settlement class is 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 skilled roofers 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 582 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. An Information Form included with the notice states class members' estimated payments and qualifying workweeks as reflected in Defendant's records, and instructs them 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, and are directed to opt out by simply providing their name and a statement requesting exclusion. Notice will be provide in both English and Spanish

The form of notice is generally adequate, but the notice must be modified to make it clear that class members may appear at the final approval hearing to make an oral objection without submitting a written objection or notice of intent to appear. The Information Form must be modified to display class members' estimated payments in bold in a box set off from the rest of

the text. And references to the class definition must be corrected to make it clear that only employees who performed roofing work are part of the class.

With regard to 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 Administrators as the settlement administrator. The administrator will mail the notice packet within 20 calendar days of preliminary approval, after updating class members' addresses using the National Change of Address Database. The administrator will re-mail returned notice to any forwarding address provided or located through reasonably available means such as a skip trace. Class members who receive a re-mailed notice shall have 15 calendar days from re-mailing or sixty calendar days from the initial mailing, whichever is later, 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 **April 14, 2022** at 1:30 p.m. in Dept. 1. The following class is preliminarily certified for settlement purposes:

All hourly, non-exempt, construction employees of All Seasons Roofing & Waterproofing, Inc. performing roofing work in the state of California for All Seasons Roofing & Waterproofing, Inc. at any time from March 2, 2016 to February 4, 2021.

IT IS SO ORDERED.

Date: December 7, 2021

The Honorable Sunil R. Kulkarni
Judge of the Superior Court