SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

THOMAS HEFNER,

Plaintiff,

v.

SOLARAY, LLC, et al.,

Defendants.

Case No.: 21CV384796

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

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff alleges that Defendant Solaray, LLC[1] assigned its route employees delivery schedules that were often not possible to complete in the expected time, failed to maintain procedures to ensure they took meal and rest periods or could report missed breaks, failed to pay wages for all hours worked and to pay overtime at the appropriate rate, and committed other wage and hour violations.

Now before the Court is Plaintiff's motion for preliminary approval of a settlement, which is unopposed. The Court issued a tentative ruling on August 24, 2022, and no one

[1] Solaray Sunglass, LLC was also named as a defendant in the complaint, but was dismissed without prejudice after it provided a declaration showing that it did not employ anyone in California and is not related to Solaray, LLC's business here.

contested it at the hearing on August 25. It now issues its final order, which GRANTS preliminary approval.

I. BACKGROUND

Solaray, LLC is a wholesale retailer of eyewear, accessories, gifts, apparel, and other merchandise and sells merchandise in California, across the United States, and in Canada. (Complaint, ¶ 6.) Plaintiff was employed by Solaray from June 2020 through January 11, 2021 as a Route Service Representative for the Bakersfield territory. (*Id.*, ¶ 5.) His duties included loading and unloading a company vehicle with Defendant's merchandise, driving a company vehicle to deliver merchandise to customers, communicating with customers, and keeping supervisors abreast of deliveries. (*Id.*, ¶ 24.) Plaintiff generally worked 14–16 hours per day and drove 600–1,000 miles per week. (*Ibid.*) His distant routes often required him to stay overnight in motels. (*Ibid.*) Plaintiff earned an hourly wage of $15.25 per hour and was to be paid bi-weekly. (*Ibid.*)

Defendant provided Plaintiff and other Route Services Representatives with a company vehicle, a company cell phone, and a storage unit. (Complaint, ¶ 25.) It also provided a portable printer and scanner so employees could perform administrative work on the road. (*Ibid.*) Defendant generally expected employees to complete their assigned deliveries within 10 minutes, but the assignments were nearly impossible to complete in such a short time. (*Id.*, ¶ 26.) Defendant did not assign employees specific schedules, but simply provided them with a list of deliveries that they were instructed to make between 7:00 a.m. and 4:00 p.m. (*Id.*, ¶ 33.) Employees also needed to perform other work, such as loading vehicles before making deliveries and driving vehicles to appropriate parking locations. (*Ibid.*) Solaray told employees that it strongly preferred them to work less than 12 hours per day, but the workload was so great that this was often not possible. (*Id.*, ¶ 34.)

Defendant did not have any specific procedures for ensuring employees took off-duty meal periods and required them to complete so many deliveries within a limited timeframe that they could not do so. (Complaint, ¶¶ 36–37.) There also was no system for employees to clock in and out or report non-compliant meal periods. (*Id.*, ¶ 38.) The same was true of rest periods.

(*Id.*, ¶ 42.) In addition, employees regularly worked overtime, often without meal and rest periods, to complete their delivery assignments because of their heavy workloads and due to traffic. (*Id.*, ¶ 45.) But Solaray failed to pay overtime at the appropriate rate of pay, including by failing to include overtime and non-discretionary bonuses in the regular rate of pay and by failing to pay double time when required. (*Id.*, ¶¶ 45–47.)

In addition, Solaray failed to pay Plaintiff at all for the hour-plus he spent returning the company vehicle and returning home after his employment was terminated. (Complaint, ¶ 46.) Plaintiff also had to pay a wiring fee of $20 to receive his final pay. (*Id.*, ¶ 49.)

As a result of these other violations, Solaray failed to timely pay employees during and upon the conclusion of their employment, and failed to provide accurate itemized wage statements. (Complaint, ¶¶ 50–54.) Wage statements also did not identify the name and address of the legal entity that is the employer. (*Id.*, ¶ 54.) Finally, Defendant failed to maintain required payroll records and to timely provide them to employees when requested. (*Id.*, ¶¶ 56–59.)

Based on these allegations, Plaintiff asserts claims for: (1) failure to provide legally compliant meal periods and/or timely pay premium wages; (2) failure to provide legally compliant rest periods and/or timely pay premium wages; (3) failure to timely pay minimum and/or regular wages; (4) failure to timely pay all overtime and/or double time wages; (5) unlawful deduction and/or underpayment of wages; (6) failure to timely pay all wages due and owing upon separation of employment; (7) failure to furnish accurate itemized wage statements; (8) failure to maintain accurate records; (9) failure to provide employment and personnel records upon request; (10) violation of the Unfair Competition Law; and (11) violation of PAGA.

The parties have now reached a settlement. Plaintiff moves 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.)

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

Plaintiff's counsel requested and reviewed Plaintiff's employment records before this action was filed, and obtained informal discovery after filing suit, including policy documents, employee handbooks, and time and payroll records. Plaintiff also received contact information for a sampling of former employees. Counsel performed legal research on the claims and defenses asserted, conducted two fact finding interviews, reviewed Defendant's document production, and performed a comprehensive analysis of the time and payroll records. Prior to mediation, the parties also informally exchanged data like the total number of class members, PAGA employees, workweeks worked, and pay periods worked.

On April 7, 2022, the parties held a full-day mediation with Steven Serratore, Esq. and were able to reach a settlement.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement amount is $750,000. Attorney fees of up to $250,000 (one-third of the gross settlement), litigation costs not to exceed $16,500, and administration costs of approximately $5,995 will be paid from the gross settlement. $75,000 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 $7,500.

The net settlement, approximately $413,755, will be allocated to settlement class members proportionally based on their weeks worked during the class period, with members of the waiting time subclass receiving credit for an additional six workweeks and PAGA employees receiving a pro rata share of the PAGA portion of the settlement in addition to the class portion. By the Court's calculation, the average payment will be $6,567.54 to each of the 63 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 and 2/3 to penalties and interest, while payments to PAGA employees and payments associated with the additional six

workweeks allocated to waiting time subclass members will be deemed 100 percent penalties. The employer's share of taxes will be paid separately from the gross settlement. Funds associated with checks uncashed after 180 days will be issued to the California State Controller in the name of the relevant employee.

At the Court's direction, the parties agreed to amend the releases to conform with *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521 (*Amaro*). Per the addendum to the settlement filed on August 16, 2022, class members who do not opt out will release all claims, actions, etc. "reasonably related to or arising from the same set of facts asserted in the operative complaint in the Action or the facts alleged in the related LWDA notice," including the causes of action alleged in the complaint. PAGA employees will release all such PAGA claims. Consistent with the statute, PAGA employees will not be able to opt out of the settlement.

V. FAIRNESS OF SETTLEMENT

Plaintiff estimates that the meal period claims are worth up to $432,822, assuming a 90 percent violation rate, and the rest period claims are worth up to $253,680.21, based on a 50 percent violation rate. Plaintiff valued the minimum wage claims at $71,806.88, the overtime claims at $161,157.84, and the double time claims at $18,585.55. The waiting time penalties were valued at $99,223.09, the wage statement claims had an estimated value of $79,200, and the PAGA penalties were valued at $555,025. Thus, Plaintiff estimated that the non-penalty claims have a maximum value of $938,052.48, the non-PAGA claims are worth up to $1.1 million, and the maximum exposure in the entire case is about $1,671,500.57.

The settlement thus represents almost 80 percent of the value of the core claims and almost 45 percent of the action's entire value, including penalties, which is a good result for the class. The Court finds that the settlement is fair and reasonable to the class, and the PAGA allocation is genuine, meaningful, and reasonable in light of the statute's purposes.

Of course, 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

Plaintiff requests that the following settlement class be provisionally certified:

> All non-exempt Route Sales Representatives, Route Service Representatives, and Route Relief Representatives who are employed or have been employed by Defendant and who worked in California at any time from July 27, 2017, through and including August 8, 2022.

He also seeks to certify a waiting time penalty subclass of "[a]ll former employees of Defendant who worked for Defendant in the State of California in the position of Route Sales Representative, Route Service Representative, and/or Route Relief Representative at any time from July 27, 2017, through and including August 8, 2022."

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 63 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. Plaintiff's 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, Plaintiff was employed by Defendant as a Route Service Representative 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 an estimated 63 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 instructed how to dispute this information. Class members are given 60 days to request exclusion from the class, submit a written objection to the settlement, or dispute their workweek information.

At the Court's direction, the notice was modified so that class members' estimated payments and workweek information are displayed in bold within a box set off from the rest of the text on the first page of the notice. The notice was also modified to instruct class members

that they may object to the settlement or 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. The modified notice also makes it clear that class members may appear at the final fairness hearing to make an oral objection without filing a written objection. And the notice describes how notice of final judgment will be provided to the class (Cal. Rules of Court, Rule 3.771(b)), and how class members can make remote appearances at the final fairness hearing using Teams.

Turning to the notice procedure, the parties have selected Phoenix Class Action Settlement Solutions as the settlement administrator. The administrator will mail the notice packet within 25 days of preliminary approval, after updating class members' addresses using the National Change of Address Database and performing an Accurint or substantially similar skip trace. Any notices returned within 30 days will be promptly re-mailed to any forwarding address provided or located through an in-depth skip trace. These notice procedures are appropriate and are approved.

VIII. CONCLUSION

The motion for preliminary approval is GRANTED. The final approval hearing shall take place on **January 12, 2023** at 1:30 p.m. in Dept. 1. The following class is preliminarily certified for settlement purposes:

> All non-exempt Route Sales Representatives, Route Service Representatives, and Route Relief Representatives who are employed or have been employed by Defendant and who worked in California at any time from July 27, 2017, through and including August 8, 2022.

The Court also preliminarily certifies a waiting time penalty subclass of "[a]ll former employees of Defendant who worked for Defendant in the State of California in the position of Route Sales Representative, Route Service Representative, and/or Route Relief Representative at any time from July 27, 2017, through and including August 8, 2022."

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

IT IS SO ORDERED.

Date: August 25, 2022

The Honorable Sunil R. Kulkarni
Judge of the Superior Court