SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: 3/26/25 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV365252	Flores v. ACCO Engineered Systems, Inc. (Included in Acco Wage and Hour Cases, JCCP5172, Santa Clara)	Off Calendar per moving party.
LINE 2	20CV371934	Manalo v. San Jose, LLC, et al. (Class Action)	Continued per Stipulation and Order to September 24.
LINE 3	22CV393492	Perez v. Best Overnite Express, Inc. (Class Action)	See Line 3 for tentative ruling.
LINE 4	22CV396462	Long v. Juniper Networks (US), Inc. (Class Action/PAGA)	See Line 4 for tentative ruling.
LINE 5	22CV401365	Hathaway v. Alliance Roofing Company, Inc. (Class Action) (Lead Case; Consolidated with Case No. 22CV407856]	See Line 5 for tentative ruling.
LINE 6	22CV407883	Sanders v. 360 Degree Customer, Inc. (Class Action)	See Line 6 for tentative ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	22CV407922	Topete v. Claire's Boutiques, Inc., et al. (PAGA)	See Line 7 for tentative ruling.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name:
Case No.:

- oo0oo -

Calendar Line 2

Case Name:
Case No.:

- oo0oo -

Calendar Line 3

Case Name: Perez v. Best Overnite Express, Inc. (Class Action)
Case No.: 22CV393492

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 26, 2025, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class and Private Attorneys General Act ("PAGA") action arising out of various alleged wage and hour violations. On January 20, 2022, plaintiff Baltazar Perez ("Plaintiff") began this action by filing a class action complaint against defendant Best Overnite Express, Inc. ("Defendant"). On April 12, 2022, Plaintiff filed the operative first amended class action complaint against Defendant, asserting the following causes of action: (1) failure to pay minimum wages; (2) failure to reimburse business expenses; (3) failure to provide accurate itemized wage statements; (4) failure to pay all wages due upon separation of employment; (5) violation of Business and Professions Code section 17200 *et seq.*; and (6) enforcement of Labor Code section 2698, *et seq.* (the Private Attorneys General Act ["PAGA"]).

On July 26, 2024, the court issued an order granting Plaintiff's unopposed motion for preliminary approval of the settlement and setting a final approval hearing for January 22, 2025. On December 6, 2024, the court issued an order on the parties stipulation, continuing the final approval hearing to March 26, 2025. Now before the court is Plaintiff's motion for final approval of the settlement, and the motion is unopposed.

II. LEGAL STANDARD FOR SETTLEMENT AGREEMENTS

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.)

B. PAGA

Labor Code section 2699, subdivision (s)(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, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___, 2022 U.S. LEXIS 2940.)

Like 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 considering 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, 2016 U.S. Dist. LEXIS 140759, at *20-24.)

III. TERMS AND ADMINISTRATION OF SETTLEMENT

This case has been settled on behalf of the following class:

> [a]ll California residents currently or formerly employed by Defendant as a non-exempt employee in the State of California at any time during the Class Period [from June 15, 2019 through June 15, 2023].

The class includes a subset of PAGA Members who are identified as all California residents currently or formerly employed by Defendant as a non-exempt employee in the State of California at any time during the PAGA Period [from June 15, 2020 through June 15, 2023].

According to the terms of the settlement, Defendant will pay a gross, non-reversionary amount of $450,000. The gross settlement payment includes attorney fees not to exceed one-third of the gross settlement amount (currently estimated at $150,000), litigation costs up to $25,000, an incentive award up to $15,000 for the class representative, settlement administration costs up to $10,650, and PAGA allocation of $40,000 (75 percent of which will be paid to the Labor and Workforce Development Agency ("LWDA") and 25 percent of which will be available for PAGA Members). Amounts not approved for use as an incentive award, attorney's fees, litigation costs, and settlement administration costs will revert to the net settlement amount. Plaintiff submitted a copy of the proposed settlement to the LWDA.

The net settlement amount will be distributed to the participating Class Members on a pro rata basis based on the number of workweeks worked. Similarly, the individual PAGA payments will be distributed to PAGA Members based on their number of applicable pay periods worked. Funds from checks that remain uncashed 180 days after issuance will be sent to the *cy pres* chosen by the parties: St. Jude Children's Research Hospital. The court approves the *cy pres* recipient.

In exchange for the settlement, the class members agree to release the Defendant and related entities and persons from all claims that were alleged, or reasonably could have been alleged, based on the facts pleaded in the FAC occurring during the Class Period. PAGA Members will be deemed to release Defendant and related entities and persons "from all claims for PAGA penalties that were alleged, or reasonably could have alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Period facts stated in the PAGA Notice that are pled in the Operative Complaint. The release provisions are appropriately tailored to the factual allegations of the operative pleading. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 538.)

In its order granting preliminary approval of the settlement, the court approved and appointed ILYM Group, Inc. ("ILYM") as the neutral entity to administer the settlement. On November 20, 2024, ILYM received the class data file from defense counsel, containing the name and information of the 387 individuals on the class list. (Declaration of Cassandra Polites

on behalf of ILYM ("Polites Decl."), ¶ 5.) On December 4, 2024, ILYM caused the class notice packet to be mailed to all 387 individuals contained on the class list. (*Id.* at ¶ 7.) ILYM ultimately deemed six notice packets to be undeliverable despite skip tracing efforts. (*Id.* at ¶¶ 8-10.) The deadline to request exclusion, submit a written objection, or submit a workweek dispute was February 3, 2025. As of the date of the Ms. Polites's declaration, February 7, 2025, ILYM has not received any requests for exclusion, written objections, or workweek disputes. (*Id.* at ¶¶ 11-13.) ILYM estimates that the average individual settlement payment will be approximately $566.80. (*Id.* at ¶ 16.) The notice process has now been completed.

At preliminary approval, the court found the settlement to be fair and reasonable. Given that there are no objections, it finds no reason to deviate from that finding now. Accordingly, the court finds that the settlement is fair and reasonable for purposes of final approval.

IV. SERVICE AWARD, ATTORNEY FEES AND COSTS

Plaintiff requests enhancement awards in the amount of $15,000. (Motion, pp. 11:23-13:3.)

> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, internal punctuation and citations omitted.) Incentive awards are particularly appropriate where a plaintiff undertakes a significant reputational risk in bringing an action against an employer. (*Covillo v. Specialty's Café* (N.D. Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29.)

Plaintiff Perez has filed a declaration describing his participation in this action. (Declaration of Baltazar Perez in support of motion for final approval, ¶¶ 4-13.) Plaintiff's work on this case had included communicating with his attorneys, gathering documents,

assisting with discovery responses, and preparing for mediation. (*Id.* at ¶¶ 4-7.) Plaintiff has also undertaken risk by becoming involved in this action as a class representative while understanding that doing so could affect his future job opportunities. (*Id.* at ¶¶ 8-11.) Plaintiff estimates that he has spent approximately 40 hours working on this action. (*Id.* at ¶ 13.)

Based on its review of the information provided, the court finds that a service award is appropriate, but the amount requested is more than the court normally awards in similar circumstances. Accordingly, the court approves a service to Plaintiff in the amount of $10,000.

The court has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) "Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." (*Wershba, supra,* 91 Cal.App.4th at p. 254.)

Class counsel seeks an attorney fee award of $150,000 (one-third of the gross settlement amount). (Motion, pp. 8:4-11:12.) Counsel presents evidence of a current lodestar of $152,830 based on a total of 219.4 hours billed at rates ranging from $450 per hour to $950 per hour. (Declaration of Julia M. Toscano in support of motion for final approval ("Toscano Decl."), ¶ 30.) This results in a negative multiplier, which supports the court's finding that the fee request is reasonable. (See *Wershba*, supra, 91 Cal.App.4th at p. 255 ["[m]ultipliers can range from 2 to 4 or even higher"]; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051, fn. 6 [stating that multipliers ranging from one to four are typical in common fund cases].)

The benefits achieved by the settlement justify an award of attorney fees to class counsel. The court finds that the requested attorney fee award is reasonable as a percentage of the common fund and approves an attorney fee award in the requested amount of $150,000.

Class counsel requests reimbursement of litigation costs in the amount of $16,387.92 and presents itemized list of costs incurred in that amount. (Motion, p. 11:13-22; Toscano Decl., ¶ 32 and Ex. 3.) This is less than the $25,000 provided for in the settlement. Accordingly, the court approves reimbursement of litigation costs in the amount of $16,387.92.

The settlement administration costs are also approved in the requested amount of $10,650.00, which is the maximum set per the settlement. (See Polites Decl., ¶ 19.)

V. CONCLUSION

The motion for final approval of class and representative action settlement is GRANTED. The class as defined herein is certified for settlement purposes. Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Pursuant to rule 3.769(h) of the California Rules of Court, the Court retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **November 19, 2025 at 2:30 p.m.** in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to the *cy pres* recipient; the status of any unresolved issues; and any other matters appropriate to bring to the court's attention.

Plaintiff shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 4

Case Name: Long v. Juniper Networks (US), Inc. (Class Action/PAGA)
Case No.: 22CV396462

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 26, 2025, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class, representative, and collective action arising from alleged wage and hour violations brought by Plaintiffs Jamie Long and Marcus Serrano (collectively, "Plaintiffs") against Defendant Juniper Networks (US), Inc. ("Defendant").

On February 24, 2022, Plaintiff Long commenced an action against Defendant in the United States District Court, Northern District of California (*Long v. Juniper Networks (US) Inc.*, N.D. Cal., 2022, Case No. 5:22-cv-01158-BLF0) alleging wage and hour violations under the Fair Labor Standards Act ("FLSA").

On April 6, 2022, Long initiated this action by filing a class action complaint against Defendant, asserting various claims arising from alleged violations of the California Labor Code. On December 20, 2023, Plaintiffs filed the operative first amended class action complaint against Defendant, asserting the following causes of action: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to provide rest breaks; (5) failure to pay wages upon separation of employment and within the required time; (6) failure to furnish accurate and itemized wage statements; (7) failure to reimburse all business expenses; (8) failure to produce all employment records; (9) violation of Business and Professions Code section 17200, *et seq.*; (10) enforcement of Labor Code section 2698, *et seq.* [the Private Attorneys General Act ("PAGA")]; and (11) violations of the FLSA.

The parties have reached a settlement. On March 26, 2024, Plaintiffs filed a motion for preliminary approval of the settlement. At the hearing on July 24, 2024, the court denied the motion without prejudice. (July 24, 2024 Minute Order, pp. 7-8.) The court explained that it

had concerns relating to the proposed hybrid class action and FLSA settlement. (*Id.* at pp. 4-5.) In particular, the court found that the proposed settlement did not comply with the opt-in requirement applicable to the FLSA claim. (*Ibid.*) The court also identified issues relating to the reversion provision, the failure to allow individuals to participate in one but not the form of action, and the lack of explanation in the notices regarding the hybrid nature of the settlement. (*Id*. at pp. 4-6.)

On December 18, 2024, Plaintiffs filed a renewed motion for preliminary approval of the settlement. At the hearing on January 15, 2025, the court continued the motion to March 26, 2025 and instructed Plaintiffs' counsel to provide supplemental materials in support of the motion. (January 15, 2025 Minute Order, pp. 6-7.) The court again expressed its concern regarding the opt-in requirement applicable to the FLSA claim and stated that it would not approve a settlement that does not require employees to give their consent in a writing that is filed with the court. (*Ibid.*) On March 12, 2025, Plaintiffs' counsel filed supplemental materials. Now before the court is Plaintiffs' renewed motion for approval of the proposed class, representative, and collective action settlement. The motion is unopposed.

II. LEGAL STANDARD

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.)

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, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___, 2022 U.S. LEXIS 2940.)

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, 2016 U.S. Dist. LEXIS 140759, at *20-24.)

C. FLSA

In reviewing an FLSA settlement, a court must determine whether the settlement represents a "fair and reasonable resolution of a bona fide dispute." (*Selk v. Pioneers Memorial Healthcare District* (S.D. Cal. 2016) 159 F.Supp.3d 1164, 1172 ("*Selk*"), quoting *Lynn's Food Stores, Inc. v. U.S. By and Through U.S. Dept. of Labor, Employment Standards Admin., Wage and Hour Div.* (11th Cir. 1982) 679 F.2d 1350, 1355; see also *Kerzich v. County of Tuolumne* (E.D. Cal. 2018) 335 F.Supp.3d 1179, 1184 [district courts in the Ninth Circuit have frequently applied the widely-used *Lynn's Food* standard].) First, the court must find that a bona fide dispute exists, in that there are legitimate questions about the existence and extent of the defendant's FLSA liability: "If there is no question that the FLSA entitles plaintiffs to the compensation they seek, then a court will not approve a settlement because to do so would allow the employer to avoid the full cost of complying with the statute." (*Selk, supra,* 159 F.Supp.3d at p. 1172.)

The court must then determine whether the settlement is fair and reasonable, considering the totality of the circumstances and factors similar to those used to assess class action settlements: "(1) the plaintiff's range of possible recovery; (2) the stage of proceedings

and amount of discovery completed; (3) the seriousness of the litigation risks faced by the parties; (4) the scope of any release provision in the settlement agreement; (5) the experience and views of counsel and the opinion of participating plaintiffs; and (6) the possibility of fraud or collusion." (*Selk, supra*, 159 F.Supp.3d at pp. 1172-1173.) "The settlement amount need not represent a specific percentage of the maximum possible recovery," but the court must evaluate "the plaintiff's range of potential recovery to ensure that the settlement bears some reasonable relationship to the true settlement value of the claims." (*Id.* at p. 1174.)

III. DISCUSSION

A. The Settlement Groups

This case has been settled on behalf of three groups: (1) "California Class" members; (2) "Settlement Collective" members; and (3) "PAGA" members. (Declaration of Jonathan M. Lebe, filed on March 12, 2025 ("Lebe Dec."), ¶¶ 22-23 and Ex. 1 ("Agreement"), §§ II.8, II.34, II.52.) The Agreement includes separate release provisions for each of these three groups. The releases relate to both this action (the "State Lawsuit"), and the separate FLSA action that Plaintiff Long filed in the United States District Court, Northern District of California (the "Federal Lawsuit"). (*Id.* at §§ II.21, II.57.) The Agreement defines "Class Member" as "all California Class Members and all Settlement Collective Members." (*Id.* at § II.9.)

The "California Class" is defined as "any individual who worked for Defendant in California in a commissioned sales role listed in Exhibit A." (Agreement, §§ II.8., II.53.) Exhibit A to the Agreement contains a list of job titles. The "California Class Settlement Period" is defined as the period from October 9, 2017, through March 13, 2023. (*Id.* at § II.3.)

The "Settlement Collective" includes "any individual who worked for Defendant in the U.S. outside of California in a commissioned sales role listed in Exhibit A at any time during the Collective Settlement Period [from September 7 2019 through March 13, 2023]." (Agreement, §§ II.13, II.54.)

"PAGA Member" means "any individual who worked for Defendant in California in a commissioned sales role listed in Exhibit A and who Defendant classified as exempt at any time during the PAGA Settlement Period [January 1, 2021, through March 13, 2023]." (Agreement, §§ II.34, II.39.)

B. Provisions of the Settlement

Defendant will pay a gross settlement amount of $3,850,000, subject to an escalator clause. (Agreement, §§ II.27, VI.32.) This amount includes attorney fees up to one third of the gross settlement amount (currently estimated to be $1,283,333.33), litigation costs not to exceed $20,000, a PAGA allocation of $200,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Employees as individual PAGA payments), enhancement awards in the total amount of $22,500 ($12,500 to Plaintiff Long and $10,000 to Plaintiff Serrano), and settlement administration costs not to exceed $22,000. (Agreement, §§ II.4-II.5, II.20, II.27, II.49.)

The remaining net settlement amount and 25 percent of the PAGA allocation will be distributed to Settlement Class Members, Settlement Collective Members, and PAGA aggrieved employees based on the number of workweeks they were employed by Defendant. (Agreement, § VI.3.) More specifically, Settlement Class Members will receive 66.66 percent of the net settlement amount, while Settlement Collective Members will receive 33.4 percent of the net settlement amount. (*Ibid.*)

California Class Members who wish to op-out from the class will be required to submit a written request for exclusion. (*Id.* at § VI.2(c).) By contrast, the Settlement Collective is an opt-in group. (*Id.* at §§ II.33, II.54-II.55, VI.2(f), VI.2(j).) The Agreement sets forth a procedure for opting-in to the FLSA Settlement:

> All Settlement Collective Members shall receive a Collective Notice that requires them to submit an Opt-In Consent Form either electronically or via U.S. Mail in order to participate in the FLSA Settlement. The Collective Notice shall include a website address for Settlement Collective Members, which they may access to opt into the FLSA Settlement and find additional information regarding final approval and final judgment of this matter. The Settlement Administrator shall conduct two reminder campaigns via U.S. Mail, e-mail, and text message to remind Settlement Collective Members of the Response Deadline within which they must opt into the FLSA Settlement. Plaintiff's

> Counsel will file all Opt-In Consent Forms received from Settlement Collective Members by the Response Deadline with the Court.

(Agreement at § VI.2(f).) Plaintiff will file all opt-in consent forms received by the response deadline with the court. (*Id.* at § II.33.)

Funds from settlement checks remaining uncashed more than 180 days after mailing, will be transmitted the nPower as the designated *cy pres* recipient, as follows:

> If any Individual Class Settlement Payment, Individual PAGA Settlement Payment, or Individual Collective Settlement Payment checks remain uncashed or not deposited by the expiration of the 180-day period after mailing the checks, the Settlement Administrator will, within two hundred (200) calendar days after the checks are mailed, pay the amount of the Individual Settlement Share, Individual PAGA Payment (as applicable), or Individual Collective Settlement Payment to the Cy Pres Recipient, nPower. The Parties hereby affirm they have no relationship with the Cy Pres Recipient.

(Agreement, § VI.4(a).) The court approves the *cy pres* designation.

In exchange for the settlement, all Settlement Class Members who do not request an exclusion will release the Defendant and related person and entities (the "Release Parties") from:

> [A]ll federal, state and local law claims, rights, demands, liabilities, and causes of action, asserted in any of the complaints filed in the State Lawsuit, and all claims that were or could have been asserted in the State Lawsuit, arising from or reasonably related any facts, transactions, events, policies, occurrences, acts, disclosures, statements, or omissions, or failures to act pleaded in the State Lawsuit, which includes in any PAGA letter sent by Plaintiffs to the LWDA, including causes of action for (1) failure to pay minimum wages, (2) failure to pay overtime wages under the California Labor Code, (3) failure to provide meal periods, (4) failure to provide rest breaks, (5) failure to pay wages due upon separation of employment and within the required time, (6) failure to furnish accurate and itemized wage statements, (7) failure to reimburse all business expenses, (8) failure to produce all employment records, (9) violation of California Business Professions Code §§ 17200, et seq., and all claims for attorneys' fees and costs, interest and penalties based on the foregoing. The Released Claims specifically include any and all claims alleged or that could have been alleged based on the facts alleged in the Actions' operative complaints, which arose during the California Class Settlement Period including, without limitation, §§ 201, 202, 203, 204, 210, 218.5, 218.6, 223, 225.5, 226, 226.7, 226.3, 227.3, 510, 512, 558, 1194, 1194.2, 1194.3, 1197, 1197.1, 1198, 1199, and 2698-2699.5, and the California Business & Professions Code §§ 17200 et seq.; and any and all claims arising under any applicable California Industrial Welfare Commission Wage Order(s)[.]

(Agreement, §§ II.43, II.46, V.1.)

In consideration for the PAGA settlement amount, PAGA Members will release the Released Parties from the Released PAGA Claims. (Agreement, §§, II.45, II.46, V.2.) In accordance with the statute, PAGA members will not have the opportunity to opt-out of or object to the PAGA release. (*Ibid.*) The Agreement defines the Released PAGA Claims as:

> [A]ll claims for civil penalties under PAGA asserted in any of the complaints filed in the State Lawsuit, and all civil penalty claims under PAGA that were or could have been asserted in the State Lawsuit arising out of or reasonably related to any facts, transactions, events, policies, occurrences, acts, disclosures, statements, omissions, or failures to act alleged in the State Lawsuit or in any PAGA letter sent by Plaintiffs to the LWDA, including but not limited to claims for civil penalties for violations of the California Labor Code for unpaid minimum wages, unpaid overtime wages, unpaid meal period premiums, unpaid rest period premiums, inaccurate wage statements, failure to keep accurate records, failure to indemnify for all necessary business expenses, and failure to timely pay wages during employment or at termination.

(*Id.* at § II.45.)

All Settlement Collective Members who opt-in to the FLSA Settlement "shall release the Released Parties of and from all Released FLSA Claims." (Agreement, § V.3.) "Only the Settlement Collective Members will be considered to have consented under the FLSA to opt into the collective action." (*Ibid.*) The Agreement defines the "Released FLSA Claims" as:

> [A]ll federal wage and hour law claims, obligations, demands, rights, causes of action, and liabilities, of whatever kind and nature, character and description, that were or could have been asserted in the Federal Lawsuit, arising out of or reasonably related to any facts, transactions, events, policies, occurrences, acts, disclosures, statements, omissions, or failures to act pleaded in the Federal Lawsuit. Released FLSA Claims include, but are not limited to, claims for overtime wages, damages, unpaid costs, penalties, liquidated damages, punitive damages, interest, attorneys' fees, litigation costs, restitution, or equitable relief, based on any and all claims arising under the Fair Labor Standards Act of 1938 ("FLSA"), as amended, 29 U.S.C. §201, et seq., that have been or could have been asserted during the Collective Settlement Period.

(*Id.* at § II.44.)

The foregoing release provisions are appropriately tailored to the factual allegations of the operative pleading. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 538.)

C. Settlement of the FLSA Claims

As discussed above, the court previously denied and then continued Plaintiffs' motions for approval of the settlement due to its concerns related to the settlement of the FLSA claim. (See July 24, 2024, Minute Order, pp. 3-8; January 15, 2025 Minute Order, pp. 6-7.) The court identified the following concerns: (1) the lack of a written opt-in procedure, separate from the cashing of a settlement check; (2) the reversionary structure of the proposed settlement; (3) the failure to allow putative class members to choose whether they would participate in only of the hybrid (California Class and FLSA Collective) forms of the actions; and (4) various defects in the class notice related to the proposed settlement of the FLSA claim.

Plaintiffs have now submitted a settlement agreement that the parties have revised and executed since the January 2025 hearing. After closely reviewing the changes made with respect to the proposed settlement of the FLSA claims, the court finds that the parties have adequately addressed the court's concerns. Most importantly, the Agreement now contains a written opt-in procedure applicable to FLSA Settlement Collective Members. (Agreement, §§ II.33, II.54-II.55, VI.2(f), VI.2(j).)

This opt-in procedure is in accordance with the statute as well as decisions interpreting the statute's terms. (See January 15, 2025 Minute Order, pp. 6-7.) In brief, the FLSA establishes an "opt-in" procedure for collective actions under its authority, which is essentially the opposite of the "opt-out" procedure typically employed in class actions. The statute provides, "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." (29 U.S.C. § 216, subd. (b); see also *Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067, 1071 [the opt-in feature of FLSA actions is the most significant difference in procedure between the FLSA and class action; under the FLSA, "no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively 'opted into' the class; that is, given his written, filed consent"]; see also *Smothers v. Northstar Alarm Services, LLC* (E.D. Cal., Jan. 22, 2019, No. 217CV00548KJMKJN) 2019 U.S. Dist. LEXIS 10220, at *28-29 [more elevated courts "have read the statutory language as requiring written consent filed with the court"].)

The parties revisions to the Agreement also generally address the court's remaining concerns with the FLSA settlement. Under the Agreement as revised, funds from uncashed settlement checks (including those to Settlement Collective Members) will be transmitted the designated *cy pres* recipient and will not revert to the Defendant. (Agreement, § VI.4(a).) Separate notices will be with respect to Class Members and Settlement Collective Members, allowing recipients to participate in one of these settlement classes and not the other if they choose. (*Id.* at §§ II.10, II.34, VI.2 and Exs. B and C.) The Collective Notice makes clear that the funds designated for the Settlement Collective are reversionary, stating that if a Settlement Collective Member decides not to opt-in to the settlement, the associated estimated settlement payment will be returned to Defendant. This is consistent with the FLSA's opt-in requirement, discussed above, and does not affect the non-reversionary structure of the remainder of the settlement.

In sum, the court finds that the revisions the proposed settlement sufficiently addressed the court's concerns regarding the FLSA aspect of the Agreement.

D. Fairness of the Settlement

Plaintiffs contend the proposed settlement is fair and reasonable. (Motion, pp. 11:6-16:11.) They estimate that Settlement Class Members will recover an average of approximately $1,440.22, and Settlement Collective Members will recover an average of $720.32. (*Id.* at p. 11:12-15.) On December 16, 2022, the parties participated in mediation with Lisa Klerman, Esq. (Lebe Decl., ¶ 21.) Prior to mediation, the parties exchanged informal discovery, with Defendant providing time and payroll records as well as documents relating to its relevant policies. (*Id.* at ¶¶ 21, 29.) The parties reached the settlement through mediation. (*Id.* at ¶¶ 21-23.)

Plaintiffs' counsel provides an analysis of Defendant's estimated maximum exposure by claim. (Lebe Decl., ¶¶ 38-46.) According to the analysis, Defendant's total estimated exposure is $78,956,358. (*Id.* at ¶ 46.) This amount is comprised of $50,959,316 in California Class damages, $26,433,142 in FLSA Collective damages, and $1,563,900 in PAGA penalties. (*Ibid.*) The gross settlement amount of $3,850,000 represents 4.9 percent of Defendant's total

estimated maximum exposure. Therefore, the settlement amount is low based on the percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D. Cal., Feb 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist. LEXIS 30201, at *41-42 [citing cases approving settlements in the range of 5 to 35 percent of the maximum potential exposure].) The fact that the percentage recovery is lower than the range generally considered reasonable gives the court reason for pause. However, the percentage is just outside the generally accepted range, and the court finds that counsel has sufficiently explained the reasoning behind the settlement amount, including that Plaintiffs would only be entitled to damages under the FLSA to the extent that potential members of the collective opted in to the action.

The court has reviewed Plaintiffs' written submissions in support of the proposed settlement. Based on the circumstances of the case, including the strength of Plaintiffs' case and potential defenses, the court finds the terms of the settlement to be fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

E. Service Award, Fees and Costs

Plaintiffs request a service award of $12,500 to Plaintiff Long and an award of $10,000. (Motion, p. 5:20-22, fn. 2.)

> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, internal punctuation and citations omitted.) Incentive awards are particularly appropriate where a

plaintiff undertakes a significant reputational risk in bringing an action against an employer. (*Covillo v. Specialty's Café* (N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 29837, at *29.)

Plaintiff Long has submitted a declaration describing her participation in this litigation. (Declaration of Jamie Long, filed on March 12, 2025, ¶¶ 9-15.) Long's participation has included communication with her attorneys, gathering documents, reviewing case documents, preparation for a possible deposition, and preparing for mediation. (*Id.* at ¶¶ 9-12.) She estimates that she has spent between 45 and 55 hours assisting with this case. (*Id.* at ¶ 15.)

Plaintiff Serrano has submitted a declaration describing his participation in this case. (Declaration of Marcus Serrano, filed on March 12, 2025, ¶¶ 9-15.) Serrano's participation has included obtaining documents, communicating with his attorneys, preparing for a possible deposition, and being available during mediation. (*Id.* at ¶¶ 9-12.) Serrano estimates that he has spent between 35 and 45 hours working with his attorneys on this litigation. (*Id.* at ¶ 15.)

The court finds that service awards are appropriate, and the amounts requested are reasonable. Accordingly, the service awards are approved the in the amounts requested.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will seek attorney fees of up to one-third of the gross settlement amount (currently estimated to be $1,283,333.33). Prior to the final approval hearing, Plaintiffs' counsel shall submit lodestar information (including hourly rate and hours worked) as well as evidence of actual litigation costs incurred and settlement administration costs.

F. Conditional Certification of Class

Plaintiff requests that the class be conditionally certified for purposes of the settlement. 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 . . . ." As

interpreted by the California Supreme Court, section 382 requires: (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 (*Sav-On*).)

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, supra*, 34 Cal.4th at p. 326.) "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.) As explained by the California Supreme Court,

> The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines 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 advantageous to the judicial process and to the litigants.
>
> (*Sav-On, supra*, 34 Cal.4th at p. 326, internal punctuation and citations omitted.)

Plaintiffs state there are approximately 848 class members and 575 collective members who can be identified from a review of Defendant's records. (Motion, p. 17:12-20.) There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

G. Class Notice

The content of a class notice is subject to court approval. "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." (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, there are two notices: the Class Notice and the Collective Notice. (Agreement, Exs. B and C.) The form of the Class Notice is generally adequate. It describes the lawsuit, explains the settlement (including the hybrid distribution to the Settlement Class Members and the Settlement Collective Members), and instructs class members that they may opt out of the settlement or object. The settlement amounts, including attorney fees and payment to the Plaintiffs, are stated. The notice informs class members that they may appear at the final fairness hearing to make an objection. However, the Class Notice does not sufficiently explain the hybrid nature of the settlement does not appear to contain any direct reference to the FLSA or a definition of the Settlement Collective. Therefore, prior to mailing, the Class Notice shall be amended to include an explanation of the difference between the California Class and the Settlement Collective, and why some recipients will not receive the Settlement Collective notice.

Similarly, the form of the Collective Notice is generally adequate. (Agreement, Ex. C.) It describes the lawsuit, explains the settlement (including the hybrid distribution to the Settlement Class Members and the Settlement Collective Members), and instructs class members that they may opt out of the settlement or object. The settlement amounts, including attorney fees and payment to the Plaintiffs, are stated. The notice informs class members that they may appear at the final fairness hearing to make an objection. However, the Collective Notice also does not sufficiently explain the hybrid nature of the settlement. Also, paragraph 14 of the Collective Notice requires recipients of the notice to provide the last four digits of their social security number along with any written objection.

Therefore, prior to mailing, the Collective Notice shall be amended to include a brief explanation of the difference between the California Class and the Settlement Collective, and why some recipients will not receive the California Class notice. It shall also be amended to remove the requirement the recipients provide the last four digits of their social security number along with any written objection.

Finally, the court requests that the following language regarding the final approval hearing be added to both notices:

> Class members may appear at the final approval hearing in person or remotely using the Microsoft Teams link for Department 19 (Afternoon Session), and should review the remote appearance instructions beforehand:
>
> https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml
>
> Class members who wish to appear remotely are encouraged to contact class counsel at least three days before the hearing, if possible, so that potential technology or audibility issues can be avoided or minimized.

On the condition that the parties make the above changes to the notices prior to mailing, the notices are approved.

IV. CONCLUSION

The motion for preliminary approval is GRANTED. The classes as defined herein are certified for settlement purposes only. The court sets a final approval hearing for October 22, 2025 at 2:30 p.m. in Department 19.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

Calendar Line 5

Case Name: Hathaway v. Alliance Roofing Company, Inc. (Class Action)
Case No.: 22CV401365
(Lead case; consolidated with Case No. 22CV407856)

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 26, 2025, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class and representative action arising from alleged wage and hour violations. Plaintiffs Chad Hathaway and Edwardo Contreras Ruiz (collectively, "Plaintiffs") filed two separate cases, now consolidated.

On July 29, 2022, Plaintiff Hathaway began this case by filing a class action complaint against defendant Alliance Roofing Company, Inc. ("Defendant"). On October 4, 2022, Hathaway filed the operative first amended class action complaint against Defendant, asserting the following causes of action: (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 reimburse business expenses; (6) failure to provide accurate itemized wage statements; (7) failure to pay wages timely during employment; (8) failure to pay all wages due upon separation of employment; (9) violation of Business and Professions Code section 17200, *et seq.*; and (10) enforcement of Labor Code section 2698, *et seq.* [Private Attorneys General Act ("PAGA")].

On November 3, 2022, Plaintiff Ruiz filed a complaint against Defendant (Super. Ct. Santa Clara County 2022, Case No. 22CV407856) (the "Ruiz Action").

On March 15, 2024, the court issued an order granting Hathaway's request for dismissal of the tenth cause of action for PAGA enforcement, without prejudice.

On April 17, 2024, the court issued an order on the parties' stipulation consolidating this action with the Ruiz Action for all purposes, with this action serving as the lead case. Also on April 17, 2024, the court issued an order granting Hathaway's motion to compel Defendant

to provide further responses to Hathaway's request for production of documents and ordering Defendant to pay $1,500 in monetary sanctions.

On January 7, 2025, the court issued an order on the parties' stipulation regarding the briefing schedule for Defendant's motion for summary adjudication, with a hearing reserved for May 28, 2025. According to the parties Joint Case Management Conference Statement filed on March 24, 2025, Defendant's motion for summary judgment is now scheduled to be heard on July 30, 2025, and the parties have agreed upon the associated briefing schedule.

Now before the court is Defendant's motion to compel arbitration and dismiss, or alternatively, stay the proceedings. Plaintiffs timely filed opposition papers, and Defendant timely filed a reply.

II. LEGAL STANDARD

"Arbitration provisions in a CBA are enforceable with respect to claims made by a union member. [Citations.]"[1] (*Oswald v. Murray Plumbing and Heating Corp.* (2022) 82 Cal.App.5th 938, 942 (*Oswald*).) "[W]hether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance -- is undeniably an issue for judicial determination." (*AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 649.)

In ruling on a motion to compel arbitration, the court must inquire as to (1) whether there is a valid agreement to arbitrate, and (2) if so, whether the scope of the agreement covers the claims alleged. (See *Howsan v. Dean Witter Reynolds* (2002) 537 U.S. 79, 84.) "Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate. [Citations.] The threshold question requires a response because if such an agreement exists, then the court is statutorily required to order the matter to arbitration." (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 19, internal quotation marks omitted.)

In determining the rights of parties to enforce an arbitration agreement within the scope of the Federal Arbitration Act ("FAA"), "courts apply state contract law while giving due

[1] One exception is that "a union may not prospectively waive an employee's right to a judicial forum to hear his or her statutory discrimination claims." (*Torrez v. Consol. Freightways Corp.* (1997) 58 Cal.App.4th 1247, 1259.) That is not an issue in this case.

regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

> But the FAA's policy favoring arbitration … is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. Or in another formulation: The policy is to make arbitration agreements as enforceable as other contracts, but not more so. Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind.

(*Morgan v. Sundance, Inc*. (2022) 596 U.S. 411 (*Morgan*), internal citations and quotation marks omitted.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of evidence]; see *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165-166 [normal formalities regarding document authentication are not required].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal, supra,* 14 Cal.4th at p. 413.)

III. MOTION TO COMPEL ARBITRATION

It is undisputed that during their employment with Defendant, Plaintiffs were members of a construction labor union, Local Union No. 95 – United Union of Roofers, Waterproofers and Allied Workers ("Local 95"). (Motion, p. 3:3-23; Opposition, pp. 1:2-14.) Defendant contends that Plaintiffs are subject to a valid arbitration agreement because negotiated changes to the applicable CBA apply to Plaintiffs retroactively. (Motion, pp. 7:23-8:26.) Plaintiffs argue the newly negotiated arbitration agreement does not apply to them and, even if it does, Defendant waived its right to compel arbitration by participating in this litigation. (Opposition, pp. 5:19-11:9.)

A. Existence of Agreement to Arbitrate

To establish the existence of an arbitration agreement, Defendant submits the declaration of Romy Roque, its president. (Motion, p. 3:4-11; Declaration of Romy Roque ("Roque Decl."), ¶ 1.) According to Mr. Roque, Defendant employed Plaintiff Hathaway from March 11, 2020 to July 24, 2020 and Hathaway was a member of Local 95 throughout his term of employment. (Roque Decl., ¶¶ 3-4.) Defendant employed Plaintiff Ruiz from February 28, 2017 to February 4, 2022 and Ruiz was a member of Local 95 throughout his term of employment. (*Id.* at ¶¶ 5-6.)

Defendant is a member of the Associated Roofing Contractor's of the Bay Area Counties, Inc. ("Associated Roofing Contractors"). (Roque Decl., ¶ 7.) Defendant has maintained a business relationship with Local 95 for more than 30 years. (*Id.* at ¶ 8.) Throughout this time, a CBA has been in place, setting forth detailed terms of employment. (*Ibid.*) In August 2022, lawyers for Associated Roofing Contractors informed Mr. Roque that California courts had found certain language within the existing CBA to be deficient. (*Id.* at ¶ 9.)

In the summer of 2024, representatives of Defendant, Local 95, and Associated Roofing Contractors met and prepared a new CBA to address the deficiencies identified by the courts and give effect to the parties intentions, as follows: "All wage/hour claims are to be arbitrated, PAGA claims are precluded, class claims are prohibited unless first approved by an arbitrator, and all of these requirements/limitations are to be applied retroactively to any currently-pending wage/hour claims, PAGA claims and class-based claims." (Roque Decl. at ¶¶ 10-11.) The new CBA between Defendant as a member of Associated Roofing Contractors and Local 95 became effective on August 1, 2024. (*Id.* at ¶ 12 and Ex. A (the "August 2024 CBA").)

The copy of the August 2024 CBA submitted with Mr. Roque's declaration bears the signature of Robert Rios, Business Manager for Local 95. (August 2024 CBA, pp. 21, 33.) Defendant contends the August 2024 CBA contains, "undeniably-clear language requiring the arbitration of wage/hour claims, and precluding PAGA claims." (Motion, p. 4:8-9.) Defendant cites the following portions of the CBA in support of its motion:

> ARBITRATION OF WAGE AND HOUR CLAIMS AND THE CALIFORNIA PRIVATE ATTORNEYS GENERAL ACT PRECLUSION. In addition to claims for meal period, rest period and heat recovery violations, the following claims and claims for associated penalties shall be resolved exclusively through the

> binding arbitration before an impartial arbitrator as set forth in this paragraph, and shall not be brought in a court of law or before any administrative agency such as the California Labor Commissioner: all claims arising under the Fair Labor Standards Act, the California Labor Code and Industrial Welfare Commission Orders (e.g. Wage Order 16) and all derivative claims arising under California Business & Professions Code section 17200, et seq., for: unpaid wages (e.g. claims for hours worked off the clock, overtime wages, incorrect rate(s) of pay and travel time); heat illness recovery violations, waiting time penalties; reimbursement of expenses (e.g. tools, cell phone charges, mileage and subsistence); record keeping of personnel files, time records and payroll records; violation of Labor Code sections 212 and 226, and all similar claims arising under applicable local law.

(August 2024 CBA, Article XXVIII, Section 3 ("Arbitration Agreement"), at p. 17.)

> It is mutually agreed that this Agreement prohibits any and all violations of the sections of the California Labor Code identified in Labor Code 2699.5 and 2699(f) as well as any others that are redressable pursuant to the Labor Code Private Attorneys General Act of 2004 ("PAGA"), and that such claims shall be resolved exclusively through binding arbitration before an impartial arbitrator and not in court of law or any administrative agency, as set forth in this Section. Pursuant to Labor Code Section 2699.6, the Parties hereby expressly and unambiguously waive the provisions of PAGA, Labor Code Section 2698, et seq., and agree that none of the provisions of that statute apply to any of the employees covered by this Agreement. This Agreement expressly authorizes the impartial arbitrator to award any and all remedies otherwise available under the California Labor Code, except the award of penalties under PAGA that would be payable to the Labor and Workforce Development Agency. …The Parties also agree that any non-individual claims will be stayed and the employee will not pursue any such claims in court until after the impartial arbitrator, and not the court, issues a final and written determination as to the employee's status (sic) an "aggrieved employee.

(*Ibid.*)

> This Section shall apply to any representative PAGA claims, class and/or individual claims that arise or are pending during the term of the Parties' current collective bargaining agreement, regardless of when they were filed with any court or administrative agency.

(*Id.* at p. 18, final paragraph of Section 3.)

By producing a copy of the August 2024 CBA signed on behalf of Local 95, which contains the Arbitration Agreement expressly stating that its terms shall apply to claims that arise or are pending, regardless of when they were filed, Defendant has established the existence of an agreement to arbitrate between itself and Plaintiffs' union. Defendant's contention that the Arbitration Agreement covers wage and hour claims, thus bringing Plaintiffs' claims within its scope, is supported by the plain language of the agreement.

Therefore, Defendant has met its initial burden by submitting prima facie evidence of a written agreement to arbitrate the claims asserted in the action. (*Espejo*, *supra*, 246 Cal.App.4th at p. 1060 [a defendant may meet their initial burden "by attaching a copy of the arbitration agreement purportedly bearing the opposing party's signature"]; see also *Oswald*, *supra*, 82 Cal.App.5th at p. 942 ["[a]rbitration provisions in a CBA are enforceable with respect to claims made by a union member"].)

B. Validity and Scope of the Agreement to Arbitration

Once the party seeking arbitration meets its burden of proving the existence of an arbitration agreement, "the party opposing arbitration bears the burden of proving any defense…." (*Pinnacle*, *supra*, 55 Cal.4th at p. 236.) Plaintiffs initially contend that Defendant cannot show that there is valid agreement to arbitrate covering the periods of the Plaintiffs' employment. (Opposition, pp. 5:19-26.) Plaintiffs' position is that Defendant has not met its initial burden of proving the existence of an arbitration agreement that applies to Plaintiffs, for two reasons. (*Ibid.*)

First, Plaintiffs argue that the August 2024 CBA, and thus the Arbitration Agreement, do not apply to Plaintiffs because they were not union employees in 2024. (Opposition, pp. 5:27-7:2.) Plaintiffs assert that they had not worked for Defendant for years before the negotiation of the August 2024 CBA, and never gained any benefits from the new CBA when it went into effect. (*Id.* at p. 6:21-27.) Plaintiffs thus maintain that when Local 95 negotiated the August 2024 CBA, it did not do so on Plaintiff's behalf because they were former employees. (*Id.* at pp. 6:28-7:2.)

In support of this argument, Plaintiffs cite a string of cases for the proposition that a union cannot bargain for former employees when negotiating a new CBA because the former employees fall outside the bargaining unit and lose union representation. (*Id.* at p. 6:7-20 [citing, among others, *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, 173 (*Pittsburgh Glass*).) However, "*Pittsburg Glass* stands for the position that labor unions do not have a duty to represents retirees, but not that they are prohibited from doing so. [Citation.]" (*Bullock v. City of Anitoch* (2022) 78 Cal.App.5th 407,

418, fn. 8.) The only California case cited here by Plaintiffs is *Division of Labor Law Enforcement, Dep't of Industrial Relations v. Standard Coil Products Co.* (1955) 136 Cal.App.2d Supp. 919 (*Standard Coil*). Nonetheless, not only does *Standard Coil* predate *Oswald* by over 60 years, but it is also a decision of the appellate department of a Superior Court pertaining to an evidentiary ruling, nowhere stating that a union cannot bargain on behalf of former employees. The court finds the other authorities cited by Plaintiffs on this point to be similarly unpersuasive.

Second, Plaintiffs argue that Defendant's reliance on *Oswald* is misguided because the facts here are distinguishable. (Opposition, pp. 7:3-8:11.) Plaintiffs assert that a CBA can only apply retroactively if the effective date or new contract show that it covered the period of the employee's employment. (*Id.* at p. 7:5-7.) Plaintiffs rely on *Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534 (*Mendez*). There, the appellate court affirmed the trial court's ruling that the arbitration provision in the collective bargaining agreement did not apply to the plaintiff's statutory discrimination claims. (*Id.* at p. 537.) The plaintiff argued that she was not a party to the arbitration agreement because she was not a party to either of the two CBAs relied upon by the defendant employer. (*Id.* at p. 541.) More specifically, the plaintiff in *Mendez* argued that neither CBA applied to her claims because, on the date the employer terminated her, the first CBA was no longer effective, and the second CBA was not yet approved. (*Id.* at p. 542.)

The *Mendez* court rejected plaintiff's argument, stating that the new agreement "applied retroactively to a date prior to Mendez's termination." (*Mendez*, *supra*, 220 Cal.App.4th at p. 542.).) The appellate court found:

> [A]s a member of the union, Mendez was bound by the terms of the collective bargaining agreement. (See *Florio v. City of Ontario* (2005) 130 Cal.App.4th 1462, 1466 [30 Cal. Rptr. 3d 841] ["'a member of a bargaining unit is bound by the terms of a valid collective bargaining agreement, though he is not formally a party to it and may not even belong to the union which negotiated it'"].)

(*Ibid.*) Thus, although the *Mendez* court affirmed the trial court's ruling denying the petition for arbitration, it rejected the plaintiff's assertion that "the trial court's decision must be affirmed regardless of the language of the collective bargaining agreement, because she was not a party to either of the two collective bargaining agreements relied upon by [the defendant]." (*Id.* at

p. 541.) The *Mendez* court affirmed, not because there was no retroactivity, but because it found that the arbitration agreement did not apply to the plaintiff's discrimination claims under the Fair Employment and Housing Act. (*Id.* at p. 543.) That is not an issue in this case. The other decisions cited by Plaintiff here are similarly unpersuasive because they do not find that a collective bargaining agreement cannot be applied retroactively. (Opposition, p. 7:9-14.)

The parties dispute whether *Oswald* represents controlling authority here. In *Oswald*, the appellate court found that a memorandum of understanding ("MOU") executed to replace a CBA's original arbitration clause and signed after the plaintiff's employed ended was effective retroactively against the plaintiff. (*Oswald, supra*, 82 Cal.App.5th at pp. 941, 944.) Defendant asserts that it was the intent of the authors of the August 2024 CBA in this case to incorporate the holding of *Oswald* to ensure that wage and hour claims "would be subject to mandatory arbitration, that PAGA claims would be precluded, and that these requirements would be applied retroactively." (Motion, p. 6:19-20.) Plaintiffs contend that *Oswald* is distinguishable because their claims did not arise during the term of the August 2024 CBA, emphasizing that Defendant and Local 95 jointly prepared a new CBA—instead of amending an existing CBA, as the parties did in *Oswald*. (Opposition, pp. 7:24-8:11.) The court finds Plaintiffs' position on this point to be without merit.

In *Oswald*, the parties' employment relationship was governed by a master agreement effective from 2017 to 2026. (*Oswald, supra*, 82 Cal.App.5th at p. 941.) The master agreement was a CBA requiring arbitration of disputes, including those arising under PAGA, as the sole and exclusive remedy. (*Ibid.*) The plaintiff was a pipefitter who sued the defendant for civil penalties under PAGA. (*Ibid.*) The defendant invoked the CBA and moved to compel arbitration. (*Ibid.*) The trial court found that Labor Code section 2699.6 (exempting construction workers from PAGA if certain conditions are met) did not apply and denied the motion to compel arbitration. (*Ibid.*) Soon after the defendant appealed, the parties' collective bargaining representatives signed an MOU, replacing the CBA's original arbitration clause and stating that the change was retroactive to 2017. (*Id.* at pp. 942.)

The appellate court in *Oswald* reversed, finding that the MOU was retroactive and that the dispute was exempt from PAGA because the revised arbitration agreement satisfied the

Labor Code section 2699.6 requirements as a matter of law. (*Oswald*, *supra*, 82 Cal.App.5th at pp. 941, 944, 947.) In reaching this conclusion, the *Oswald* court stated the cited rule that "[a]rbitration provisions in a CBA are enforceable with respect to claims made by a union member. [Citations.]" (*Id.* at p. 942.) In finding that the MOU applied retroactively, the court looked to terms of the MOU itself, stating "that it 'shall apply to any representative PAGA claims and class action claims **that arise or are pending** during the term of the parties' 2017 2016 Master Agreement **regardless of when they were filed with any court** or administrative agency.' (Boldface added.)" (*Id.* at p. 944.) The court stated, "Oswald cites no limitation, restriction or qualifying language in the [original CBA] preventing his union from signing an MOU that is retroactive to 2017 and incorporates section 2699.6. The union's agreement to make the MOU retroactive affects Oswald's pending claims." (*Id.* at 944.)

Here, Defendant persuasively argues that the same reasoning applies. Indeed, by design, the Arbitration Agreement contains nearly identical language as that in *Oswald* regarding the parties' intention to retroactively to cover pending claims:

> This Section shall apply to any representative PAGA claims, class and/or individual claims that arise or are pending during the term of the Parties' current collective bargaining agreement, regardless of when they were filed with any court or administrative agency.

(Arbitration Agreement, at p. 17 of August 2024 CBA, Article XXVIII, Section 3, final paragraph.) While the Plaintiffs here placed emphasis on the fact that the MOU in *Oswald* modified an existing CBA and was not a new CBA, the *Oswald* court focused on whether the terms of the original CBA prevented retroactivity. The Plaintiffs here, like those in *Oswald*, have cited "no limitation, restriction or qualifying language" prevented Local 95 from signing an agreement that is retroactive to the term of the prior CBA, regardless of when they were filed.

Accordingly, Plaintiffs' contention that Defendant has failed to show a valid arbitration agreement covering their claims is without merit.

C. Waiver

Plaintiffs next argue that even if the August 2024 CBA does apply, Defendant waived its right to compel arbitration through its actions in this lawsuit. (Opposition, pp. 8:12-11:9.)

Plaintiffs contend that Defendant acted with extreme delay in bringing this motion and cannot show good reason for the delay. (*Id.* pp. 9:4-10:10.) Defendant anticipates Plaintiffs' waiver argument in its motion but, notably, does not discuss it in its reply. (Motion, pp. 9:1-10:13.)

1. *Legal Standard*

"[W]here the FAA applies, whether a party has waived a right to arbitrate is a matter of federal, not state, law." (*Davis v. Shiekh Shoes, LLC* (2022) 84 Cal.App.5th 956, 963 (*Davis*).) However, "the test for determining waiver of the right to arbitrate is the same under the FAA and the [California Arbitration Act]." (*Zamora v. Lehman* (2010) 186 Cal.App.4th 1, 11.) The leading California case discussing waiver, *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*), adopted a set of factors from the Tenth Circuit opinion in *Peterson v. Shearson/American Express, Inc.* (10th Cir. 1988) 849 F.2d 464. Both federal and California law "reflect[] a strong policy favoring arbitration agreements and require[] close judicial scrutiny of waiver claims." (*St. Agnes, supra,* 31 Cal.4th at p. 1195.) "[W]aivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*Ibid.*)

Under the *St. Agnes* test, the following factors are relevant in deciding whether a party's conduct constitutes a waiver of arbitration:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place; and [formerly] (6) whether the delay affected, misled, or prejudiced the opposing party.

(*St. Agnes, supra,* 31 Cal.4th at pp. 1195–1196, internal quotations omitted.)

The sixth factor regarding prejudice is based on federal cases that "applied an arbitration-specific rule that required a showing of prejudice to establish waiver." (*Quach v. California Commerce Club, Inc.* (2024) 16 Cal.5th 562, 569 (*Quach*).) In its 2022 *Morgan* decision, "the United States Supreme Court rejected this rule." (*Quach,* 16 Cal.5th at p. 569.)

> *Morgan* clarified that the federal "'policy favoring arbitration'" is about putting arbitration agreements on equal footing with other contracts, not about favoring arbitration. ([*Morgan*, *supra*, 596 U.S. at p. 418].) Accordingly, the Supreme Court held that, under federal law, a court must apply the same rules that apply to any other contract when determining whether a party to an arbitration agreement has lost the right to enforce the agreement. (*Ibid.*)
>
> Because our state law arbitration-specific prejudice requirement is based upon the federal precedent that *Morgan* overruled, we now abrogate it. California policy, like federal policy, puts arbitration agreements on equal footing with other types of contracts. Accordingly, under California law, as under federal law, a court should apply the same principles that apply to other contracts to determine whether the party seeking to enforce an arbitration agreement has waived its right to do so.

(*Ibid.*) "To establish waiver, there is no requirement that the party opposing enforcement of the contractual right demonstrate prejudice or otherwise show harm from the waiving party's conduct." (*Id.* at p. 585.)

The multifactor test is not "a mechanical process in which each factor is assessed and the side with the greater number of favorable factors prevails," nor is the list of factors exclusive: rather, the factors reflect the principles that should guide courts in determining whether a party has waived its right to demand arbitration. (*Zamora, supra,* 186 Cal.App.4th at p. 15, internal quotation marks and citation omitted.) "The waiver inquiry is exclusively focused on the waiving party's conduct; neither the effect of that conduct on the party seeking to avoid enforcement nor that party's subjective evaluation of the waiving party's intent is relevant." (*Quach, supra,* 16 Cal.5th at p. 585.)

2. *Discussion*

Plaintiffs contend that Defendant's conduct in the more than two years since this action was filed has been inconsistent with a right to enforce arbitration, and the court agrees. As Defendant concedes, it did not assert the presence of an arbitration agreement among the many affirmative defenses in its answer filed in 2023. (Motion, p. 9:5-13.) Defendant asserts that it was not required to plead an arbitration defense because courts are critical of the inclusion of boilerplate affirmative defenses lacking any good faith basis. (*Id.* at p. 9:14-28.)

Defendant contends that it preserved its right to pursue arbitration by inserting a final affirmative defense into its answers entitled "Additional Defenses," containing the following

language: “Defendant presently has insufficient knowledge or information upon which to form belief as to Whether it may have additional, yet unstated affirmative defenses. Defendant reserves the right to assert additional affirmative defenses in the event discovery indicates that additional affirmative defenses are appropriate.” (Motion, p. 10:1-8.) According to Defendant, this case presents a unique situation in which the obligation to assert arbitration did not exist at the time it filed its answers.

Nevertheless, even if Defendant had asserted an arbitration defense in its answers, which it did not, that alone would not be sufficient. It is the waiving party’s conduct during litigation that is determinative. (*Quach, supra,* 16 Cal.5th at p. 585 [inquiry focused on waiving party’s conduct]; see also *Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 998 [trial court erroneously failed to find waiver where “the only affirmative act the [petitioner] took to invoke arbitration was to allege its right to arbitrate as an affirmative defense in an answer” and “[t]he remainder of [its] conduct was inconsistent with an intent to arbitrate”]; *Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 217 [defendants’ assertion of arbitration as an affirmative defense in their answers was “merely one factor for the trial court to consider”].)

Here, Defendant’s actions were inconsistent with a right to enforce arbitration because, after meeting and conferring with Hathaway’s counsel on the subject in January 2023, Defendant decided not to pursue arbitration. (See Opposition, p. 5:4-10; see also Declaration of Michael Ellis, ¶ 8 [“a decision was made to forego pursuing arbitration because we did not have a good faith belief that such a motion would be meritorious”].) Defendant then delayed for a substantial period before moving to compel arbitration and seeking a stay of these proceedings. It was not until more than a year and a half later that Local 95 and Defendant executed the August 2024 CBA. As Plaintiffs point out, Defendant fails to explain why it took this long for it to modify its CBA despite being aware that California courts had on five occasions found the previous version to be unenforceable.

While Defendant asserts it modified the CBA to comport with *Oswald*, that opinion was filed in September 2022, nearly two years before the execution of the August 2024 CBA containing the Arbitration Agreement that Defendant now seeks to enforce. In the meantime,

Defendant continued to participate in this litigation without informing Plaintiffs' counsel that the negotiations for a modified CBA were in progress. (Opposition, pp. 9:27-10:10; Declaration of Alex J. Valle ("Valle Decl."), ¶ 17; Declaration of Arman Marukyan, ¶ 6.) In March 2024, the parties stipulated to consolidate the Hathaway and Ruiz Actions. According to Plaintiffs, Defendant initiated this consolidation instead of trying to compel the Plaintiffs to individual arbitration. (Opposition, p. 10:13-17.) Plaintiffs also emphasize that Defendant actively participated in discovery that would have been unavailable in arbitration, including by agreeing to protective order, negotiating the language of a proposed *Belaire-West* notice, attending three informal discovery conferences, and responding to discovery requests. (*Id.* at pp. 10:21-11:9.)

Defendant effectively concedes these arguments by failing to address them in reply. Notably, Defendant's reply brief makes no mention of the waiver issue whatsoever, seemingly ignoring the final four pages of Plaintiffs' opposition. In sum, the court finds that Defendant's conduct in this action, including initially deciding to forego arbitration and delaying its instant motion for many months while participation in the litigation, sufficiently establishes that it waived any right to pursue arbitration, irrespective of whether doing so caused any prejudice to Plaintiffs. (*Quach*, *supra*, 16 Cal.5th at p. 585 ["[t]o establish waiver, there is no requirement that the party opposing enforcement of the contractual right demonstrate prejudice or otherwise show harm from the waiving party's conduct"].)

Accordingly, the motion to compel arbitration is DENIED, and the request to dismiss, or alternatively, stay these proceedings is MOOT.

V. CONCLUSION

The motion to compel arbitration is DENIED, and the request to dismiss, or alternatively, stay these proceedings is MOOT.

Plaintiffs' shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 6

Case Name: Sanders v. 360 Degree Customer, Inc. (Class Action)
Case No.: 22CV407883

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 26, 2025, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. BACKGROUND

This is a putative class and representative action arising from alleged wage and hour violations. On November 16, 2022, plaintiff David Jermine Sanders ("Plaintiff") began this action by filing a class action complaint against defendant 360 Degree Customer, Inc. ("Defendant"). On August 25, 2023, Plaintiff filed the operative second amended complaint against Defendant, asserting various causes of action based on alleged violations of wage and hour laws, including under the Private Attorneys General Act ("PAGA").

On April 12, 2024, Plaintiff filed an application for an order permitting service by publication on the grounds that he had not been able to serve Defendant by other means despite repeated efforts. On May 3, 2024, the court issued an order denying the application for service by publication, without prejudice, stating that Plaintiff must first attempt service on the defendant corporation by service on the Secretary of State, as authorized under the law.

Now before the court is Plaintiff's motion for application for service of process by service on the Secretary of State. The motion is unopposed.

II. DISCUSSION

Plaintiff moves for an order pursuant to Code of Civil Procedure section 416.10, subdivision (d), authorizing service of the summons and complaint on the California Secretary of State to effectuate service on corporate defendant 360 Degree Customer, Inc.

As a general matter, effecting service on a corporation requires the delivery of summons and complaint to a person on behalf of the corporation. (Code Civ. Proc., § 416.10 ("Section 416.10"); *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1437

["when the defendant is a corporation, the 'person to be served' is one of the individuals specified in in section 416.10"].) A corporation that has been suspended but continues to operate may be served under Section 416.10, like any other corporation.[2] (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 302 [disapproved on other grounds by *California Capital Ins. Co. v. Hoehn* (2024) 17 Cal.5th 207, 215].)

Section 416.10 provides, "A summons may be served on a corporation by delivering a copy of the summons and the complaint by any of the following methods: [¶] (a) To the person designated as agent for service of process …. [¶] (b) To the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process. [¶] (c) If the corporation is a bank, to a cashier or assistant cashier or to a person specified in subdivision (a) or (b). [¶] (d) If authorized by any provision in Section 1701, 1702, 2110, or 2111 of the Corporations Code (or Sections 3301 to 3303, inclusive, or Sections 6500 to 6504, inclusive, of the Corporations Code, as in effect on December 31, 1976, with respect to corporations to which they remain applicable), as provided by that provision."

As relevant here, Corporations Code section 1702 provides:

> If an agent for the purpose of service of process … cannot with reasonable diligence be found at the address designated for personally delivering the process … and it is shown by affidavit to the satisfaction of the court that process against a domestic corporation cannot be served with reasonable diligence upon the designated agent by hand in the manner provided in Section 415.10, subdivision (a) of Section 415.20 or subdivision (a) of Section 415.30 of the Code of Civil Procedure or upon the corporation in the manner provided in subdivision (a), (b), or (c) of Section 416.10 or subdivision (a) of Section 416.20 of the Code of Civil Procedure, the court may make an order that the service be made upon the corporation by delivering by hand to the Secretary of State, or to any person employed in the Secretary of State's office in the capacity of assistant or deputy, one copy of the process for each defendant to be served, together with a copy of the order authorizing such service. Service in

[2] Similarly, a defunct or dissolved corporation may be served by delivering a copy of the summons or other process to an officer, director, or person having charge of its assets, and if no such persons or agents can be found, the court may make an order authorizing service on the Secretary of State. (Code Civ. Proc., § 416.20, subd. (b); *Penasquitos, Inc. v. Superior Court* (1991) 53 Cal.3d 1180, 1185, fn. 4.)

> this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State.

(Corp. Code, § 1702, subd. (a).)

Here, Plaintiff's counsel has submitted a declaration in support of the instant motion, describing his office's attempts to effectuate service on Defendant. (Declaration of Enzo Nabiev in Support of Service of Process by Service Upon the Secretary of State ("Nabiev Decl."), ¶¶ 6-11.) Mr. Nabiev's office performed a business entity search through the California Secretary of State website, discovering that Defendant's agent for service of process is Gulneesh Mukhija and that Defendant's principal place of business (and Gulneesh Mukjiha's listed address) is on Sapena Court in Santa Clara, California. (*Id.* at ¶¶ 6-7.)

After repeated and unsuccessful efforts to effectuate service at the Santa Clara address, Mr. Nabiev's office performed internet searches to identity other possible addresses for Defendant's agent for service of process. (Nabiev Decl., ¶ 9.) According to these searches, there were three other addresses possibly associated with Ms. Mukjiha: one on Chardonnay Court in Saratoga, California; one on Healthmore Drive in Fairburn Georgia, and one on Fortran Drive in San Jose, California. (*Ibid.*) Service was not successful at the Saratoga Address because Ms. Mukjiha did not reside there. (*Ibid.*) Service was not effectuated at the Georgia address, because when the tenant eventually responded to the process server, the tenant said she worked for Defendant years ago as a speech therapist and does not have an ownership interest in the property. (*Ibid.*) Service was also not effectuated at the San Jose address because the location is now a different business, and the front desk informed the process server that Defendant occupied the location ten years prior. (*Id.* at ¶ 9 and Ex. C.)

Plaintiff's counsel provides declarations from five different process servers documenting a total of 16 different attempts to effectuate service at the three addresses between December 12, 2022 and March 11, 2024. (Nabiev Decl., ¶ 9 and Ex. C.) Plaintiff's counsel also attempted to effectuate service on Defendant by substitute service pursuant to Code of Civil Procedure section 415.20, but this was unsuccessful because the business was closed, and no activity was detected inside the place of business. (*Id.* at ¶ 13 and Ex. C [detailing the process server's attempts].) The court also observes that Plaintiff has provided proofs of service indicating that copies of the instant motion and Mr. Nabiev's supporting declaration were

mailed to Gulneesh Mukhija's attention at the Santa Clara address in Santa Clara associated with Defendant.

The court concludes that based on the foregoing showing, Plaintiff has demonstrated that Defendant cannot, with reasonable diligence, be served with summons and complaint in any of the manners of service set forth in subdivision (a) of Corporations Code section 1702. Accordingly, service may be made on Defendant via the California Secretary of State.

III. CONCLUSION

Plaintiff's motion requested an order authorizing service of process on Defendant by service upon the California Secretary of State is GRANTED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 7

Case Name: Topete v. Claire's Boutiques, Inc., et al. (PAGA)
Case No.: 22CV407922

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 26, 2025, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a representative action for civil penalties pursuant to the Private Attorneys General Act ("PAGA"), arising from alleged wage and hour violations. On November 23, 2022, plaintiff Karina Topete ("Plaintiff") began this action by filing a complaint against defendants Claire's Boutiques, Inc., and Claire's Stores, Inc., asserting causes of action for: (1) civil penalties pursuant to PAGA for violations of Labor Code and Industrial Welfare Commission ("IWC") Wage Order No. 7-2001, subdivision 14(A); and (2) civil penalties pursuant to PAGA for violations of Labor Code and Industrial Welfare Commission ("IWC") Wage Order No. 7-2001, subdivision 14(B). On December 8, 2023, the court issued an order deeming the case complex and staying the discovery and responsive pleading deadline.

On February 28, 2025, Plaintiff filed the motion now before the court, a motion for preliminary approval of class action and PAGA settlement. The motion is unopposed.

II. LEGAL STANDARD FOR SETTLEMENT AGREEMENTS

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.)

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, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___, 2022 U.S. LEXIS 2940.)

Like 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 considering 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, 2016 U.S. Dist. LEXIS 140759, at *20-24.)

III. DISCUSSION

Plaintiff Topete moves for approval of a settlement intended to resolve three separate actions. (Declaration of Raul Perez, filed on February 28, 2025 ("Perez Decl."), ¶¶ 2-5 and Ex. 1 ("Settlement"), ¶ 1.) As discussed above, the action filed by Plaintiff Topete in this court is a PAGA-only action. The other two actions are: *Cuevas v. Claire's Boutiques, Inc.* (C.D. Cal., 2022, No. 5:22-cv-01953-JGBSP) (the "*Cuevas* Action"); and *Luna v. Claire's Boutiques, Inc.* (C.D. Cal., 2023, No. 5:23-cv-01740-JGB-SP (C.D. Cal.) (the "*Luna* Action"). (Perez Decl., ¶ 2; Settlement, ¶ 1.)

On July 28, 2022, plaintiff Daniel Cuevas began the *Cuevas* action by filing a wage and hour complaint against Claire's Boutiques, Inc. ("Defendant") in San Bernardino County Superior Court. (Perez Decl., ¶ 3.) On November 4, 2022, Defendant removed the action to the United States District Court for the Central District of California. (*Ibid.*) On May 24, 2023,

plaintiff Cuevas filed a first amended complaint in federal court, adding Alexis Zapeda Coutts as a plaintiff and adding a PAGA claim. (*Ibid.*) On March 28, 2023, plaintiff Maria Luna began the *Luna* Action by filing a wage and hour complaint against Defendant in San Bernardino County Superior Court. (*Ibid.*) On August 25, 2023, Defendant removed the *Luna* Action to the United States District Court for the Central District of California. (*Ibid.*)

On May 1, 2024, the parties participated in a global mediation with Jeffrey Fuchsman, resulting in the proposed settlement for which Plaintiff Topete now seeks approval. The Settlement provides:

> As a condition of settlement, the Parties will stipulate to the filing of a First Amended Complaint ("FAC") in the Topete Action to: (a) add Daniel Cuevas, Alexis Zepeda Coutts, and Maria Luna as named plaintiffs; and (b) conform the pleadings with the scope of the Released Class Claims and Released PAGA Claims. Defendant will not be required to file an answer or other responsive pleading to the FAC. If, for any reason, the Court does not approve of the Settlement, or if the Settlement does not become final for any reason, then the FAC will be deemed withdrawn and the Complaint will again become the operative complaint without prejudice to Plaintiffs' right to seek leave to file another amended complaint and without prejudice to Defendant's rights to object and/or challenge an amended pleading. Defendant does not impliedly or expressly waive any arguments or defenses to the FAC.

(Settlement, ¶ 33.) The Settlement contains release provisions for class and PAGA claims. (*Id.* at ¶¶ 25-26.)

Here, the court finds that Plaintiff has not established that this court has jurisdiction over the non-PAGA allegations. Plaintiff has not yet filed an amended complaint adding allegations on behalf of a class, nor does a proposed first amended complaint appear within Plaintiff's moving papers. No motion for coordination or consolidation has been put before this court, nor is there any indication whether the federal court has remanded the *Cueva* Action or the *Luna* Action. The proposed settlement does not appear to contain any provision regarding the dismissal of the *Cuevas* and *Luna* Actions.

The court appreciates the parties efforts in working to resolve the actions in question. Nevertheless, under these circumstances, it is unclear to the court how it could have jurisdiction to issue a ruling regarding class claims that are currently pending in federal court and not in this court. (See *Varian Med. Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196 [a judgment or order rendered by a court lacking subject matter jurisdiction is "void on its face"];

see also *People v. National Automobile & Casualty Ins. Co.* (2000) 82 Cal.App.4th 120, 125 [subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel].)

Accordingly, the motion for preliminary approval shall be CONTINUED, and prior to the continued hearing, the parties shall meet and confer to see whether they can resolve the issues addressed above, and Plaintiff's counsel shall file supplemental material advising the court of the parties progress in that regard.

IV. CONCLUSION

The motion for preliminary approval is CONTINUED to July 2, 2025 at 1:30 p.m. in Department 19. Prior to the continued hearing, the parties shall meet and confer to see whether they can resolve the court's concerns discussed herein. At least ten court days prior to the continued hearing, Plaintiff's counsel shall file supplemental materials advising the court of the parties' progress, including any amended agreement or relevant stipulation(s).

Plaintiff shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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