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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CLAUDE DE'SILVA, on and all others similarly situated,

Plaintiffs,

v.

INDEPENDENCE LOGISTICS, a corporation and ZAHOOR KAREEM, an individual,

Defendants.

CASE NO.: RG17855933

COMPLEX DESIGNATION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF CLASS REPRESENTATIVE, CLASS COUNSEL, AND CLASS NOTICE

Date: April 2, 2021
Time: 10:00am
Dept.: 21
Judge: Hon Winifred Y. Smith

Reservation No.: R-2237555

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I. INTRODUCTION

Plaintiff Claude De'Silva brought a class, collective, and representative action for wage and hour violations against entity Defendant Independence Logistics, a transportation company, and its owner and individual Defendant Zahoor Kareem ("Defendants"), arising from the alleged failure to compensate Defendants' non-exempt drivers as required by California and federal law. Plaintiff now seeks preliminary approval of a class action settlement for 135 Class Members.

Independence Logistics has gone out of business, having lost the lucrative Federal Express contract which was its source of revenues. The non-reversionary, $300,000 cash Settlement is an excellent result under these circumstances, getting meaningful compensation for a discrete group of Class Members for work they performed many years ago (with the class period ending in 2017). As such, the Settlement falls well within the range of possible approval for a class action settlement, and the proposed Settlement Class is appropriate for provisional class certification.

Plaintiff requests the Court: preliminarily approve the Settlement and certify a provisional Class; approve the form, content, and method of Notice; appoint Bryan Schwartz Law as Class Counsel, Plaintiff Claude De'Silva as Class Representative, and Rust Claims Administration ("Rust") as Settlement Administrator; dismiss individual Defendant Zahoor Kareem from this matter; and set a Final Approval Hearing date.

II. FACTUAL AND PROCEDURAL BACKGROUND

Class Members were parcel delivery drivers employed by Defendants to deliver packages in Defendants' business as a subcontractor for FedEx in California. Plaintiff principally alleges Defendants commonly violated California and San Francisco municipal law by failing to: pay Class Members all earned overtime premiums owed; provide uninterrupted meal and rest breaks or pay Class Members premiums for missed meal and/or rest breaks; pay employee sick leave benefits; and provide Class Members accurate itemized wage statements, as required by California law.

The Parties attended settlement conferences with judges of this Court in 2019. Though the Parties were not able to resolve this matter at the settlement conferences, the Parties continued good faith, arm's-length negotiations for the next year and a half. The process was lengthy principally because of the difficulty in obtaining detailed employment records from the defunct company, based upon Plaintiff's

insistence on identifying the precise list of Class Members and the Class Period covered by the Settlement. As a result of these continued negotiations, on December 4, 2020, the Parties finally executed a Settlement Agreement, attached to the Declaration of Samuel Lorraine Goldsmith, Esq. filed in support of this Motion as Exhibit A (hereinafter "Exhibit A").

III. SUMMARY OF SETTLEMENT TERMS

A. The Settlement Class

The Class includes 135 drivers who were employed by Defendants within four years to the date of the filing of the initial complaint (*i.e.,* April 3, 2013) through December 31, 2017, contained on a list attached to the Settlement. Ex. A at ¶ 3; Ex. E.

B. Relief to the Settlement Class

The Settlement consists of a non-reversionary Settlement Amount of $300,000, equal to an average gross distribution of at least $2,222.22 per person (Goldsmith Decl., at ¶¶ 9-10), to be distributed among:

- 135 Class Members (inclusive of Plaintiff) (Ex. A, at ¶ 3);
- attorneys' fees and costs representing a fraction of Plaintiff's lodestar, not to exceed $100,000.00 in fees (one-third of the Settlement Fund) (Ex. A, at ¶ 6; Goldsmith Decl. at ¶ 11), plus $4,490.18 in costs (*id.*);
- administrative costs not to exceed $22,800 (for multiple rounds of settlement payments), to be paid to Rust, an experienced settlement administrator, which the Parties selected after comparing bids from several well-known administrators (Ex. A, at ¶¶ 14; Goldsmith Decl., at ¶ 12);
- a representative service award for and payment for a general release from Plaintiff Claude De'Silva of $10,000 (Ex. A, at ¶ 7); and,
- a $3,000 allocation to PAGA claims, with 75% ($2,250) paid to the Labor & Workforce Development Agency ("LWDA") under Labor Code § 2699(i) (Ex. A, at ¶ 11).

Settlement payments will be considered to be unpaid civil and statutory penalties. Ex. A at ¶ 4.

After attorneys' fees and costs, administrative costs, the service award/payment for general release, and the government portion of the PAGA settlement are subtracted from the Settlement Amount, a net Settlement amount of approximately $160,459.82 (assuming no further out-of-pocket costs are incurred) will be available to the Class, for an average net distribution of $1,188.59 per Class Member. Goldsmith Decl., at ¶ 10.

Class Members will get Notice by first-class mail and email, and they will have an opportunity to contest the workweek data underlying their allocation estimates, and to object to or opt out of the settlement. Ex. A, at ¶ 13. Due to Defendant's financial difficulties, as discussed in detail below, upon final approval, Defendant will make quarterly payments into the settlement fund in order to comply with its financial obligations under the Settlement Agreement. Defendant will pay: (a) $75,000 into the settlement fund within 90 days after the Court approves the Settlement; then, (b) $25,000 quarterly (every three months) until the Settlement is totally funded. The first Settlement payments to Class Members will be made within 30 days of the settlement fund reaching $100,000. The second Settlement payments will be made within 30 days of the settlement fund reaching $200,000. The third Settlement payment will be made within 30 days of the final payment into the settlement fund (as in, when the settlement fund reaches $300,000). Ex. A, ¶ 5(a). Each Class Member's share will be based on that Class Member's number of workweeks during the applicable class period. *Id*., at ¶ 10. The second round of settlement payments will be distributed only to those Class Members who cashed their checks from the first round of settlement payments; likewise, the third round of settlement payments will be distributed only to those Class Members who cashed their checks both of the previous two rounds of settlement payments. *Id.* at Addendum. The amount of any checks that remain uncashed after ninety (90) calendar days will be allocated to Legal Aid at Work, a suitable *cy pres* recipient, in compliance with California Code of Civil Procedure Section 384. *Id.*, at ¶ 10. None of the $300,000 settlement fund reverts to Defendants. *Id.*, at ¶ 3. By participating in the Settlement, Class Members agree to a release tailored to the wage-hour claims at issue in the lawsuit, while named Plaintiff De'Silva agrees to a general release and dismissal of claims, for which they are paid additional consideration. *Id.*, at ¶¶ 7 (Plaintiff's general release of claims), 8 (Class's tailored release of claims).

IV. THE COURT SHOULD GRANT PRELIMINARY APPROVAL.

A. The Settlement is the Presumptively Fair Product of Arm's-Length Negotiations.

When considering approval of a class action settlement, California courts recognize "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; [and] (3) counsel is experienced in similar litigation." *Wershba*, 91 Cal.App.4th at 245. The Settlement here is the

result of very lengthy, arm's-length negotiation between experienced attorneys familiar with wage and hour class action litigation in general and with the legal and factual issues of this case. *See* Goldsmith Decl. at ¶¶ 4-8. In the nearly four years since litigation commenced in this matter, the parties gained ample familiarity with the matters in dispute, having engaged in formal discovery, including three sets of document requests from Plaintiff, extensive exchange informally for mediation, and a deposition of the PMK for Independence Logistics/the company's owner, co-Defendant, Kareem. *Id.* at ¶ 4. Plaintiff's Counsel supports the Settlement as fair, adequate, and reasonable. *Id*. at ¶ 8. The Settlement is presumptively fair.

B. The Legal Standard Favors Approval.

The Court has broad discretion to approve a settlement the Court determines is "fair, adequate, and reasonable" in light of the circumstances of the case. *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 407. At this stage, the Court must merely find the settlement falls within the range of possible final approval. *Wershba v. Apple Comp., Inc.* (2001) 91 Cal.App.4th 224, 234-235. In evaluating a settlement, courts consider several relevant factors including:

> [T]he 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, [and] the presence of a governmental participant.

Kullar v. Foot Locker Retail, Inc. (2010) 168 Cal.App.4th 116, 128. At preliminary approval, the Court should compare the outcome achieved in settlement to "the realistic range of outcomes of the litigation," not the theoretical maximum value of the case. *Munoz*, 186 Cal.App.4th at 408-09.

C. Risks Concerning Defendant's Viability and of Further Litigation Support the Deal.

Defendants' financial insecurity, in addition to ordinary litigation risks, provides a strong incentive for the Parties to settle, as described below.

1. The Company's Insolvency Favors this Settlement.

Even before the current pandemic and its devastating impact on the economy, which threatens the viability of many businesses, Defendants were already in a precarious financial position. Defendants ceased doing business as a subcontractor for FedEx in around March 2020. *See* Goldsmith Decl. at ¶ 4. In addition, Defendants have provided Plaintiff with documentation of individual Defendant Kareem's

personal finances as of October 2020. Goldsmith Decl. at ¶ 4. This documentation suggests that Plaintiff and the Class may not have been able to obtain any recovery had this matter proceeded to trial due to Defendants' financial outlook. *Id*. at 4. In the event of successful litigation, Plaintiff and the Class also risked further delay in potential bankruptcy or collections proceedings. *Id*. at 4. That the Class is able to recover at all, especially given that the Class consists entirely of individuals who have not worked for Defendants for over three years, demonstrates that this Settlement Agreement is an excellent result in the circumstances.

The Court should consider Defendants' financial uncertainty in approving this settlement. *See, e.g.*, *Lane v. Facebook, Inc.* (9th Cir. 2012) 696 F.3d 811, 823 (rejecting objector's challenge to class action settlement where the lower court "meaningfully accounted for potential value of members' claims . . . and noted risks of bringing such claims to trial, and evidence indicated that one of defendants that could be subject to liability under [a particular theory] was on verge of bankruptcy."); *Torrisi v. Tucson Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1376 ("Here one factor predominates to make clear that the district court acted within its discretion [approving the class settlement]. That factor is [the defendant's] financial condition."). Particularly in light of the pandemic's impact on so many workers in this economy, sure money is worth more to Class Members than any time in recent memory.

2. Risks Related to the Class Members' Claims Also Favor the Settlement.

Defendants maintain they complied with the wage and hour laws at issue in this case. *See generally* Defendants' October 9, 2019, Answer to Plaintiff's Amended Complaint ("Defendants' Answer"). Plaintiff disagrees. Nevertheless, the Class faces the risk of non-recovery.

For example, Defendants may contend that they provided 24 hours of paid sick leave to each Class Member each year. Plaintiff would contest this factual allegation. Regardless, Plaintiff would argue that San Francisco's Paid Sick Leave Ordinance would require 72 hours of accrued sick leave, not 24. (*See* SF Admin. Code §12W.3(d).) Although Plaintiff is confident that Defendants' arguments as to this issue would fail, Plaintiff nonetheless ran the risk of losing at least a significant portion or even the entirety of damages, if the Court were to accept Defendants' position.

Plaintiff also faced hurdles in demonstrating the extent of their overtime damages and withheld uninterrupted meal and rest break period premiums. Although some damages might be established

through the payroll information exchanged in informal discovery, some of these damages concern Class Members' work time and meal and rest breaks that were never properly recorded. The extent to which many Class Members would be available to offer proof of violations – or would be in a position to offer compelling testimony or evidence, more than three years after the wage violations ostensibly occurred – is dubious.

3. Defendants' Possible Good-Faith Defense Supports this Settlement.

Even if Plaintiff were to prevail on his wage and hour claims, an award of full penalties, including PAGA penalties, depends on the failure of Defendants' good-faith defense. *See, e.g.*, *Cotter v. Lyft, Inc.* (N.D. Cal. 2016) 193 F.Supp.3d 1030, 1037 (lack of willfulness evidence warrants PAGA penalty reduction).[1] Plaintiff faced the risk of the Court drastically reducing penalties.

4. Certification-Related Risks Support Approval.

Class Members faced the prospect that their underlying class claims would not be certified, due to the lack of policies denying such compensation, and the lack of probative records. In particular, Defendants maintain that they had no common policies requiring Class Members to work more than eight hours a day or forty hours a week such that they would accrue overtime, or to withhold overtime compensation from Class Members when they worked overtime. Defendants may further maintain that no common policy to deny Class Members sick leave to which they are lawfully entitled, or to prevent Class Members from taking compliant meal and rest periods.

D. The Settlement Provides Substantial Relief for Class Members.

Notwithstanding Defendants' financial circumstances, and the challenges Plaintiff faces in certifying a class through trial and overcoming Defendants' defenses, the Settlement commits Defendants to pay $300,000. Ex. A, at ¶ 3. The Settlement provides these funds on a set timeline, avoiding the risks and delay of continued litigation and possible appeals, vindicating California's public policy strongly

[1] *See also, e.g.*, *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 (PAGA claim fails if Lab. Code Section 203 claim fails); *Nordstrom Com'n Cases* (2010) 186 Cal.App.4th 576, 589 (court could approve settlement allocating $0 to PAGA where employer had good faith basis to believe compensation scheme was lawful); *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 325 (good faith belief in legal defense precludes willfulness finding necessary for waiting time penalties); Ex. B (Statement of Decision in *Sanchez v. McDonald's Rests. of Cal.* (*McDonald's*) (L.A. Sup. Ct. Jul. 6, 2017) Case No. BC499888, 24-25 (denying PAGA penalties after bench trial, finding willfulness insufficiently established).

favoring the prompt payment of wages. *See McLean v. State* (2016) 1 Cal.5th 615, 626 (championing the timely payment of employee wage claims because "of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family) (internal citations and quotation marks omitted).

Plaintiff's Counsel estimates the $300,000 Settlement Amount represents roughly 39.78% of the total, best-day recovery, before PAGA penalties. *See* Goldsmith Decl., at ¶ 14. This favors Settlement approval. *See, e.g.*, *Uschold v. NSMG Shared Services, LLC* (N.D. Cal. 2019) (approving class action settlement of "approximately 19.4% of the high-end estimate of potential damages"); *Bellinghausen v. Tractor Supply Co.* (N.D. Cal. 2015) 306 F.R.D. 245, 256 ("between 27 percent and 11 percent"); *In re Omnivision Technologies, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036, 1042 ("just over 9%").

E. The Manner of Distribution is Fair.

The use of workweeks to determine allocations is fair. *See* Ex. A, at ¶ 10. Class Members were paid similarly, performed similar job responsibilities for Defendants, and were subject to the same compensation practices, making this the fairest approach. *See, e.g.*, *Ferrell v. Buckingham Prop. Mgmt.* (E.D. Cal. Jan. 21, 2020) 2020 WL 291042 (approving calculation of allocations by workweeks).

F. The LWDA Has Taken No Action Regarding This Case.

Plaintiff first exhausted his PAGA claims with the LWDA on March 22, 2017, and submitted the Settlement Agreement to the LWDA for review on January 19, 2021, pursuant to Labor Code 2699(l)(2). Goldsmith Decl., at ¶ 15. The LWDA's silence favors approval, where Plaintiff obtained some compensation under PAGA, shared with the State. *See Ontiveros v. Zamora* (E.D. Cal. 2014) 303 F.R.D. 356, 371.

G. The Stage of the Proceedings Supports Approval.

As noted above, this matter has undergone over three and a half years of litigation, including extensive formal and informal discovery, including discovery regarding Defendants' financial circumstances, and a year and a half of settlement negotiations. Due to the lengthy litigation history and documentation in this matter, Plaintiff's Counsel evaluated the strengths of Class Members' claims, Defendants' possible defenses, and litigation risks. Goldsmith Decl., at ¶ 16. Thus, Plaintiff is well positioned to assess the settlement value of this action.

H. The *Cy Pres* Recipient is Appropriate.

Plaintiff intends to seek approval of Legal Aid at Work as the *cy pres* recipient. Goldsmith Decl., at ¶ 17; Ex. A at ¶ 10. Legal Aid at Work is a leading non-profit organization that provides legal services to low-wage workers in California. Goldsmith Decl., at ¶ 17. In non-reversionary settlements, funds that remain unclaimed by the class should be distributed "to the fullest extent possible, in a manner designed either to further the purposes of the underlying class action or causes of action, or to promote justice for all Californians." Code Civ. Pro. § 384; *In re Microsoft-V Cases* (2006) 135 Cal.App.4th 706, 722. The Court should distribute unclaimed funds to Legal Aid at Work because such would "serve the public interest or the interest of the class." Code Civ. Pro. § 384(b)(1).

I. The Proposed Service Payments to the Named Plaintiff is Justified.

Plaintiff will seek a reasonable Class Representative service award of $10,000 for Plaintiff De'Silva for his work performed on behalf of the Class and for the broad release he is providing as a component of the Settlement Agreement. Ex. A, at ¶ 7. This amount is reasonable, especially since he is the only Class Representative, without whose courage in stepping forward, and efforts in support of this action, no one would have recovered at all. *See e.g.*, *Singer v. Becton Dickinson & Co.* (S.D. Cal. June 1, 2010) 2010 WL 2196104, at *9 (awarding $25,000 to the class representative for 2.5 years of service resulting in a $1 million settlement); *Vedachalam v. Tata Consultancy Servs., Ltd*. (N.D. Cal. July 18, 2013) 2013 WL 3929129, at *2 ($25,000 to Class Representatives); *Glass v. UBS Fin. Servs.*, Inc. (N.D. Cal. Jan. 26, 2007) 2007 WL 221862, at *16 ($25,000 to each named plaintiff); *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995), 901 F. Supp. 294, 299 ($50,000 to lead plaintiff); *Lopez v. Uber Tech., Inc.* (N.D. Cal. Nov. 14, 2018) 2018 WL 5982506 ($50,000 and $30,000 to two named plaintiffs); *Willix v. Healthfirst, Inc.* (E.D. N.Y. Feb. 18, 2011) 2011 WL 7548628 ($30,000, $15,000 and $7,500)..

"[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class" *Munoz*, 186 Cal.App.4th at 412. Plaintiff cooperated extensively with Class Counsel to represent Class Members. In support of final approval, Plaintiff's Counsel intends to file a declaration from Plaintiff detailing the hours he spent over the past years of litigation and preparing for litigation speaking to counsel about his claims, gathering evidence and providing counsel with supporting

documentation, reviewing pleadings, attending settlement conferences, reviewing the Memorandum of Understanding, and in other ways advancing the Class's interests. Goldsmith Decl., at ¶ 18. This payment recognizes the time and effort Plaintiff invested in assisting Counsel with the investigation, prosecution, and settlement of the case and accepting the risk of an adverse result. *Id.*, at ¶ 18. Undersigned counsel believes $10,000 is the minimum enhancement that would viably promote the public policy interest of encouraging those with wage and hour claims to assert them, despite associated fears. Goldsmith Decl., at ¶ 18. *See Gentry v. Sup. Ct.* (2007) 42 Cal.4th 443, 459-461, *abrogated on other grounds* (employees often fear retaliation for pursing employment claims). Plaintiff also deserves additional compensation for his general release. *See, e.g.*, *Bellinghausen*, 306 F.R.D. at 266.

J. The Attorneys' Fees and Expenses are Justified.

This settlement vindicates Plaintiffs and the Class as to violations subject to fee-shifting provisions, under the California Code (Cal. Lab. Code §§ 1194(a), 218.5, 2699(g), and Code of Civil Procedure §1021.5). "In fee-shifting cases, requests for attorney fees are typically measured under the lodestar method." *See Roos v. Honeywell Internat., Inc.* (2015) 241 Cal.App.4th 1472, 1490, *disapproved of on other grounds, Hernandez v. Restoration Hardware* (2018) 4 Cal.5th 260).

Under the lodestar method, the court begins with "the reasonable hours spent, multiplied by the hourly prevailing rate for private attorneys in the community conducting non-contingent litigation of the same type." *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1133. Courts observe "a 'strong presumption' that the lodestar figure is reasonable." *Kerkeles v. City of San Jose* (2015) 243 Cal. App. 4th 88, 100. The Court has a duty "to compensate counsel at the prevailing rate in the community for similar work; no more, no less." *Id*. (quoting *Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1111). The California Supreme Court has noted that "the purpose behind statutory fee authorizations—*i.e.*, encouraging attorneys to act as private attorneys general and to vindicate important rights affecting the public interest—will often be frustrated, sometimes nullified, if awards are diluted or dissipated by lengthy, uncompensated proceedings to fix or defend a rightful fee claim." *Ketchum*, 24 Cal.4th 1122 at 1133- 34. Thus, "fee awards should be fully compensatory." *Id.* at 1133. As the *Kerkeles* Court of Appeal held, quoting the Ninth Circuit:

> [L]awyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where [the] plaintiff's lawyer engages in churning. By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.

Id., 243 Cal. App. 4th at 104 (quoting *Moreno, supra,* at p. 1112).

As of this filing, Plaintiff's Counsel has accrued $264,320 in attorneys' fees, without any compensation to date. The fee request of $100,000 set forth in the Settlement Agreement is therefore 0.38, a tiny fraction of the accrued fees. This multiplier is around 10 times smaller than other multipliers approved by California courts. *See, e.g.*, *Lealao*, 82 Cal.App.4th at 26, 49-54 (reversing trial court denial of new trial as to fees where court denied 3.5 multiplier in class action where average class member recovery was "over $2,000"); *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255, *disapproved of on other grounds* (multipliers "can range from 2 to 4, or even higher"). This multiplier will only decrease as Plaintiff's Counsel performs further work through final approval and distribution.

The lodestar approach (as well as the percentage-of-the-common-fund approach, which Plaintiffs do not recommend here) aims to give a reasonable fee to compensate counsel for their efforts. *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal. 5th 480, 504. Plaintiff's Counsel would be entitled to a positive multiplier, given the length and risks associated with the above-captioned litigation, reflecting the full lodestar plus a contingency multiplier. The Court should not hesitate to grant Plaintiff's Counsel's modest fee request, involving a reduction from the lodestar of more than 50%. *See Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) ("a negative multiplier . . . suggests that the negotiated fee award is a reasonable and fair valuation of the services rendered to the class by class counsel."

V. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT.

PAGA settlements must be reviewed and approved by the Court. Lab. Code § 2699(*l*)(2). Neither the Act nor binding state court decisions squarely address the PAGA settlement standard of review. *Flores v. Starwood Hotels & Resorts Worldwide, Inc.* (C.D. Cal. 2017) 253 F. Supp. 3d. 1074, 1075.

Wage claim settlements must be considered in the context of "the overall settlement of the case" and need not allocate any amount to PAGA penalties. *Nordstrom Com'n Cases*, 186 Cal.App.4th at 589.

Courts that have done extensive analysis of the value of PAGA claims have tended to apply a "sliding scale" approach to considering settlements that contain both class and representative PAGA claims that permits a small award of PAGA penalties, where the settlement for the "class is robust" and "not only vindicates the rights of [] class members as employees, but may have a deterrent effect upon the defendant [] and other employers, an objective of PAGA." *Viceral v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016) 2016 WL 5907869, at *9; *O'Connor v. Uber, Inc.* (N.D. Cal. Aug. 18, 2016) 201 F. Supp. 3d 1110, 1134-35.

Here, the Settlement is fair and would have a deterrent effect on employers, as it requires them to pay meaningful monetary damages, under the circumstances. The $3,000 penalty allocation (1% of the Settlement Amount) is appropriate.[2] In *Nordstrom*, the Court of Appeal affirmed an allocation of $0 to PAGA claims, under this test. *Id.*, 186 Cal.App.4th at 589.

Valuation of PAGA claims must be considered in light of the substantial risk of losing, or diminution in value of the claims at trial. Labor Code Section 2699(e) provides that a court has discretion to award PAGA penalties and to determine the amount of penalties to award. *See also Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157 (PAGA penalties imposed may be subject to reduction by trial court; increased penalty "for subsequent violation" only triggered after employer has notice of violation). After the 2017 *McDonald's* trial, plaintiffs won just $700,270 in PAGA penalties, which their expert valued at $41 million. *See* Ex. B, at 24-25; Ex. C (June 12, 2017, *Daily Journal* article concluding "McDonald's won" after PAGA trial). That *McDonald's* plaintiffs achieved less than 2% of claimed PAGA penalties, after a full trial, warrants discounting the PAGA allocation at this stage in the case.

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[2] The one percent allocation is reasonable as compared to the ratios approved for similar class actions with PAGA components. *See, e.g.*, *Viceral*, 2017 WL 661352, at **1, 3 (approving PAGA penalties worth 0.33% of gross settlement amount, where plaintiffs faced risks of non-recovery on their PAGA claims). *See also, e.g.*, *Rodriguez v. Kraft Foods Grp.* (E.D. Cal. Oct. 5, 2016) 2016 WL 5844378, at **2, 6 (0.43%); *Alexander v. Fedex Ground Pkg. Sys., Inc.* (N.D. Cal. Apr. 12, 2016) 2016 WL 1427358, at *2 (0.7%); *Vazquez v. USM Inc.* (N.D. Cal. Feb. 16, 2016) 2016 WL 612906, at *1 (0.67%); *Davis v. Brown Shoe Co., Inc.* (E.D. Cal. Nov. 3, 2015) 2015 WL 6697929, at *3 (0.33%); *Cruz v. Sky Chefs, Inc.* (N.D. Cal. Dec. 19, 2014) 2014 WL 7247065, at *3 (0.57%); *Garcia v. Gordon Trucking, Inc.* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, at *3, 7 (0.27%).

Here, in light of the wage recovery, under difficult circumstances, the Court should approve the 1% PAGA allocation.

VI. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS.

A. The Proposed Settlement Class is Ascertainable and Numerous.

A class is "ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself as having a right to recover." *Harper v.* 24 *Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 977. Here, the class definition precisely defines who is entitled to relief, with a list of 135 already-identified Class Members who are covered. Ex. A, at ¶ 3; Ex. E. Thus, the Class is numerous. Goldsmith Decl., ¶ 9; Cal. Code Civ. Proc. § 382. *See Rose v. City of Hayward*, 126 Cal. App. 3d 926, 934 (1981) (numerosity with 42 class members; examples with classes of as few as 10, 28, and 44 members).

B. Commons Issues of Law and Fact Exist.

The commonality requirement is met if there are questions of law or fact common to the class. *Williams v. Sup. Ct.* (2013) 221 Cal.App.4th 1353, 1369 (a single common question can create commonality). When determining commonality, "the focus must be on the policy the plaintiffs are challenging and whether the legality of that policy can be resolved on a class-wide basis." *ABM Indus. Overtime Cases* (2017) 19 Cal.App.5th 277. Here, common, predominant questions exist, as to whether Defendants maintained policies depriving their drivers and of SF sick leave, overtime pay, meal and rest breaks, owed compensation at the time of termination, and related claims. *See id*. at 310. *See also* FAC, ¶ 28 (listing common questions).

C. Plaintiff is Typical of the Class.

Plaintiff's claims are typical of the Class's claims because Plaintiff "possess[es] the same interest and suffer the same injury as the class members." *J.P. Morgan & Co. Ins. v. Sup. Ct.* (2003) 113 Cal.App.4th 195, 212; *Caro v. Proctor & Gamble Co.* (1993) 18 Cal.App.4th 644, 663-664 (typicality equates to membership in the proposed class). Plaintiff performed the same parcel delivery services as all Class Members and was subject to the same compensation and meal and rest break practices, so he is typical. *See Torchia v. W.W. Grainger, Inc.* (E.D. Cal. 2014) 304 F.R.D. 256, 266 (plaintiff typical of

wage and hour class where "she worked under the same wage and hour policies as other Class Members.").

D. Plaintiff and Counsel Are Adequate to Represent the Class.

Plaintiff and Class Counsel satisfy the two requirements to demonstrate adequacy: (1) the named representative is represented by counsel qualified to conduct the pending litigation; and (2) the named representative's interests are not antagonistic to the Class's. *See Richmond v. Dart Indus. Inc*. (1981) 29 Cal.3d 462, 470. First, Plaintiff retained counsel experienced in wage and hour class litigation, who have demonstrated their commitment to litigating the case vigorously on behalf of the Class. Goldsmith Decl., at ¶¶ 23-24. Second, Plaintiff himself is adequate. Plaintiff was informed and accepted the responsibility of performing the fiduciary duties which class representatives owe the members of the class. *Id.* at ¶ 18. Plaintiff has diligently and responsibly represented the class in this litigation, actively participating in the prosecution of this case. *Id.*, at ¶¶ 18-19. Plaintiff has no apparent conflicts with the Class Members. *Id.*

E. Common Issues Predominate.

"[A] lesser standard of scrutiny is used for settlement cases," when considering the predominance of common issues.. *Glob. Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 859.The test for determining predominance of common issues is whether the proposed class is sufficiently cohesive to warrant class-wide adjudication. *Jimenez-Sanchez v. Dark Horse Express, Inc.* (2019) 32 Cal.App.5th 224, 233-34. Plaintiff alleges, and maintains that discovery throughout conducted in the course of litigation indicates, that Defendants had a policy and practice of depriving Class Members of earned overtime, uninterrupted meal and rest breaks, SF sick leave pay, and owed compensation at the time of termination. FAC, at ¶ 28.

Class resolution is superior to other methods of adjudication. *See Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1807 n.19. Here, the methods of adjudication alternative to class adjudication would be repetitive individual cases relying on the same facts and legal argument, amounting to a waste of judicial resources. *See Sav-On Drug Stores, Inc. v. Sup. Ct.* (2004) 34 Cal.4th 319, 340. Using the class device will provide efficient redress for many drivers who were subject to Defendants' uniform violations of wage and hour laws, underscoring the propriety of class-wide resolution. *See, e.g.*, *ABM Indus.*, 19 Cal.App.5th at 310-11.

VII. THE PROPOSED NOTICE AND METHOD OF DISTRIBUTION ARE PROPER.

The Court must determine that a proposed notice to the class of the Settlement's terms and fairness hearing are worthwhile. *Wershba*, 91 Cal.App.4th at 234-235. Here, the proposed Class Notice fairly apprises the Class of the Settlement's terms and the options to participate in, object to, or opt out of the settlement, and includes disclosures required by California Rules of Court, Rule 3.766. *See* Ex. D (a copy of the proposed notice).

California law vests courts with discretion to fashion a notice plan, that provides a "reasonable chance of reaching a substantial percentage of the class[.]" *See Cartt v. Sup. Ct.* (1975) 50 Cal.App.3d 960, 973-974; Cal. R. Ct., R. 3.766(f). The Parties believe that conveying the class notice to Class Members both via regular mail and email will likely prove effective in reaching Class Members. *See* Ex. A, at ¶ 13; Goldsmith Decl., at ¶ 26.

VIII. THE FINAL APPROVAL HEARING SHOULD BE SCHEDULED

Plaintiff requests that the Court schedule the Final Fairness Hearing within 90 days of its preliminary approval order. CRC 3.769(e).

IX. CONCLUSION

For the reasons above and in the documents filed with this Motion, Plaintiff submits that the Settlement is fair, adequate, reasonable, and in the best interests of Class Members. Plaintiff requests the Court: (1) preliminarily approve the Settlement; (2) preliminarily certify the Class for purposes of settlement only; (3) approve the form, content, and method of distribution of the Notice; (4) appoint Rust as the Settlement Administrator; (5) appoint Plaintiff Claude De'Silva as Class Representative; (6) appoint Bryan Schwartz Law as Class Counsel; (7) dismiss Zahoor Kareem without prejudice as a defendant in this matter; and (8) set a Final Approval Hearing date.

Date: February 3, 2021

BRYAN SCHWARTZ LAW

By: */s/ Samuel L. Goldsmith*
Samuel Lorraine Goldsmith
Attorney for Plaintiff on behalf of himself and others similarly situated