CIVIL COMPLEX CENTER

DEPARTMENT CX103

Judge Lon F. Hurwitz

Procedural guidelines for several types of motions and dismissals handled regularly in this department are set forth here. The guidelines appear after the Tentative Rulings.

TENTATIVE RULINGS

Date: SEPTEMBER 15, 2023

Time: 1:30PM

The Court will hear oral argument on all matters at the time noticed for the hearing. If you would prefer to submit the matter on your papers without oral argument, please advise the clerk by emailing her as soon as possible. The email should be directed to CX103@occourts.org. When sending emails to the department, make sure to CC ALL SIDES as to avoid any sense of ex parte communication. The Court will not entertain a request for continuance nor filing of further documents once the ruling has been posted.

If appearing **remotely** on the date of the hearing, log into ZOOM through the following link and follow the prompts**:**

https://www.occourts.org/media-relations/remotehearings.html

OTHER INFORMATION ABOUT THIS DEPARTMENT

HEARING DATES/RESERVATIONS: Except for Summary Judgment and Adjudication Motions, **no reservations are required for Law and Motion matters**. Call the Clerk to reserve a date for a Summary Judgment or Adjudication Motion. Regarding all other motions, the parties are to include a hearing date (Friday at 1:30PM) in their motion papers. The date initially assigned might later be continued by the Court if the assigned date becomes unavailable for reasons related to, among other things, calendar congestion.

COURT REPORTERS AND TRANSCRIPTS: Court reporters are not available in this department for *any* proceedings. Please consult the Court's website at www.occourts.org concerning arrangements for court reporters. If a transcript of the proceedings is ordered by *any* party, that party must ensure that the Court receives an electronic copy by email as mentioned above.

SUBMISSION ON THE TENTATIVE

If a tentative ruling is posted and **ALL** counsel intend to submit on the tentative without oral argument, please advise the clerk by emailing the department at **CX103@occourts.org** as

soon as possible. When sending emails to the department, make sure to **CC ALL SIDES** as to avoid any sense of ex parte communication. If all sides submit on the tentative ruling and so advise the court, the tentative ruling shall become the court's final ruling and the prevailing party shall give Notice of Ruling. If there is no submission or appearance by either party, the court will determine whether the matter is taken off calendar or will become the final ruling.

ORDERS
The court's minute order will constitute the order of the court and no further proposed orders must be submitted to the court unless the court or the law specifically requires otherwise. **Where an order *is* specifically required by the court** or by law, the parties are required to do so in accordance with California Rules of Court, rule 3.1312(c) (1) and (2).

BOOKMARKS
Bookmarking of exhibits to motions and supporting declarations - **The court requires strict compliance with CRC, rule 3.1110 (f) (4)** which requires electronic exhibits to include electronic bookmarks with the links to the first page of each exhibit, and with bookmarked titles that identify the exhibit number or letter and briefly describe the exhibit. CRC, rule 3.1110 (f) (4).

The court may continue a motion that does not comply with rule 3.1110 (f) (4) and require the parties to comply with that rule before resetting the hearing.

SEPTEMBER 15, 2023

#		Tentative
1	**20-01145687** **Ontiveros vs. Jellco Container Inc.**	**Final Accounting** The deadline for Class Members to cash their checks was June 12, 2023—180 days after issuance. [Admin. Decl., ¶ 11.] As of September 1, 2023, 12 settlement checks totaling $14,612.54 remain uncashed. In accordance with the Settlement Agreement, the requisite paperwork to report the unclaimed funds has been submitted to the State Controller's Office – Unclaimed Property Fund. [Id., ¶ 12.] However, the Administrator does not state if or when the unclaimed funds have been disbursed to the State Controller's Office. **RULING:** The Final Accounting hearing is **CONTINUED** to October 27, 2023, at 1:30 p.m. in Department CX103 so that the settlement administrator can file a supplemental declaration attesting that the uncashed funds have been disbursed to the State Controller's Office. Counsel must file the settlement administrator's supplemental declaration no later than ten (10) calendar days prior to the continued hearing date. If it is clear that the uncashed funds will not be disbursed to the State Controller's

		Office prior to the continued hearing date, counsel must contact the Court to request a continuance of the hearing. Plaintiff to give notice of the Court's ruling. The Court does not require any physical or remote appearance at the hearing scheduled for September 15, 2023.
2	**18-01019945** **Porter vs. AW Management, LLC,**	**Final Accounting** **RULING:** Since all distribution efforts are fully concluded, the final report is **APPROVED**, and the Court's file is closed. The Court does not require any physical or remote appearance at the hearing scheduled for September 15, 2023. Please inform the clerk by emailing her before 12:00 p.m. on the date of the hearing at CX103@occourts.org if both parties intend to submit on the tentative.
3	**19-01112030** **Johnson vs. Case Barnett Law Corporation**	**Final Accounting** The Administrator attests that two settlement checks totaling $212.96 remained uncashed after the check cashing deadlines. [Admin Decl., ¶ 12.] The Administrator further attests that on April 12, 2023, in accordance with the Settlement Agreement, paperwork to report the uncashed funds was sent to the State Controller's Office of Unclaimed Property. The Administrator will hold the funds for one year from the date of submission of the paperwork to the State Controller. The Administrator estimates that all unclaimed funds will be distributed to the State's Unclaimed Property Division in or around April 2024. [Id., ¶ 13.] **RULING:** The Final Accounting Hearing is **CONTINUED** to May 10, 2024, at 1:30 p.m. in Department CX103 so that the Settlement Administrator can complete administration of the settlement. Plaintiff must file a supplemental administrator's declaration no later than ten (10) calendar days prior to the continued hearing date. Plaintiff to give notice of the Court's ruling, including to the LWDA, within five (5) calendar days of the hearing. The Court does not require any physical or remote appearance at the hearing set for September 15, 2023.

4	**23-01309066** **Dodson vs. Leaffilter North, LLC**	**1. Motion to Appear Pro Hac Vice (Joseph R. Blalock)** **2. Motion to Appear Pro Hac Vice (Yelena Katz)** **<u>RULINGS:</u>** **The Application of Joseph R. Blalock to Appear Pro Hac Vice is GRANTED.** **The Application of Yelena Katz to Appear Pro Hac Vice is GRANTED.** Moving parties are ordered to give notice and file proof of service within five (5) calendar days of this Order. The Court does not require any physical or remote appearance at the hearing scheduled for September 15, 2023.
5	**22-01292639** **PIRIZ vs. CARECAR, INC.**	**1. Motion to Compel Arbitration** **2. Case Management Conference** **<u>Motion to Compel Arbitration</u>** RELIEF SOUGHT: Defendant CareCar, Inc. moves for an order compelling arbitration of all causes of action in the First Amended Complaint of Plaintiff Olga Page Piriz, and staying all proceedings pending the outcome of arbitration. UPCOMING EVENTS: None **FACTS/OVERVIEW**: This is a putative wage-and-hour class action. On November 21, 2022, Plaintiff Olga Page Piriz, individually and on behalf of all others similarly situated ("Plaintiff"), filed a Complaint against Defendant CareCar, Inc. ("Defendant"). (ROA 2). The Complaint alleges eight causes of action for: 1. Failure to Pay Minimum Wages; 2. Failure to Pay Overtime Wages; 3. Failure to Provide Meal Periods; 4. Failure to Permit Paid Rest Breaks; 5. Failure to Pay Wages Upon Separation of Employment and Within the Required Time; 6. Failure to Provide Accurate Itemized Wage Statements; 7. Failure to Reimburse Necessary Business Expenses; and

		8. Violation of Bus. & Prof. Code §§ 17200, et seq. On March 14, 2023, as a matter of right, Plaintiff filed the operative First Amended Complaint ("FAC"), which added a ninth cause of action for Enforcement of Labor Code § 2698 et seq. ("PAGA"). (ROA 14). Defendant is a ride-share company that provides drivers for non-emergent transportation to health-related destinations and other personal care services. Plaintiff worked as a driver for Defendant, and alleges that she and other drivers were misclassified as independent contractors. The proposed Class is defined as: "All California citizens who performed driver work for Defendants in the State of California, who were misclassified as independent contractors from May 17, 2018 to the date of class certification." [FAC, ¶ 17.] Plaintiff also seeks to certify a Waiting Time Subclass. On May 17, 2023, Defendant filed the current Motion to Compel Arbitration and Stay Proceedings. (ROA 30). Plaintiff opposes the motion (ROA 48), and Defendant replies (ROA 56). **CONTENTIONS AND ANALYSIS**: <u>Statement of the Law</u> Under Code of Civil Procedure section 1281.2, a party to an arbitration agreement may move to compel arbitration if another party to the agreement refuses to arbitrate. A party moving to compel arbitration under Section 1281.2 must prove by a preponderance of the evidence that: (1) The parties entered into a written agreement to arbitrate; and (2) one or more of the claims at issue are covered by that agreement. (Code Civ. Proc., § 1281.2; Villacreses v. Molinari (2005) 132 Cal.App.4th 1223, 1230.) If the moving party meets this burden, the burden shifts to the resisting party to prove by a preponderance of evidence a defense to enforcement of the agreement. (Id., at p. 1230.) California law favors the enforcement of valid arbitration agreements. (Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal.3d 312, 320; In re Tobacco I (2004) 124 Cal.App.4th 1095, 1103.) Any doubts to arbitration will be resolved against the party asserting a defense to arbitration, whether the issue is construction of contract language, waiver, delay or any other defense to arbitrability. (Erickson, supra, 35 Cal.3d at p. 320; In re Tobacco I, supra, 124 Cal.App.4th at p. 1103.) <u>Merits</u> In resolving petitions to compel arbitration, courts must first determine whether the agreement exists—i.e., whether the parties actually entered into a valid contract agreeing to arbitrate certain disputes—and whether it is enforceable. (Pinnacle Museum Tower Ass'n v. Pinnacle Market Develop. (US), LLC (2012) 55 Cal.4th 223, 236.) The moving party has the initial burden to prove the existence of an agreement to arbitrate by either reciting verbatim or

		providing a copy of the alleged agreement. (CRC, rule 3.1330; Condee v. Longwood Mgmt. Corp. (2001) 88 Cal.App.4th 215, 219.) If the moving party meets its initial burden and the opposing party disputes the existence of the agreement, then "the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement." (Gamboa v. Northeast Community Clinic (2021) 72 Cal.App.5th 158, 165.) The opposing party may do this by declaring under penalty of perjury that the party never saw or does not remember seeing the agreement, or that the party never signed or does not remember signing the agreement. (Ibid.; see also, Bannister v. Marinidence Opco, LLC (2021) 64 Cal.App.5th 541, 546; Espejo v. Southern California Permanente Medical Group (2016) 246 Cal.App.4th 1047, 1054.) If the opposing party meets its burden, then the burden shifts back to the moving party to establish with admissible evidence the existence of a valid arbitration agreement. "The burden of proving the agreement by a preponderance of the evidence remains with the moving party." (Gamboa, supra, 72 Cal.App.5th at pp. 165-166.) Here, Defendant states that Plaintiff is not an employee of the company, but began providing contracted services as a driver in January 2022, and signed a "Service Provider Addendum" on January 21, 2022. [Motion, Exh. A.] The Service Provider Addendum expressly states that it is "An Addendum To The Terms of Use Agreement Between You and CareCar And It Sets Forth Additional Terms And Conditions That Are Applicable In The Market In Which You Provide Services." [Motion, Exh. A, p. 1.] The Terms of Use are contained in a separate document, and are provided by Defendant as Exhibit B to the motion. Defendant contends that the Terms of Use were effective as of April 20, 2021, and clearly state that any disputes are to be submitted to arbitration and claims must be brought on an individual basis. [Motion Exh. B, Sec. 15.] As noted by Defendant, Section 15 of the Terms of Use not only contains an arbitration agreement, but also a class action waiver and representative PAGA waiver that waives Plaintiff's and Defendant's right to bring claims on a "class, collective action, or representative basis." Defendant contends that it requires all of its contracted drivers to read the Terms of Use before agreeing to work for the company. Defendant acknowledges that the Terms of Use do not need to be signed by any of its contractors. However, Defendant contends that it informs all of its contractors that their continued work with the company constitutes the contractor's acceptance of the Terms of Use. [Declaration of Joshua Itano ("Itano Decl.") (ROA 26), ¶ 8.] In citing to Diaz v. Sohnen Enterprises (2019) 34 Cal.App.5th 126, 130, Defendant argues that an agreement to arbitrate may be implied-in-fact when acceptance of the agreement is a condition precedent to providing services. In this instance, Defendant contends that when Plaintiff began working as a contractor for the company, she impliedly agreed to the arbitration agreement and waivers in the Terms of Use.

		In opposition, Plaintiff contends Defendant has failed to establish the existence of a valid arbitration agreement. In citing to Long v. Provide Commerce, Inc. (2016) 245 Cal.App.4th 855, Plaintiff contends that Defendant's Terms of Use is an unenforceable "browsewrap" agreement that did not require her signature or any other action to affirmatively indicate her assent to its terms. According to Plaintiff, she applied to work for Defendant in January 2022 by inputting her basic personal information on Defendant's website. [Declaration of Olga Page Piriz ("Plaintiff Decl.") (ROA 52), ¶ 2.] Plaintiff claims that a few days later, she received more information about working as a driver for Defendant, and shortly thereafter, she was approved to work in that capacity. Plaintiff acknowledges that when she was approved to work for Defendant, she signed some documents. However, Plaintiff contends she did not sign any document that purported to be an arbitration agreement. [Id., ¶¶ 3, 4.] Plaintiff contends she was not notified of the existence of the Terms of Service and she was never told during her employment that she was required to agree to arbitrate her claims against Defendant. [Plaintiff Decl., ¶¶ 4-5.] In addition, Plaintiff notes that the Service Provider Addendum does not mention anything about arbitration. As a result, Plaintiff argues that Defendant has not demonstrated that she had actual knowledge of the arbitration agreement or that Defendant has put her on inquiry notice of the agreement. In reply, Defendant contends the Terms of Use are not a browsewrap type of agreement, but rather a "sign-in" wrap agreement. According to Defendant, the Terms of Use were provided to Plaintiff as part of the sign-up process on its website prior to a determination of her eligibility to provide driving services. [(ROA 58) Reply Declaration of Joshua Itano ("Itano Reply Decl."), ¶ 2.] Defendant argues that Plaintiff's assent to the Terms of Use is inferred by her completion of the sign-up process. In pointing to a purported screenshot of the sign-up page on its website, Defendant contends that Plaintiff was presented with a textual notice on the sign-up page that signing up to use the platform included an agreement to be bound by Defendant's Terms of Use. [Itano Reply Decl., ¶ 2 and Exh. B.] Defendant argues that since Plaintiff was signing up for an ongoing account to use the platform, this notice was sufficient, and Plaintiff should have reasonably contemplated that the ongoing relationship with Defendant would be governed by terms and conditions. In support, Defendant cites to B.D. v. Blizzard Entertainment, Inc. (2022) 76 Cal.App.5th 931. **Defendant's arguments are not well taken, and it has failed to demonstrate the existence of a valid arbitration agreement. As discussed further below, Defendant has not proffered sufficient evidence to demonstrate its Terms of Use is an enforceable "sign-in wrap" agreement.** As a preliminary matter, it is noted that courts have held that although internet transactions are relatively new, they have not changed the requirement that "'"[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract."' [Citation.]" (Sellers v. JustAnswer LLC (2021) 73 Cal.App.5th 444, 460.) Mutual assent of the parties " 'is essential to the existence of a contract [citations]," and it " 'is

		determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.' [Citations.]" (Ibid.) " 'The parties' outward manifestations must show that the parties all agreed "upon the same thing in the same sense." [Citation.] If there is no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract and no contract formation. [Citation.]' [Citation.]" (Ibid.) "'This principle of knowing consent applies with particular force to provisions for arbitration' [citation], including arbitration provisions contained in contracts purportedly formed over the internet [citation]." (Ibid.) Relevant here, contracts formed on the internet generally come in four forms: browsewraps, clickwraps, scrollwraps, and sign-in wraps. (Sellers, supra, 73 Cal.App.5th at pp. 462-477.) On one end of the spectrum, "'A "browsewrap" agreement is one in which an internet user accepts a website's terms of use merely by browsing the site." (Id. at p. 463.) Unlike the other three forms of internet contracts, browsewrap agreements do not require users to affirmatively click a button to see the agreement or confirm their assent to the agreement's terms. (Id. at pp. 463-464.) Instead, a user's assent is inferred from his or her use of the website. (Id. at p. 467, citing to Long v. Provide Commerce, Inc. (2016) 245 Cal.App.4th 855, 858.) " 'The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists.' [Citation.]" (Id., at p. 862.) On the other end of the spectrum, clickwrap agreements require an active role by the user of the website wherein the user has to click on an "I agree" box after being presented with a list of terms and conditions to use the website. (Sellers, supra, 73 Cal.App.5th at p. 470.) By clicking on "I agree" in a clickwrap agreement, the user is confirming his or her assent to the agreement's terms. As a result, clickwrap agreements are generally considered enforceable. (Ibid.) Scrollwrap agreements go a step further by placing the contract terms directly in front of the user and requiring them to scroll through the terms and conditions before checking a box or clicking a button to indicate their assent to the terms. (Ibid.) Since the user is given the contract up front, scrollwrap agreements are consistently found by the courts to be enforceable because they sufficiently place the user on inquiry notice of the contractual terms. (Ibid.) Sign-in wrap agreements fall somewhere between the extremes of browsewrap and scrollwrap agreements. (Sellers, supra, 73 Cal.App.5th at p. 471.) "Sign-in wrap agreements do include a textual notice indicating the user will be bound by the terms, but they do not require the consumer to review those terms or to expressly manifest their assent to those terms by checking a box or clicking an 'I agree' button. Instead, the [user] is purportedly bound by clicking some other button that they would otherwise need to click to continue with their transaction or their use of the website—most frequently, a button that allows the consumer to 'sign in' or 'sign up' for an account." (Ibid.) In this format, it is not readily apparent that the user is aware he or she is

		agreeing to contractual terms by signing up to use the website. As a result, courts have found that " 'the [user's] assent is "largely passive,"' and the existence of a contract turns ' "on whether a reasonably prudent offeree would be on inquiry notice of the terms at issue."' [Citation.]" (Ibid.) In the current litigation, however, **Defendant has not demonstrated that its Terms of Use were contained in a sign-in wrap agreement.** In reply, Defendant's CEO attests that all users who sign up on the website to provide driving services are presented with the following notice: "In continuing, you agree to the Terms and Conditions." [Itano Reply Decl., ¶ 2.] The CEO further states that the words "Terms and Conditions" are a hyperlink and presented in a darker shade that the other words on the page. [Ibid.] The CEO then attests that "[a] true and correct screenshot of the sign-up page" for Defendant is attached to his declaration. [Id., ¶ 4.] **However, a review of the attached exhibit does not provide any indicia that it was taken from Defendant's website. [See, Itano Reply Decl., Exh. A.] Unlike the copies provided by Defendant of the Terms of Use, the Service Provider Addendum, and the HelloSign document history showing Plaintiff signed the Service Provider Agreement, the purported screenshot of the sign-up page does not contain Defendant's name or Defendant's logo. Indeed, not only does it not contain any identifying information, but it also refers to "Terms & Conditions" instead of "Terms of Use" as found in the exhibits provided with Defendant's opening brief—a discrepancy that is left unexplained by Defendant. [See, Exhs. A and B to motion.] Since the evidence in reply is insufficient to show that it was taken from Defendant's website, Defendant has also failed to demonstrate that its Terms of Use were contained in an enforceable sign-up wrap agreement.** Absent sufficient evidence of the existence of a sign-in wrap agreement on Defendant's website, the Court cannot consider the usual criteria in determining the enforceability of such an agreement—namely, "1) the size of the text; 2) the color of the text as compared to the background it appears against; 3) the location of the text and, specifically, its proximity to any box or button the user must click to continue use of the website; 4) the obviousness of any associated hyperlink; and 5) whether other elements on the screen clutter or otherwise obscure the textual notice." (Sellers, supra, 73 Cal.App.5th at p. 473.) Consideration of these criteria is a fact-intensive inquiry. (Ibid.) **Therefore, despite Defendant's urging to follow the holding in B.D. v. Blizzard Entertainment, the Court cannot determine if the Terms of Use were provided in the context of a sign-in wrap agreement, or whether Plaintiff was given sufficiently conspicuous notice on Defendant's website of the Terms of Use and its arbitration provisions.** Based solely on the evidence provided with Defendant's opening brief, it cannot be found that Plaintiff had actual or constructive knowledge of the arbitration agreement in the Terms of Use. Although the Service Provider Addendum stated it was an addendum to Defendant's Terms of Use, this was

		not sufficient to place Plaintiff on inquiry notice of the terms of the agreement or its arbitration provision. **Although Defendant has provided evidence that Plaintiff electronically signed the Service Provider Addendum [see, Motion, Exh. A], Defendant seems to concede that Plaintiff was not also required to sign the Terms of Use. Moreover, Defendant has also failed to indicate whether the Service Provider Addendum provided a hyperlink to the Terms of Use Agreement so that Plaintiff could read its terms, or whether the Terms of Use were otherwise provided to Plaintiff.** **As noted by Plaintiff, the Service Provider Addendum does not even contain any mention of an arbitration agreement or that the Terms of Use included an arbitration agreement. Instead, as noted above, the Service Provider Addendum merely states that it "sets forth additional terms and conditions that are applicable in the market in which you provide services." [Motion, Exh. A.] Contrary to Defendant's contention, this language did not advise Plaintiff that by continuing to work for Defendant, she was agreeing to be bound by an arbitration provision in the Terms of Use or that the Terms of Use even contained an arbitration provision pertinent to Plaintiff's status as a contractor.** As observed in Long v. Provide Commerce Inc. (2016) 245 Cal.App.4th 855 in the context of browsewrap agreement, absent a notification that the Terms of Use contained binding contractual terms that governed Plaintiff's relationship with Defendant, the phrase "Terms of Use" as used in the Addendum may not necessarily have alerted Plaintiff of the presence of an arbitration agreement. (Id. at p. 858.) "In our view, the problem with merely displaying a hyperlink in a prominent or conspicuous place is that, without notifying consumers that the linked page contains binding contractual terms, the phrase 'terms of use' may have no meaning or a different meaning to a large segment of the Internet-using public. In other words, a conspicuous 'terms of use' hyperlink many not be enough to alert a reasonably prudent internet consumer to click the hyperlink." (Ibid.) **Therefore, there is no evidence establishing a manifestation of Plaintiff's mutual assent to the Terms of Use and its arbitration provisions. If the Terms of Use were provided in a browsewrap agreement, the arbitration provisions are unenforceable. (Long, supra, 245 Cal.App.4th at p. 858.) Conversely, Defendant has not proffered sufficient evidence that the Terms of Use were contained in an enforceable sign-in-wrap agreement on its website. As a result, Defendant has not met its burden of demonstrating the existence of a valid arbitration agreement. Accordingly, the Court need not reach Plaintiff's argument regarding the purported unconscionability of the agreement.** **RULING:**

		Defendant CareCar Inc.'s Motion for Order Compelling Arbitration and Staying Proceedings is **DENIED** on the ground that Defendant did not meet its burden of demonstrating that the parties entered into a valid arbitration agreement. **IT IS ORDERED THAT** all of Plaintiff Olga Page Piriz's individual, class, and PAGA claims against Defendant CareCar Inc. be adjudicated in this civil action. The Clerk shall give notice of the Court's ruling. **The Status Conference is continued to January 24, 2024 at 1:30 p.m.** Clerk to give Notice.
6	**14-00746312** **Baer vs. Tedder**	**1. Motion for Attorney Fees** **2. Motion to Strike or Tax Costs** **Continued to 9/26/23 at 2:30 p.m.**
7	**21-01178034** **Wanderlingh vs. Alcoa Electrical Contractor, Inc., a California Corporation**	**Motion for Final Approval** **Motion for Final Approval of Class and Representative Action Settlement** On August 1, 2022, Plaintiff filed the Motion for Preliminary Approval of Class and Representative Action Settlement. (ROA 69). On April 7, 2023, at the second hearing on the matter, the Court granted the motion. (ROA 95). The Order Granting Preliminary Approval was entered on April 26, 2023. (ROA 100). On August 23, 2023, Plaintiff filed the current Motion for Final Approval of Class and Representative Action Settlement. (ROA 119). Plaintiff also filed supporting papers and declarations. (ROA 107, 109, 111, 113). This is the first hearing on this matter. **TERMS OF PRELIMINARILY APPROVED SETTLEMENT**: The Settlement Agreement provided at preliminary approval is found attached to the Declaration of James Kawahito, ROA 65, Exhibit 1. Proposed Class Definition: "All persons who have been employed by Defendants in the State of California who held or hold any position designated as a pole planner or position with similar duties during the Class Period." [Settlement, ¶ 2.] Class Period: January 8, 2017, to May 20, 2022. [Id., ¶ 4.] Proposed PAGA Group: "All non-exempt, hourly-paid California employees employed by Defendants during the PAGA Period." [Id., ¶ 15.]

		PAGA Period: January 8, 2020, to May 20, 2022. [Id., ¶ 17.] Class Size: 367 Class Members as of January 21, 2022. [Id., ¶ 2.] Workweeks are estimated at 46,139 during the Class Period. [See, Counsel Decl., ¶¶ 18-21.] No estimate given for number in PAGA Group. Total pay periods estimated as 17,926 during the PAGA Period. [Id., ¶ 25.] Maximum Settlement Amount ("MSA"): $1,775,000.00, plus employer taxes paid by Defendants in addition to the MSA. [Settlement, ¶ 40.] $ 591,608.00 Attorneys' fees (not to exceed 33 1/3% of MSA) [Id., ¶ 42.] $ 15,000.00 Litigation costs (not to exceed) [Ibid.] $ 5,000.00 Enhancement (not to exceed) [Id., ¶ 43.] $ 15,000.00 Administration costs (not to exceed) [Id., ¶ 45.] $ 25,000.00 PAGA penalties (75% or $18,750 to LWDA; 25% or $6,250 to PAGA Members) [Id., ¶ 44.] $ 1,123,393.00 Net Settlement Amount ("NSA") There is no escalator clause in the Settlement Agreement. The Settlement Agreement expressly states, "Defendants are under no obligation under this Settlement Agreement to pay, and shall not pay, anything other than the Maximum Settlement Amount and the employer payroll taxes referred to above." [Id., ¶ 40.c.] Payments to Class: How Calculated? Class Members – pro rata based on number of Workweeks. PAGA Share – pro rata based on number of Workweeks. [Settlement, ¶ 61.] Reversion? No. Claims Made? No. Taxation? Individual Settlement Payments –25% as wages (excluding any portion of share of PAGA Payment); 73.6% as non-wage damages and interest; 1.4% as penalties. [Id., ¶ 62.] Uncashed Any checks uncashed after 180-day Checks? check cashing period will be distributed to State Controller Unclaimed Property Fund. [Id., ¶ 67.] Average Pymt. $3,070.00 per Class Member. [Counsel Decl., ¶ 17.] **ANALYSIS OF SETTLEMENT AND FINAL APPROVAL MOTION**: (ROA 119, 107, 109, 111, 113, 115)

		1. Release Language There are three parts to the Release: (1) release of Class Claims; (2) release of PAGA claims; and (3) Class Representative release. " 'Released [Class] Claims' means any and all claims, damages, or causes of action alleged in, or arising out of, the allegations in the First Amended Complaint … which were alleged or that could have been alleged by Plaintiff and/or any Participating Class Member … and/or the PAGA Notice based on any of the factual allegations contained in such complaints and/or the PAGA Notice …." [Settlement, ¶ 23.] This includes all causes of action and Labor Code sections alleged in the FAC, and all claims and Labor Code sections set forth in the LWDA PAGA letter. " 'Released PAGA Claims' means any and all claims for civil penalties under PAGA based on the Labor Code violations alleged in the PAGA Notice sent by Plaintiff to the LWDA, including … Labor Code sections 201, 2020, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1197.1, 1198, 2800, 2802, 2698, et seq. … as well as all facts, theories, or claims for civil penalties that would be considered administratively exhausted under applicable law by the PAGA Notice Plaintiff sent to the LWDA." [Id., ¶ 24.] Both Releases are effective "upon the funding of the Maximum Settlement Amount …." [Id., ¶ 69.] The cashing of settlement checks by Class Members "will be considered a consent and opt-in" to settlement of all federal claims under the FLSA that are encompassed in the Released Claims. Class Members who do not cash their settlement checks will retain all rights and claims under the FLSA. [Ibid.] "General Release" by the Class Representative is effective upon funding of the MSA. [Id., ¶ 71.] Class Representative releases the Released Claims, and also "unconditionally waives and forever releases, waives, discharges, any and all demands, damages, debts, liabilities, contracts, obligations, actions, causes of action and claims of every kind, nature, and description whatsoever, whether now known or unknown, suspected or unsuspected … which he ever had or now has against the Released Parties arising or accruing at any time prior to the Effective Date…." [Ibid.] This includes any claim arising out of or related to the facts or events occurring prior to execution of the Settlement Agreement and/or related to Plaintiff's employment with Defendants and his separation, and claims related to all Labor Code sections mentioned or alleged in the FAC and LWDA PAGA letter, except for FEHA-related claims alleged in Plaintiff's individual action, OCSC Case No. 2020-01168328. [Ibid.] (It is noted that Plaintiff's FEHA case was dismissed with prejudice on April 3, 2023, at his request.) 2. Results of Class Notification Actual Class Size: 347 Class Members. [Admin. Decl. (ROA 115), ¶ 5.]

		ISSUE: Administrator does not state how many individuals there are in the PAGA Group. Mailing Success: On May 9, 2023, the Administrator mailed the Notice Packet via U.S. Mail to all 347 Class Members. [Id., ¶ 7.] As of August 23, 2023, 32 Notice Packets were returned as undeliverable. The Administrator performed a skip trace on all returned Notice Packets that did not have a forwarding address. As a result, 27 updated addresses were obtained, and those Notice Packets were re-mailed. [Id., ¶¶ 8, 9.] As of August 23, 2023, a total of 5 Notice Packets have been deemed undeliverable since no updated address was found. [Id., ¶ 10.] Opt Outs: As of August 23, 2023, the Administrator has received 2 opt out requests. The deadline to opt out was July 8, 2023. [Id., ¶ 11.] Objections: As of August 23, 2023, Administrator had not received any objections. [Id., ¶ 12.] Disputes: The Administrator does not provide any information regarding disputes. As of August 23, 2023, the Administrator reports a total of 345 Participating Class Members, representing 99.42% of the Settlement Class Members. [Id., ¶ 13.] The Administrator does not provide any information on PAGA Group Members. Workweeks: The Administrator does not attest to the number of Workweeks. Net Settlement Amount: $1,123,392.50 ($1,775,000.00 MSA minus $591,607.50 attorneys' fees, $15,000.00 litigation costs, $5,000.00 enhancement, $15,000.00 administration costs, $18,750.00 LWDA payment, and $6,250.00 to Aggrieved Employees). [Id., ¶ 14.] Average Payment: $3,256.21 average gross payment (highest est. amt. approx. $6,480.22). [Ibid.] ISSUE: The results of the Class Notification are excellent. This supports a finding that the Settlement is reasonable, fair, and adequate. However, the Administrator does not provide lowest estimated payment amount for Class payments. Administrator also does not provide any information about high, low, and average PAGA Payment. 3. Notice of Judgment Settlement Administrator is required to post copy of the Judgment on its website for at least 30 days from date of Judgment. [Settlement, ¶ 52.j.] 4. Final Accounting

		Plaintiff proposes Final Accounting hearing to be set for April 4, 2024. [Proposed Order (ROA 105), ¶ 20.] Should the Settlement be approved, the Court will hold a status conference for a final accounting. The Final Accounting should occur after the deadline for Class Members to cash their settlement checks. Counsel shall submit a final report at least 14 calendar days prior to that conference regarding the status of the settlement administration. The final report must include all information necessary for the Court to determine the total amount actually paid to Class Members and any amount tendered to the State Controller. 5. Service on LWDA Plaintiff served the Settlement Agreement on the LWDA on July 28, 2022, and the Motion for Final Approval on August 23, 2023. [Counsel Decl. (ROA 113), ¶ 34.] 6. Fee-Splitting Arrangements Class Counsel, James Kawahito of Kawahito Law Group APC, attests he entered into a fee-splitting arrangement with Brock & Gonzales LLP, wherein 75% will be allocated to Kawahito Law Group. [Counsel Decl., ¶ 32.] DISBURSEMENTS: Since the parties have demonstrated the settlement is reasonable and fair, below is an analysis of the requested disbursements: 1. Representative Enhancement Named Plaintiff seeks a $5,000.00 enhancement. Named Plaintiff attests he has spent approximately 32 hours engaged in activities related to this litigation, including frequently speaking with Class Counsel, providing documents and Class Member contact information, made himself available during the mediation, and worked closely with Class Counsel during settlement negotiations. [Wanderlingh Decl. (ROA 109), ¶¶ 4-10.] Amount of requested enhancement is entirely in line with amount usually granted by the Court. 2. Attorneys' Fees The Settlement Agreement provides for attorneys' fees of $591,607.50, which is 33 1/3% of the MSA. Class Counsel, Kawahito Law Group APC, seeks attorneys' fees of $273,840.00, and co-counsel, Brock & Gonzales LLP, seeks attorneys' fees totaling $16,500.00. [Counsel Decl., ¶¶ 32.] Kawahito Law Group is an experienced employment class and PAGA action law firm. [Id., ¶¶ 17-25.] As of August 18, 2023, Kawahito expended a total of

342.3 hours litigating this action, and his hourly rate is $800. This amounts to a lodestar of $273,840.00. [Id., ¶¶ 29, 30, 32.] There is no multiplier.

D. Aaron Brock of Brock & Gonzales LLP attests he is the attorney of record in Plaintiff's individual FEHA-related litigation, and his firm referred Plaintiff's wage-and-hour claims to Kawahito. [Brock Decl. (ROA 111), ¶¶ 1, 2.] Before and after the initiation of this action, Brock & Gonzales researched factual and legal issues, interviewed and obtained information from Plaintiff and putative Class Members, met and conferred with Class Counsel, reviewed and revised pleadings, analyzed discovery documents, and reviewed the Settlement Agreement and release. [Id., ¶¶ 4-6.] Brock attests the lawyers involved in this litigation are experienced in employment matters, including wage-and-hour and PAGA cases, and his firm has expended a total of 25.5 hours on this litigation. [Id., ¶ 9, 11-21.] The total lodestar amounts to $16,500.00.

A summary of hours expended by the two law firms is as follows:

Attorney	Hours	Rate	Total
KLG Attorneys			
James Kawahito,	342.3	$800	$273,840.00
Firm Lodestar			$273,840.00
B&G Attorneys			
Timothy Gonzales	6.25	$750	$ 4,687.50
D. Aaron Brock	1.75	$750	$ 1,312.50
Lindsay Bowden	17.50	$600	$ 10,500.00
Firm Lodestar			$ 16,500.00
TOTAL LODESTAR			**$290,340.00**

ISSUE: The lodestar amount is 49.1% of, and $301,267.50 less than, the maximum agreed-upon attorneys' fees amount of $591,608.00. Neither attorney asks for a multiplier, nor do they state whether they are only seeking the lodestar amount or are seeking fees under the "common fund" doctrine—i.e., the amount of reasonable attorneys' fees determined by a percentage of the common fund created for the class. (Laffitte v. Robert Half Int'l, Inc. (2016) 1 Cal.5th 480, 503.) Counsel also does not discuss an estimate of attorneys' fees to be incurred after final approval up to final accounting.

3. Litigation Costs

Kawahito attests his firm incurred $15,211.39 in litigation costs. [Counsel Decl., ¶ 33, Exh. 5.] A breakdown of the costs is provided in counsel's

		declaration and attached ledger. [Ibid.] Majority of costs incurred are for mediation ($9,450.00). Expert fees, filing fees, printing and copying costs, and attorney service fees totaled $5,597.78. "Document retrieval" fees totaled $173.61. [Ibid.] ISSUE: This amount is $211.39 more than the maximum amount of $15,000.00 approved at preliminary approval. Notable and unusual charge of $600.00 on January 19, 2021, for "messenger service." This fee was incurred only 11 days after the case was initiated. Counsel does not explain why the fee was incurred. 4. Administration Costs Administrator attests that its costs associated with this litigation are $15,000.00, and this includes fees and costs incurred to date, as well as anticipated fees and costs for completion of the settlement administration. [Admin. Decl., ¶ 15, Exh. B.] This amount equals the maximum amount in the Settlement Agreement and approved by the Court during preliminary approval. **ISSUES TO BE ADDRESSED**: 1. The Settlement Administrator must provide a supplemental declaration discussing: (a) the total number of individuals in the PAGA Group; (b) the number of Notice Packets sent to PAGA Group Members that were returned and re-mailed; (c) the number of disputes; (d) the number of Workweeks upon which the Individual Settlement Payments are calculated; (e) the lowest estimated amount of Individual Settlement Payments to Class Members; and (f) the high, low, and average estimated amount of Individual Settlement Payments to PAGA Group Members. 2. Class Counsel needs to explain discrepancy in lodestar amount and maximum amount of approved attorneys' fees. Is counsel seeking lodestar amount or attorneys' fees under the "common fund" doctrine? RE PROPOSED ORDER: (ROA 105) 1. The Proposed Order is to be revised consistent with the issues addressed above. 2. Paragraph 8 of the Proposed Order must state the names of the Class Members who opted out of the Settlement. 3. A definition of Aggrieved Employees (PAGA Group) should be provided. 4. The full address of the location of the Final Accounting hearing must be provided in Paragraph 20. **RULING:**

		The hearing on the Motion for Final Approval is **CONTINUED** to November 17, 2023, at 1:30 p.m. in Department CXC103 so that counsel may address the issues identified above. Counsel is ORDERED to file supplemental papers addressing the Court's concerns no later than fourteen (14) calendar days prior to the continued hearing date. Counsel is ORDERED to provide red-lined versions of all revised papers and an explanation of how the pending issues were resolved. The Court does not require any physical or remote appearance at the hearing set for September 15, 2023.
8	**21-01185270** **Brown vs. MinuteClinic Diagnostic Medical Group of California, Inc.**	**1. Motion for Final Approval** **2. Status Conference** **<u>Motion for Final Approval</u>** At the June 23, 2023 Final Approval hearing, the Court identified the following concerns with the motion. Discussed below are the responses provided by counsel and whether the issues were adequately addressed: 1. The information provided regarding attorneys' fees was concerning. It reflected substantial inconsistencies, which appeared to increase the lodestar and decrease the multiplier. The table summary (Mankin Decl. ¶ 26) reflects a grand total of $179,520 for two attorneys, but the same paragraph states the lodestar is "approximately $191,325." This is a delta of $11,805. Of Mr. Mankin's 129.4 hours, 35 were anticipated. In other words, Mr. Mankin incurred approximately 94.4 hours for a total lodestar of $73,160, not $100,285. (Id. ¶¶ 26-27.) Additionally, the Court notes this is an unrealistic number of anticipated hours, especially for the senior attorney, and results in a $27,125 delta. As for Mr. Carlson, his declaration stateed he incurred 185.6 hours, three of which are anticipated. (ROA 91 ¶ 8.) However, the table summary referenced above reflects 137.8 total hours for Mr. Carlson. (Mankin Decl. ¶ 26.) This is a delta of at least $25,760. In the memorandum (ROA 88), which cites the declarations above, Mr. Mankin claimed 108.5 hours for himself, 35 of which were anticipated. (Mem. at 14.) In other words, a total of 73.5 hours were incurred by Mr. Mankin for a lodestar of $56,962.50. As for Mr. Carlson, the memorandum provides a total of 186.5 hours (minus 3.0 anticipated) for a total lodestar of $105,512.50. (Id.) Accordingly, while the memorandum asserts a total lodestar of $191,325, if the calculation does not include anticipated hours, the lodestar, at most, is $162,475. This reflects a multiplier of 1.43, not the 1.22 claimed. (Mankin Decl. ¶ 26.) Furthermore, taking the lower set of numbers provided

		and described above, the lodestar is $136,197.50 ($56,962.50 [Mankin @ 73.5 hrs] + $79,235 [Carlson @ 137.8 hrs]). This reflects a multiplier of 1.7. Given the above, the Court ordered both attorneys to provide sworn declarations describing, in detail, how time or billing records were kept, including whether records were made contemporaneously or recreated at a later point in time. Counsel are ORDERED to attach all time and/or billing records. RESOLVED. Mr. Mankin has provided an updated table summary. He attests that the 129.4 hours reported in Paragraph 27 of his original declaration were accurate, wherein he advised that he had expended 94.4 hours through the preparation of the declaration, and anticipated expending an additional 35 hours on future work. [ROA 107, Supplemental Declaration of Brian Mankin ("Mankin Supp. Decl."), ¶ 2.] Mr. Mankin attests that he contemporaneously tracks and records his time in 0.1-hour increments. He also attests that as the managing attorney, he generally responds to 150 to 200 emails per day, but he does not contemporaneously record his time for this activity. Instead, his practice is to bill 0.1 hour for emails reviewed, and to bill emails he prepares based on reasonable time spent. Mr. Mankin attaches his billing records confirming the hours already expended and showing the anticipated future hours. [Id., ¶ 6 and Exh. A.] Regarding the discrepancies in his original declaration, Mr. Mankin attests that the chart at Paragraph 26 was not updated to reflect the total hours worked on the case. He attests that his hours, including his anticipated hours, totals 129.4, and Mr. Carlson expended 185.6 hours. [Id., ¶ 3.] Mr. Carlson similarly attests that the original table summary was incorrect due to a scrivener's error, and he expended 185.6 hours. He provides his billing records in support. He further attests that he contemporaneously records the time billed on cases in 0.1-hour increments. [Supplemental Declaration of Peter J. Carlson ("Carlson Supp. Decl.") (ROA 103), ¶¶ 4, 5, and Exh. A.] The corrected table summary at Paragraph 3 of Mr. Mankin's supplemental declaration reflects a grand total of $207,005.00 for the two attorneys. Mr. Mankin still includes the 35 hours of future work in his calculation for his lodestar, and the 3 hours of future work in his calculation of Mr. Carlson's lodestar. [Mankin Supp. Decl., ¶ 3.] Regarding the 35 hours of anticipated work, Mr. Mankin attests they are allocated into two components: 15 hours through final approval and 20 hours from final approval to final accounting, which he anticipates will occur 1 ½ years from now. The 15 hours through final approval pertains to work on the current motion that had not been completed at the time he prepared his original declaration—i.e., finalizing and filing the motion, appearing at the hearing, addressing the Court's concerns, submitting revised documents, etc. The 20 hours from final approval to final accounting includes up to 1 ½ years of case management related to disbursement of settlement funds, responding to Class Members' questions, working with the settlement administrator regarding uncashed checks and remailings, assisting with the administrator's

		declarations, appearing at the final accounting hearing, etc. Mr. Mankin notes that the 20 hours basically amounts to 1 hour per month. Mr. Mankin attests that with these hours included, the multiplier is 1.13, and without these hours, it is 1.22. He states that either multiplier is fair and reasonable in light of the work performed and the result achieved. Counsel has adequately addressed all of the Court's concerns on this issue, and the 1.13 multiplier is fair and reasonable. The Court approves the requested attorneys' fees of $233,333.33. 2. The $14,120.14 (Mankin Decl. ¶ 28, Ex. A) sought in attorneys' costs includes $300 in anticipated filing fees. The Court finds the latter unrealistically high. Please identify any additional costs incurred. ISSUE: Neither Mr. Mankin nor Mr. Carlson addressed this issue in their respective supplemental declarations. 3. The Proposed Order and Judgment includes a date (03-15-24) for the Administrator's declaration regarding disbursements. The Court finds it unlikely all disbursements will be complete at that time. Additionally, a date for a Final Accounting hearing, at least 14 calendar days later, should be included/proposed. RESOLVED. Mr. Mankin attests that if final approval is granted on September 15, 2023, then he projects the check cashing deadline will occur on or around May 7, 2024. As a result, he has submitted a revised Proposed Final Order that includes a revised deadline of June 5, 2024, to file the Administrator's declaration regarding disbursements. Mr. Mankin further attests that the funds from the uncashed checks will not be disbursed to the State Controller until around May 2025. Accordingly, he proposes submitting the Administrator's declaration on or around June 5, 2025, if the Court wants to wait until all funds are disbursed. However, if the Court wants a declaration from the Administrator after the check cashing deadline, but before uncashed funds are sent to the State Controller, then Mr. Mankin attests the Administrator's declaration can be filed by June 5, 2024. [Mankin Supp. Decl., ¶ 13.] 4. The Proposed Judgment and Order should (1) identify the operative Settlement Agreement by ROA number and (2) identify, by name, the two individuals who opted out. ISSUE: The revised Proposed Order does not identify the names of the two individuals who opted out of the settlement. (ROA 101, ¶ 8.) **RULING:** The Motion for Final Approval is **CONTINUED** to November 17, 2023, at 1:30 p.m. in Department CX103, so that counsel may address the issues identified above.

		Counsel is ORDERED to file supplemental papers addressing the Court's concerns no later than ten (10) calendar days prior to the continued hearing date. Counsel must is ORDERED to provide red-lined versions of all revised papers, and provide the Court with an explanation of how the pending issues were resolved. The Status Conference is **CONTINUED** to November 17, 2023, at 1:30 p.m. The Court does not require any physical or remote appearance at the hearing scheduled for September 15, 2023. Please inform the clerk by emailing her before 12:00 p.m. on the day of the hearing at CX103@occourts.org if both parties intend to submit on the tentative.
9	**22-01247444** **CARTER vs. MEDLAB2020, INC.**	**Motion for Approval of Class Settlement** On April 20, 2023, Plaintiff filed the current Motion for Preliminary Approval of Class and PAGA Action Settlement. (ROA 42.) At the hearing on June 30, 2023, the Court continued the hearing so that counsel could address several issues identified by the Court. (ROA 54). Counsel was ordered to file supplemental papers, including red-lined versions of any revised papers, no later than 14 calendar days before the continued hearing. In addition, counsel was ordered to provide a supplemental declaration with an explanation of how pending issues were resolved. In that regard, the Court stated that if the supplemental papers and declaration were insufficient, it would "result in a continuance and/or an OSC re Sanctions for failure to comply" with the Order. (Ibid.) **RULING:** Counsel has failed to provide any supplemental papers for the continued hearing on this matter. Accordingly, the Motion for Preliminary Approval of Class Action and PAGA Settlement is **OFF CALENDAR**. An OSC re Monetary Sanctions is scheduled for November 3, 2023 at 1:30 p.m. pursuant to CCP section 177.5, for counsel's failure to file supplemental papers in compliance with the June 30, 2023 Order. Clerk to give notice.
10	**19-01058127** **Ramirez vs. St. George Auto Sales, Inc.**	**Motion for Approval of Class Settlement** **Motion for Preliminary Approval of Class and Representative Action Settlement** The Motion for Preliminary Approval was filed on May 5, 2023. (ROA 638.) At the hearing on July 14, 2023, the Court continued the hearing so that counsel

		could address the Court's concerns with the Settlement Agreement and Proposed Order. (ROA 661). **RULING** This is a putative class and PAGA action involving alleged wage-and-hour violations. This is the second hearing on the Motion for Preliminary Approval of Class and Representative Action Settlement. The previous hearing was continued so that Plaintiffs could address issues identified by the Court. The Court has reviewed the supplemental materials submitted by counsel, and finds that, with one small exception, they address the identified concerns. Accordingly, the Motion for Preliminary Approval is **GRANTED.** Prior to finalizing and sending the Class Notice, Plaintiffs and Plaintiffs' counsel are ordered to revise Section 9 of the Class Notice to include an end date for the Class Release as well as the time frame for the PAGA Release. The Motion for Final Approval will be heard on March 22, 2024, at 1:30 p.m. in Department CX103. The Revised Proposed Order must be corrected to reflect this new date for the Final Fairness and Approval Hearing. All papers for the Motion for Final Approval are due no later than fourteen (14) calendar days prior to the hearing. At the Final Approval hearing, evidence of attorneys' fees and actual litigation costs should be presented in the form of time records, or a summary of time spent on the substantive tasks, to enable the Court to evaluate the lodestar and costs claimed. Counsel should state by declaration whether time records were kept and created contemporaneously or otherwise. Plaintiff to give notice, including to the LWDA, of this ruling, and file proof of service within five (5) calendar days of the date the Preliminary Approval Order is entered. The Court does not require any physical or remote appearance at the hearing scheduled for September 15, 2023.
11	**19-01111809** **Nolte vs. Oasis Outsourcing III, Inc.**	**1. Motion for Approval of Class Settlement** **2. Status Conference** **Motion for Preliminary Approval of Class Action and PAGA Settlement** On May 3, 2022, Plaintiff filed the current Motion for Preliminary Approval of Class Action Settlement. (ROA 181). On December 9, 2022, at the initial hearing on the matter, the Court identified numerous issues for counsel to address. (ROA 201). Per the Court's Minute Order, counsel was to file supplemental papers addressing the issues no later than April 3, 2023. However, no such papers were filed. At the hearing on April 14, 2023, the Court continued the hearing and set an OSC re sanctions for counsel to show

		cause why sanctions should not be imposed for the failure to comply with the Court's previous Order. (ROA 211). At the continued hearing on June 23, 2023, the Court discharged the OSC upon a sufficient showing that the missed deadline was due to an inadvertent filing error. (ROA 221). The Court also discussed its review of the supplemental papers and found that they adequately addressed most of the issues previously identified by the Court. (Ibid.) However, the Court found a few substantive issues remained. Accordingly, the Court continued the hearing to September 15, 2023, and ordered counsel to once again file supplemental papers addressing the outstanding issues. (Ibid.) **ANALYSIS:** On August 30, 2023, counsel filed a second supplemental declaration to address the issues identified in the Court's previous rulings. (ROA 224). As to the remaining issues identified in the June 23, 2023 Order, the analysis is as follows: 1. The release appears to include a release of tort causes of action. Why should the release include this language when the operative complaint does not contain any torts? Remaining issue: The Amendment to the Release purports to replace "Paragraph I.CC", which is identified as "Released Claims", but the Released Claims in the Settlement are contained in Paragraph I.BB. Additionally, counsel should have provided a redline comparing the existing release with the amendment, but has not done so. For example, in addition to the torts issue, which appears resolved, it appears specific Labor Code sections have been added to the revised release, yet this has not been disclosed and no explanation has been provided. Regarding the release as articulated in the Notice (p. 4), it should not include the language "common law claims based on the foregoing …." RESOLVED. As a preliminary matter, counsel attests that a red-lined version was not provided because he submitted an Amendment to the Joint Stipulation, Settlement Agreement, and Release of Claims instead of an amended agreement. [(ROA 224) Second Supplemental Declaration of Ian M. Silvers ("Counsel 2nd Supp. Decl."), ¶ 5.] Counsel attests that now, for the sake of clarity, the parties have executed the Amended Settlement Agreement. A red-lined version and non-redline version are provided by counsel. The Amended Settlement Agreement supersedes the Agreement and the Amendment, and incorporates all changes made to the Agreement through the Amendment and the items addressed in counsel's declaration and the Court's June 2023 Order. [Id., ¶¶ 6, 7, and Exh. 1.] The phrase "common law claims based on the foregoing" has been deleted from the Class Notice.

		UNRESOLVED: Counsel states that the release language in the Amended Joint Stipulation now includes Labor Code sections 204b, 1174, 1174.5, and 1175 because some Labor Code sections covered by the settlement and the allegations in the FAC that were listed in the Proposed Notice of Class Settlement release language were inadvertently not included in the original Joint Stipulation release language. [Id., ¶ 5.] He also attests the Joint Stipulation's release language inadvertently included Labor Code section 2802, which was not part of the claims alleged. However, Labor Code sections 1174, 1174.5, and 1175 are NOT alleged in the FAC, nor are they mentioned in the September 9, 2019 LWDA letter or the original Joint Stipulation. Counsel still has not sufficiently explained why these Labor Code sections are, or should be, included in the release language in Paragraph I.BB and the release language in the Class Notice. 2. As to the Proposed Order, Paragraphs 1-2 are unnecessary and should be deleted. The Court does not preliminarily approve disbursement amounts. Paragraphs 3-4 are adequate at this stage. RESOLVED. Counsel has provided clean and red-lined versions of the Proposed Order with these corrections. [Counsel 2nd Supp. Decl., Exhs. 4, 5; see also, ROA 227.] 3. As to the Proposed Order, Paragraphs 16-17 contain injunctions, which the Court does not grant as res judicata is sufficient. Additionally, the whole of Paragraphs 16-17 are otherwise unnecessary at this stage, and should be deleted. RESOLVED. The clean and red-lined versions of the Proposed Order have deleted these paragraphs. [Ibid.] 4. As to the Proposed Order, the signature block identifies the incorrect judicial officer. RESOLVED. Counsel has provided clean and red-lined versions of the Proposed Order with this correction. [Ibid.] **RULING:** The Motion for Preliminary Approval of Class Action and PAGA Settlement is CONTINUED to November 3, 2023, at 1:30 p.m. in Department CX103. As to the issues identified in the Court's June 23, 2023 Order (ROA 221), the Court finds the supplemental papers have adequately addressed most of the issues identified by the Court. However, the substantive issues identified hereinbelow remain. Counsel is ORDERED to file supplemental papers addressing the Court's concerns no later than fourteen (14) calendar days prior to the continued hearing date. Counsel is ORDERED to provide redlined versions of all revised

		papers and provisions, as well as an explanation of how the pending issues were resolved. A supplemental declaration or brief that simply asserts the issues have been resolved or does not make clear a specific concern has been resolved and the reason(s) why, is insufficient. As to the Release Language in the Amended Joint Stipulation and Class Notice: The release language in Paragraph I.BB. of the Amended Joint Stipulation, and on page 4 of the Class Notice, now includes Labor Code sections 204b, 1174, 1174.5, and 1175. Counsel states these are included because some Labor Code sections covered by the settlement and the allegations in the FAC that were listed in the Proposed Notice of Class Settlement release language were inadvertently not included in the original Joint Stipulation release language. However, Labor Code sections 1174, 1174.5, and 1175 are NOT alleged in the FAC, nor are they mentioned in the September 9, 2019 LWDA letter or the original Joint Stipulation. Counsel still has not sufficiently explained why these Labor Code sections are, or should be, included in the release language in Paragraph I.BB and the release language in the Class Notice. The Status Conference is Off Calendar. Clerk to give Notice.
12	**21-01192372** **Echeverria vs. Statek Corporation**	**1. Motion for PAGA Approval** **2. Status Conference** **Motion For PAGA Approval** **RULING:** This is a PAGA-only action based on alleged wage-and-hour violations. This is the second hearing on the Motion for Order Approving Settlement Under California Labor Code Section 2699 et seq. The previous hearing was continued so that Plaintiff could address issues identified by the Court. The Court has reviewed the supplemental materials submitted by counsel; and finds that they adequately address the identified concerns. Accordingly, the Motion for Order Approving Settlement Under California Labor Code Section 2699 et seq. is **GRANTED.** The Final Accounting hearing is set for May 17, 2024, at 1:30 p.m. in Department CX103. Counsel must submit a final report regarding distribution of the settlement funds at least fourteen (14) calendar days prior to the hearing. Plaintiff to give notice, including to the LWDA, of this ruling, and file proof of service within five (5) calendar days of the date the Order is entered.

		The Court does not require any physical or remote appearance at the hearing scheduled for September 15, 2023. The Status Conference is Off Calendar.

PROCEDURAL GUIDELINES

Procedural Guideline for Preliminary Approval of Class Action Settlements

Parties submitting class action settlements for preliminary approval should be certain that the following procedures are followed and that all of the following issues are addressed. Failure to do so may result in unnecessary delay of approval. It is also strongly suggested that these guidelines be considered during settlement negotiations and the drafting of settlement agreements.

1) NOTICED MOTION - Pursuant to California Rule of Court ("CRC") 3.769(c), preliminary approval of a class action settlement must be obtained by way of regularly noticed motion.

2) CLAIMS MADE VS. CHECKS-MAILED SETTLEMENT/CY PRES – The court typically finds that settlement distribution procedures that do not require the submission of claim forms, but rather provide for settlement checks to be automatically mailed to qualified recipients, result in greater benefit to the members of most settlement classes. If a claims-made procedure is proposed, the settling parties must be prepared to explain why that form is superior to a checks-mailed approach. If the settlement results in "unpaid residue or unclaimed or abandoned class member funds," the agreement must comply with Code of Civil Procedure § 384.

3) REASONABLENESS OF SETTLEMENT AMOUNT – Admissible evidence, typically in the form of declaration(s) of plaintiffs' counsel, must be presented to address the potential value of each claim that is being settled, as well the value of other forms of relief, such as interest, penalties and injunctive relief. Counsel must break out the potential recovery by claims, injuries, and recoverable costs and attorneys' fees so the court can discern the potential cash value of the claims and how much the case was discounted for settlement purposes. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116.) Where the operative complaint seeks injunctive relief, the value of prospective injunctive relief, if any, should be included in the *Kullar* analysis. The court generally requires that this analysis be fully developed and supported at the preliminary approval stage. The analysis must state the number of anticipated class members (broken down by subclasses if applicable), and the final approval hearing papers must similarly state the number of class members (again by subclass, if applicable).

This analysis must also include a description of the expected low, average, and high payments to class members, and the expected amount to be received by the Plaintiff(s) (excluding any enhancement award).

4) ALLOCATION – In employment cases, if the settlement payments are divided between taxable and non-taxable amounts, a rationale should be provided consistent with

counsel's *Kullar* analysis. The agreement and notice should clearly indicate whether there will be withholdings from the distribution checks, and who is paying the employer's share of any payroll tax. The court is unlikely to approve imposing the employer's share of payroll taxes on class members. If the operative complaint and the settlement include penalties under the Labor Code Private Attorneys General Act of 2004 ("PAGA"), proof of submission to the LWDA must be provided. (Labor Code §2999(l)(1).)

5) RELEASE - The release should be fairly tailored to the claims that were or could be asserted in the lawsuit based upon the facts alleged in the complaint. Releases that are overbroad will not be approved. Furthermore, while the court has no problem, conceptually, with the waiver by the named Plaintiff of the protection of Civil Code §1542, a 1542 waiver by the absent class members is generally inappropriate in the class settlement context. A comprehensive description of released claims as those arising out of or reasonably related to the allegations of the operative complaint generally provides an adequate level of protection against future claims. A 1542 waiver, which by its own terms is not necessarily circumscribed by any definition of "Released Claims," goes too far.

Also, although the court will not necessarily withhold approval on this basis, it generally considers a plain language summary of the release to be better than a verbatim rendition in the proposed class notice.

6) SETTLEMENT ADMINISTRATION - The proposed Settlement Administrator must be identified, including basic information regarding its level of experience. Where calculation of an individual's award is subject to possible dispute, a dispute resolution process should be specified. The court will not approve the amount of the costs award to the Settlement Administrator until the final approval hearing, at which time admissible evidence to support the request must be provided. The court also generally prefers to see a settlement term that funds allocated but not paid to the Settlement Administrator will be distributed to the class pro rata.

The settlement should typically provide that the settlement administrator will conduct a skip trace not only on returned mail, but also on returned checks.

7) NOTICE PROCEDURE - The procedure of notice by first-class mail followed by re-sending any returned mail after a skip trace is usually acceptable. A 60-day notice period is usually adequate.

8) NOTICE CONTENT - The court understands that there can be a trade-off between precise and comprehensive disclosures and easily understandable disclosures and is willing to err on the side of making the disclosures understandable. By way of illustration, parties should either follow, or at least become familiar with the formatting and content of The Federal Judicial Center's "Illustrative" Forms of Class Action Notices at http://www.fjc.gov/, which conveys important information to class members in a manner that complies with the standards in the S.E.C.'s plain English rules. (17 C.F.R. § 230.421.)

Notices should always provide: (1) contact information for class counsel to answer questions; (2) an URL to a web site, maintained by the claims administrator or plaintiffs' counsel, that has links to the notice and the most important documents in the case; and (3) the URL for the court for persons who wish to review the court's docket in the case.

The motion should address whether translation(s) of the Notice and all attachments thereto should be provided to class members.

9) CLAIM FORM - If a claim form is used, it should not repeat voluminous information from the notice, such as the entire release. It should only contain that which is necessary to elicit the information necessary to administer the settlement.

10) EXCLUSION AND OBJECTION- The court prefers that the Notice be accompanied by a Form to be completed by the class member seeking to be excluded, and a separate Form to be completed by the class member wishing to object.

The notice need only instruct class members who wish to exclude themselves to send a letter to the settlement administrator setting forth their name and a statement that they request exclusion from the class and do not wish to participate in the settlement. It should not include or solicit extraneous information not needed to effect an exclusion. The same applies to the contents of the Form, if used.

Objections should also be sent to the settlement administrator (not filed with the court nor served on counsel). Thereafter counsel should file a single packet of all objections with the court. The court will not approve blanket statements that objections will be waived or not considered if not timely or otherwise compliant—rather, any such statements must be preceded by a statement that "Absent good cause found by the court…."

11) INCENTIVE AWARDS - The court will not decide the amount of any incentive award until final approval hearing, at which time evidence regarding the nature of the plaintiff's participation in the action, including specifics of actions taken, time committed and risks faced, if any, must be presented. (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.)

12) ATTORNEY FEES - The court will not approve the amount of attorneys' fees until final approval hearing, at which time sufficient evidence must be presented for a lodestar analysis. Parties are reminded that the court will not award attorneys' fees without reviewing information about counsel's hourly rate and the time spent on the case, even if the parties have agreed to the fees. (*Laffitte v. Robert Half International, Inc*. (2016) 1 Cal. 5th 480, 573-575.) Further information regarding fee approval is set forth in the court's Procedural Guidelines for Final Approval of Class Action Settlements.

At the final approval hearing, Plaintiff's counsel must disclose whether they have any fee-splitting arrangement with any other counsel or confirm none exists. (*Barnes, Crosby, Fitzgerald & Zeman, LLP v. Ringler* (2012) 212 Cal.App.4th 172, 184; California Rules of Court, rule 3.769(b).)

13) CONCURRENT PENDING CASES – The declaration(s) filed in support of the motion must inform the court as to whether the parties, after making reasonable inquiry, are aware of any class, representative or other collective action in any other court that asserts claims similar to those asserted in the action being settled. If any such actions are known to exist, the declaration shall also state the name and case number of any such case and the procedural status of that case. (*Trotsky vs. Los Angeles Fed. Sav. & Loan Assn*. (1975) 48 Cal. App. 3d 134, 148; Effect of failure to inform court of another pending case on same or similar issues.)

14) PROPOSED ORDER GRANTING PRELIMINARY APPROVAL – **All proposed orders should include adequate information to provide clear instructions to the settlement administrator.** The proposed order should also attach the proposed notice and any associated forms as exhibits. The proposed order must contain proposed dates for all future events contemplated therein. **The settlement agreement should not be attached** to the order. Instead, it should be identified by reference to the Register of Action (ROA) number of the declaration to which it is attached. See below.

The Proposed Order must identify the documents comprising the Settlement Agreement (both the Original Settlement Agreement and any Amendments thereto) by reference to the **ROA number(s) of the declaration(s) to which they are attached**. This facilitates the identification of the settlement agreement (and any amendments) approved by the court. Referencing the ROA number(s) is less cumbersome than attaching the Settlement Agreement/Amendments as exhibit(s) to the Proposed Order.

B.

<u>Procedural Guideline for Final Approval of Class Action Settlements</u>

1) Parties submitting class action settlements for final approval should be certain that the following procedures are followed, and that all of the following issues are addressed. Failure to do so may result in unnecessary delay of final approval.

Since the date and place of final approval hearings are set by the preliminary approval order, notice of which is typically included in the notice to class members of the settlement itself

(California Rules of Court ["CRC"] 3.769(c) & (f)), the final approval hearing is outside the scope of Code of Civil Procedure §1005. Nevertheless, settling parties should caption their papers submitted in support of final approval as a "Motion for Final Approval," and set the matter for hearing on the reserved date.

2) With rare exceptions, the court will expect all issues related to final approval to be heard at the same time, including, without limitation, (a) final approval of the settlement itself, (b) approval of any attorney's fees request, (c) approval of incentive awards to class representatives, and (d) approval of expense reimbursements and costs of administration. If the settling parties elect to file separate motions for any of these categories, the motions must be set on the same day.

3) All requests for approval of attorney's fees awards, whether included in a Motion for Final Approval or made by way of a separate motion, must include lodestar information, even if the requested amount is based on a percentage of the settlement fund. The court generally finds the declarations of class counsel as to hours spent on various categories of activities related to the action, together with hourly billing-rate information, to be sufficient, provided it is adequately detailed. It is generally not necessary to submit copies of billing records themselves with the moving papers, but counsel should be prepared to submit such records at the court's request.

Plaintiff's counsel must disclose whether they have any fee-splitting arrangement with any other counsel or confirm none exists. (*Barnes, Crosby, Fitzgerald & Zeman, LLP v. Ringler* (2012) 212 Cal.App.4th 172, 184; California Rules of Court, rule 3.769(b).)

4) Requests for approval of enhancement/incentive payments to class representatives must include evidentiary support consistent with the parameters outlined in *Clark* v. *American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.

5) For all settlements that include a distribution to settlement class members, a final compliance/accounting hearing must be set, which requires the submission and approval of a final status report after completion of the distribution process. The final accounting hearing will be set when final approval is granted**, so the moving papers should include a suggested range of dates for this purpose.** The compliance status report must be filed at least 10 calendar days prior to the compliance hearing.

6) In light of the requirements of CRC 3.769(h), all final approvals must result in the entry of judgment, and the words "dismissal" and "dismissed" should be avoided not only in proposed orders and judgments, but also in settlement agreements.

7) To ensure appropriate handling by the court clerk, the court prefers the use of a combined "order and judgment," clearly captioned as such (e.g. "Order of Final Approval and Judgment" or "Order and Judgment of Final Approval"). The body of the proposed order and judgment must also incorporate the appropriate "judgment is hereby entered" language, and otherwise fully comply with California Rule of Court ("CRC") 3.769(h), including express reference to that rule as the authority for the court's continuing jurisdiction. The proposed order and

judgment should also include the compliance hearing provision (with suggested date and time) discussed above.

8) If the actions that are being settled are included in a Judicial Council Coordinated Proceedings ("JCCP"), termination of each included action by entry of judgment is subject to CRC 3.545(b) & (c), and proposed orders and judgments must so reflect. Language must also be included to the effect that compliance with CRC 3.545(b)(1 & 2) shall be undertaken by class counsel, and that a declaration shall be filed confirming such compliance.

9) All proposed orders and judgments should include all the requisite "recital," "finding," "order" and "judgment" language in a manner that clarifies the distinctions between these elements, and care must be taken that all terms that require definition are either defined in the proposed order and judgment itself or that definitions found elsewhere in the record are clearly incorporated by reference. No proposed order and judgment should be submitted until after review by counsel for each settling party.

C.1

Guidelines for PAGA Dismissals

(Private Attorney General Act of 2004, Labor Code sections 2698 et seq.)

In light of the similarity of a representative PAGA claim to a class action, and the requirements of Labor Code § 2699 (l) (2) which requires court approval of PAGA settlements, when a plaintiff wishes to dismiss a PAGA claim, the court requires plaintiff or plaintiff's attorney to file a declaration containing information similar to that required under CRC, rule 3.770 (pertaining to class actions). In that declaration the declarant shall explain to the court why plaintiff wishes to dismiss the PAGA action, whether consideration was given for the dismissal, and if so, the nature and amount of the consideration given. The declaration shall be accompanied by a Proposed Order to Dismiss the PAGA claim.

If the dismissal arises out of settlement with the individual plaintiff, **a copy of that settlement agreement must be provided to the court.** If the parties have agreed to maintain the confidentiality of the settlement agreement, it must be provided to the court for *in camera* review. It should be submitted to the clerk by emailing it to CX103@occourts.org.

C.2

Guidelines for PAGA Settlements

Pursuant to Labor Code section 2699(1)(2): "The superior court shall review and approve any settlement of any civil action filed pursuant to this part."

While the court will review every such motion for approval on its own merits, the court requires that at a minimum the settlement and/or any order or judgment requested from the court in connection with it must contain at least the following.

A comprehensive definition of the group of allegedly aggrieved employees represented by plaintiff in the action.

1. A definition of the PAGA claims encompassed by the settlement, premised on the allegations of the operative complaint.

2. The total consideration being provided by defendant for the settlement ("gross settlement amount"), and a description of each allocation of the consideration, such that all the total consideration is accounted for. This description must include:

    a. A description of all consideration being received by plaintiff, including for plaintiff's individual claims, PAGA claims, attorney's fees and costs.

    b. A description of all consideration being received by aggrieved employees including, if applicable, civil penalties, unpaid wages, and attorneys' fees and costs.

    c. A statement of the amount of consideration that will be subject to the 75%/25% allocation required by section 2699(i).

    d. A statement of the net amount, after deduction of any identified fees and/or costs, payable to purported aggrieved employees, along with a precise explanation as to how the amount payable to each purported aggrieved employee is to be calculated.

3. To the extent not otherwise explained, the allocation of attorneys' fees between the part of the case dealing with individual claims and the part of the case dealing with PAGA claims An explanation as to why the attorneys' fees and costs sought are reasonable within the meaning of Labor Code section 2699 (g) (1).

    a. Any amount allocated to claims administration.

    b. A description of any other amount(s) being deducted from the gross settlement amount.

    c. A description of the tax treatment for any of the payments to plaintiff and/or aggrieved employees.

4. A provision setting forth the disposition of unclaimed funds, i.e., checks uncashed within a stated period of time after being sent to aggrieved employees.

5. A provision that the proposed settlement be submitted to the Labor and Workforce Development Agency at the same time that it is submitted to the court. (Labor Code section 2699(l)(2))

6. A provision that the Court will retain jurisdiction to enforce the settlement pursuant to CCP section 664.6.

7. A notice to aggrieved employees that will accompany the payment to them, a copy of such notice to be provided to the court for approval along with the motion seeking approval of the settlement.

8. Releases that do not include Civil Code section 1542 releases for aggrieved employees other than plaintiff.

9. Releases that release no more, for aggrieved employees other than plaintiff, than the civil penalties available under PAGA by reason of the facts alleged in the operative complaint.

10. Inform the court by declaration whether there is any class or other representative action in any other court that asserts claims similar to those alleged in the action being settled. If any such actions are known to exist, state the name and case number of any such case and the procedural status of that case.