SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

TERESA ZAPATA,

Plaintiff,

v.

KEYPOINT CREDIT UNION, et al.,

Defendants.

Case No.: 21CV375646

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

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff alleges that Defendant Keypoint Credit Union failed to pay employees for off-the-clock work, failed to provide meal and rest breaks, and committed other wage and hour violations.

Now before the Court is Plaintiff's motion for preliminary approval of a settlement, which is unopposed. The Court issued a tentative ruling on December 7, 2022, and no one contested it at the hearing on December 8. The Court now issues its final order, which GRANTS preliminary approval.

I. BACKGROUND

Defendant provides retail banking services and owns and operates six credit union branch locations in California. (First Amended Class Action Complaint ("FAC"), ¶ 11.) It employed Plaintiff as a salary-paid, non-exempt Financial Services Representative II from approximately

July 2019 to June 2020, at branch locations in San Jose and Santa Clara. (*Id.*, ¶ 4.) Plaintiff typically worked seven to eight hours or more per day, and five or more days per week, with primary job duties including performing teller transactions, opening and closing customer accounts, sending referrals to loan officers, adhering to branch sales goals, and balancing the cash drawer. (*Ibid.*)

Plaintiff alleges that she and other employees were not paid for all hours worked because all such hours were not recorded. (FAC, ¶ 16.) Employees did not receive overtime wages owed and minimum wages for off-the-clock work (*id.*, ¶¶ 17, 19), and were not paid at an overtime and sick time rate that included all income derived from incentive pay, nondiscretionary bonuses, and/or other compensation (*id.*, ¶¶ 18, 27). They did not receive compliant meal and rest periods or complete and accurate wage statements. (*Id.*, ¶¶ 20–22.) Defendant failed to maintain accurate payroll records and to pay vested vacation wages, sick leave pay, and other wages due during their employment and upon termination of employment. (*Id.*, ¶¶ 23–26.) Finally, employees did not receive full reimbursement of business expenses. (*Id.*, ¶ 28.)

Based on these allegations, Plaintiff asserts the following putative class claims: (1) unpaid overtime, (2) unpaid minimum wages, (3) meal period violations, (4) rest period violations, (5) non-compliant wage statements and failure to maintain accurate payroll records, (6) failure to pay all vested vacation time and paid time off upon termination, (7) failure to timely pay wages during employment, (8) wages not timely paid upon termination, and (9) unpaid business-related expenses. She also brings: (10) a representative claim for PAGA penalties; and (11)–(12) derivative claims under Business & Professions Code section 17200 et seq.

Plaintiff now moves for an order preliminarily approving the settlement of the class and PAGA claims, provisionally certifying the settlement class, approving the form and method for providing notice to the class, and scheduling a final fairness hearing.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba, supra*, 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of relevant factors, depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.) The trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra*, 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be

"provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___, 2022 U.S. LEXIS 2940.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76–77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. SETTLEMENT PROCESS

According to Plaintiff's attorneys, they interviewed Plaintiff and conducted a preliminary investigation into her claims prior to drafting the complaint, including a careful examination of her employment records. Then, in response to formal and informal discovery requests, counsel received and reviewed employee demographic data, a sample of putative class members' time and pay records and contact information, and Defendant's labor policies and procedures manuals covering a broad range of topics, including employee clock-in policies and procedures, attendance policies, meal and rest periods, overtime and premium pay, etc. This allowed counsel to fully assess the nature and magnitude of the claims at issue and the impediments to recovery.

Following this investigation and analysis, the parties mediated with Louis Marlin, Esq. on July 6, 2022. They were able to reach a settlement.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement amount is $500,000. Attorney fees of up to $166,667 (one-third of the gross settlement), litigation costs of up to $20,000, and $10,000 in administration costs will be paid from the gross settlement. $20,000 will be allocated to PAGA penalties, 75 percent of which ($15,000) will be paid to the LWDA. The named plaintiff will seek an incentive award of $5,000, plus a payment of $5,000 in exchange for her provision of a general release.

The net settlement, approximately $278,333 by the Court's calculation, will be allocated to settlement class members proportionally based on their weeks worked during the class/PAGA periods. The average payment will be around $1,391.67 to each of the 200 class members. Class members will not be required to submit a claim to receive their payments. For tax purposes, settlement payments will be allocated 20 percent to wages and 80 percent to penalties and interest. The employer's share of taxes will be paid separately from the gross settlement. Funds associated with checks uncashed after 180 days will be paid to the California State Controller for deposit in the Unclaimed Property Fund in the name of the appropriate employee.

In exchange for the settlement, class members who do not opt out will release all claims, rights, etc. "reasonably arising from, or related to, the same set of operative facts as those set

forth in the operative complaint during the Class Period, including" specified wage and hour claims. Similarly, the PAGA release encompasses all claims for PAGA penalties "that were brought or could reasonably have been brought based on the facts alleged in Plaintiff's LWDA letter during the PAGA Period." The releases are appropriately tailored to the allegations at issue. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.) Consistent with the statute, aggrieved employees will not be able to opt out of the PAGA portion of the settlement.

V. FAIRNESS OF SETTLEMENT

Plaintiff valued the claims in this action as follows. The meal period claim was valued at $552,395. The minimum wage claim has an estimated value of $138,100, and the overtime claim was estimated at $207,150. The rest period claim was estimated at up to $552,395. The claim for unreimbursed business expenses could be worth up to $55,620. The regular rate claim was valued at $136,330 and the vacation pay claim at $14,775. The core claims were accordingly valued at up to $1,656,765.

In addition, Plaintiff estimated that wage statement penalties could total $400,000, waiting time penalties could total $715,105, and PAGA penalties could be worth up to $250,000. By this estimate, the maximum total value of the case is $3,021,870. The settlement accordingly represents over 16.5 percent of the maximum value of the case including penalties, or over 30 percent of the maximum value of the core claims.

In light of the uncertain penalties and the meal and rest break claims that may be difficult to certify and manage, the settlement achieves a good result for the class. For purposes of preliminary approval, the Court finds that the settlement is fair and reasonable to the class, and the PAGA allocation is genuine, meaningful, and reasonable in light of the statute's purposes.

Of course, the Court retains an independent right and responsibility to review the requested attorney fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127–128.) Counsel shall submit lodestar information prior to the final approval hearing in this matter so the Court can compare the lodestar information with the requested fees. (See *Laffitte v. Robert Half*

Intern. Inc. (2016) 1 Cal.5th 480, 504 [trial courts have discretion to double-check the reasonableness of a percentage fee through a lodestar calculation].)

VI. PROPOSED SETTLEMENT CLASS

Plaintiff requests that the following settlement class be provisionally certified:

All persons who worked for Defendant as non-exempt, hourly employees in California at any time from January 27, 2017 through October 4, 2022.

A. Legal Standard for Certifying a Class for Settlement Purposes

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On Drug Stores*).) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or

overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

B. Ascertainable Class

A class is ascertainable "when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).) A class definition satisfying these requirements

> puts members of the class on notice that their rights may be adjudicated in the proceeding, so they must decide whether to intervene, opt out, or do nothing and live with the consequences. This kind of class definition also advances due process by supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment.

(*Noel*, *supra,* 7 Cal.5th at p. 980, citation omitted.)

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel*, *supra,* 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on another ground by *Noel, supra,* 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

Here, the estimated 200 class members are readily identifiable based on Defendant's records, and the settlement class is appropriately defined based on objective characteristics. The Court finds that the settlement class is numerous, ascertainable, and appropriately defined.

C. Community of Interest

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact, (2) class representatives with claims or defenses typical of the class, and

(3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, supra*, 34 Cal.4th at pp. 326, 332.)

For the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also examine evidence of any conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be good for the judicial process and to the litigants. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104–1105 (*Lockheed Martin*).) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks*, *supra,* 89 Cal.App.4th at p. 916.)

Here, common legal and factual issues predominate. Plaintiff's claims all arise from Defendant's wage and hour practices applied to the similarly-situated class members.

As to the second factor,

> The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

(*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations, brackets, and quotation marks omitted.)

Like other members of the class, Plaintiff was employed by Defendant as a non-exempt employee and alleges that she experienced the violations at issue. The anticipated defenses are not unique to Plaintiff, and there is no indication that Plaintiff's interests are otherwise in conflict with those of the class.

The FAC alleges that Plaintiff was a "salary-paid" employee. In a supplemental memorandum filed on December 5, 2022, Plaintiff explains that, for a large portion of the class period, Defendant paid class members semi-monthly, based on their scheduled hours, and then made adjustments in the following pay period. Given these circumstances, Plaintiff's counsel initially believed that Plaintiff was paid a salary, and this is why her Complaint alleges she was "salary-paid." But in fact, Plaintiff and all the other employees at issue were classified as non-exempt and paid on an hourly basis.

Finally, adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba, supra,* 91 Cal.App.4th at p. 238.) "Differences in individual class members' proof of damages [are] not fatal to class certification. Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid.*, internal citations and quotation marks omitted.)

Plaintiff has the same interest in maintaining this action as any class member would have. Further, she has hired experienced counsel. Plaintiff has sufficiently demonstrated adequacy of representation.

D. Substantial Benefits of Class Certification

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.)* "Thus, even if questions of law or fact predominate, the lack of

superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id.* at pp. 120–121, internal quotation marks omitted.)

Here, there are an estimated 200 class members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

VII. NOTICE

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement (except the PAGA component) or object. The gross settlement amount and estimated deductions are provided. Class members are informed of their qualifying workweeks as reflected in Defendant's records and are instructed how to dispute this information. Class members are given 45 days to request exclusion from the class or submit a written objection to the settlement.

The notice is generally adequate, but must be modified to instruct class members that they may opt out of or object to the settlement by simply providing their name, without the need to provide their Social Security number, telephone number, or other identifying information.

Class members must be instructed that they may appear at the final fairness hearing to make an oral objection without submitting a written objection. Class members' estimated payments and workweek information must be displayed in bold within a box set off from the rest of the text on the first page of the notice. And class members must be informed of how notice of final judgment will be provided (for example, by posting the judgment to a settlement web site).

Regarding appearances at the final fairness hearing, the notice shall be further modified to instruct class members as follows:

> Hearings before the judge overseeing this case will be conducted remotely. (As of August 15, 2022, the Court's remote platform is Microsoft Teams.) Class members who wish to appear should contact class counsel at least three days before the hearing if possible. Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members may appear remotely using the Microsoft Teams link for Department 1 (Afternoon Session) or by calling the toll free conference call number for Department 1.

Turning to the notice procedure, the parties have selected CPT Group, Inc. as the settlement administrator. The administrator will mail the notice packet within 30 days of preliminary approval, after updating class members' addresses using the National Change of Address Database. Any returned notices will be re-mailed to any forwarding address provided or better address located through a skip trace or other search. Class members who receive a re-mailed notice will have at least 15 days to respond. These notice procedures are appropriate and are approved.

VIII. CONCLUSION

Plaintiff's motion for preliminary approval is GRANTED. The final approval hearing shall take place on **April 13, 2023** at 1:30 p.m. in Dept. 1. The following class is preliminarily certified for settlement purposes:

> All persons who worked for Defendant as non-exempt, hourly employees in California at any time from January 27, 2017 through October 4, 2022.

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

IT IS SO ORDERED.

Date: December 9, 2022

The Honorable Sunil R. Kulkarni
Judge of the Superior Court