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21 Attorneys for Plaintiffs

22 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 23 IN AND FOR THE COUNTY OF CONTRA COSTA

24 MARCO DIMERCURIO, CHARLES GAETH,)
 25 and JOHN LANGLITZ, on behalf of themselves)
 26 and others similarly situated,)

27 Plaintiffs,)

28 v.)

29 MARTINEZ REFINING COMPANY, LLC and)
 30 DOES 1 through and including 25,)

31 Defendants.)

Case No. MSC20-01257

**[PROPOSED] ORDER AFTER HEARING
 GRANTING PLAINTIFFS' MOTION FOR
 PRELIMINARY APPROVAL OF CLASS
 ACTION SETTLEMENT &
 CONDITIONAL CLASS CERTIFICATION**

Date: October 5, 2023
 Time: 9:00 a.m.
 Dept: 12
 Judge: Honorable Charles Treat

FILED
 OCT 18 2023
 CLERK OF THE COURT
 SUPERIOR COURT OF CALIFORNIA
 COUNTY OF CONTRA COSTA
 By: *[Signature]*
 Deputy Clerk

1 Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Conditional
2 Class Certification was scheduled for hearing on October 5, 2023 at 9 a.m. in Department 12
3 before Honorable Charles Treat of the Contra Costa County Superior Court. The Court issued a
4 Tentative Ruling on October 4, 2023, which was not contested by any of the parties. Accordingly,
5 no hearing was held and, after full consideration of the submissions of the parties, including
6 Plaintiffs' counsel's supplemental declaration required in the Tentative Ruling, and the entire
7 record in this matter, it is the conclusion of this Court that Plaintiffs' Motion is **GRANTED**. The
8 Court hereby adopts its Tentative Ruling as the Order of the Court, attached hereto as **Exhibit A**,
9 subject to the following additional findings and orders:

- 10 1. A class shall be conditionally certified for settlement purposes only and is defined as
11 follows: "All past and current Operators working at the Defendant's Martinez Refinery,
12 located in Martinez, California ("Refinery"), who during their past and current employment
13 with Defendant were scheduled for standby at any time from February 1, 2020 up through
14 August 31, 2022. The Settlement Class will exclude any person who previously settled or
15 released the claims covered by this Settlement, or any person who previously was paid or
16 received awards through civil or administrative actions for the claims covered by this
17 Settlement." The Court conditionally finds that, for settlement purposes only, the proposed
18 class meets the requirements for certification under section 381 of the California Code of
19 Civil Procedure.
- 20 2. The named Plaintiffs Marco DiMercurio and John Langlitz are suitable class
21 representatives and are preliminarily appointed Class Representatives for the Settlement
22 Class conditionally certified by this Order.
- 23 3. The Court preliminarily appoints the law firms of Weinberg, Roger & Rosenfeld and
24 Leonard Carder, LLP as Class Counsel. The Court finds that counsel have demonstrable
25 experience litigating, certifying, and settling class actions, and will serve as adequate
26 counsel for the Settlement Class conditionally certified by this Order.

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- 1 4. This Order incorporates by reference the definitions in the Settlement Agreement (“SA”)
2 submitted with the Supplemental Declaration of Aaron Kaufmann filed on September 12,
3 2023, and all terms defined therein shall have the same meaning in this Order.
- 4 5. The Settlement is preliminarily approved as it appears to fall within the range of
5 reasonableness, to be the product of arm’s-length, non-collusive, and informed negotiations
6 facilitated by an experienced wage and hour mediator, to treat all Settlement Class
7 Members fairly, and to be presumptively valid, subject only to any objections that may be
8 raised at or before the final approval hearing. The Court further finds that Plaintiffs’
9 counsel conducted extensive investigation and research, and that they were able to
10 reasonably evaluate Plaintiffs’ position and the strengths and weaknesses of their claims
11 and the ability to certify them. Plaintiffs’ counsel have provided the Court with enough
12 information about the nature and magnitude of the claims being settled, as well as the
13 impediments to recovery, to make an independent assessment of the reasonableness of the
14 terms to which the parties have agreed.
- 15 6. The Court also finds that settlement now will avoid additional and potentially substantial
16 litigation costs, as well as delay and risks if the parties were to continue the litigation.
- 17 7. The Court approves and appoints CPT Group as the Settlement Administrator.
- 18 8. The Court approves, as to form and content, the proposed Notice of Class Action
19 Settlement (“Class Notice”), which is Exhibit A to the SA.
- 20 9. The Court finds that the method for communicating preliminary approval of the Settlement
21 Agreement to Settlement Class Members set forth in the SA fully complies with the
22 requirements of California Rule of Court 3.769(f), fairly and adequately informs Settlement
23 Class Members of the pendency of the class action, the conditional certification of the
24 Settlement Class, the terms of the proposed Settlement Agreement and the benefits
25 available to Settlement Class Members, the right to request exclusion or to object to the
26 Settlement Agreement, and the date of the Final Approval Hearing, and therefore
27 constitutes due and sufficient notice to all persons entitled to notice, and thereby satisfies
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due process.

- 10. The deadline for Settlement Class Members to submit an opt-out request, objection, or dispute shall be 45 calendar days from the mailing of the Class Notice. Any such submissions must comply with the terms of the Settlement to be valid.
- 11. A Final Approval Hearing on the proposed Settlement shall be held before the Court on January 18, 2024 at 9:00 a.m. to determine whether the proposed Settlement is fair, reasonable, and adequate, and whether it should be finally approved by the Court.
- 12. Plaintiffs' counsel shall file a motion for Final Approval of the Settlement, Service Awards and Attorneys' Fees and Costs by no later than December 22, 2023.
- 13. Neither this Order, the SA, nor any related statements or proceedings shall be construed as, offered as, or deemed to be an admission or concession of liability or wrongdoing or breach of any duty on the part of any of the Defendant or of the appropriateness of certification of the Settlement Class other than for settlement purposes. If the Court does not finally approve the Settlement that is the subject of this Order, and all evidence, briefing, and proceedings related to the Settlement shall have no force and effect, and the parties will be returned to their status quo ante rights as more specifically set forth in the Settlement Agreement.
- 14. The Court expressly reserves the right to continue the date of the Final Approval Hearing without further notice to the Settlement Class Members.

IT IS SO ORDERED.

Dated: OCT 16 2023



 Hon. Charles S. Treat
 Superior Court Judge

Approved as to form and content per 10/10/23 email:

/s/ Ingrid Ahuja
 Ingrid Ahuja
 Counsel for Defendant

EXHIBIT A

Superior Court of California, Contra Costa County

Department 12
925-608-1000
www.cc-courts.org



K. Bieker
Court Executive Officer

MINUTE ORDER	
MARCO DIMERCURIO VS. MARTINEZ REFINING COMPANY LLC	MSC20-01257
HEARING DATE: 10/05/2023	
PROCEEDINGS: *HEARING ON MOTION IN RE: PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT	
DEPARTMENT 12 JUDICIAL OFFICER: CHARLES S TREAT	CLERK: DENESE JOHNSON COURT REPORTER: NOT REPORTED
<u>JOURNAL ENTRIES:</u>	
No appearance either party.	
There being no opposition to the tentative ruling, the tentative ruling becomes the order of the court as follows:	
Plaintiffs Marco DiMercurio and John Langlitz move for preliminary approval of their class action and PAGA settlement with defendant Martinez Refining Co. LLC. The motion is granted , conditioned on prompt filing of a supplemental declaration as stated herein.	
A. Background and Settlement Terms	
Defendant operates an oil refinery in Martinez. Plaintiffs are employed there as Operators.	
The original complaint was filed on July 2, 2020 as a class and PAGA action. It was amended twice, including deletion of one named plaintiff and modification of the claims asserted. The second amended complaint successfully withstood demurrer.	
The settlement would create a gross settlement fund of \$1,224,210. The class representative payments to the plaintiffs would be \$7,500 each. Attorney's fees would be \$408,070 (one-third of the settlement). Litigation costs would not exceed \$18,000. The settlement administrator's costs are estimated at \$11,500. PAGA penalties would be \$25,000, resulting in a payment of \$18,750 to the LWDA. The net amount paid directly to the class members would be about \$750,000. The fund is non-reversionary. There are an estimated 300 class members. Based on the estimated class size, the average net payment for each class member is approximately \$2,467. The individual payments will vary considerably, however, because of the allocation formula prorating payments according to the number of weeks worked during the relevant time.	
The entire settlement amount will be deposited with the settlement administrator within 30 days after the effective date of the settlement.	
The proposed settlement would certify a class of all current and former non-exempt employed at Defendants' California facilities between February 1, 2020 and August 31, 2022. The latter cutoff date was set because after that date, defendant agreed to modify its practices to eliminate the alleged violations. For PAGA purposes, the period covered by the settlement is the same.	

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K. Bieker
Court Executive Officer

The class members will not be required to file a claim. Class members may object or opt out of the settlement. (Aggrieved employees cannot opt out of the PAGA portion of the settlement.) Funds would be apportioned to class members based on the number of workweeks worked during the class period.

A list of class members will be provided to the settlement administrator within 25 days after preliminary approval. The administrator will use skip tracing as necessary. Various prescribed follow-up steps will be taken with respect to mail that is returned as undeliverable. Settlement checks not cashed within 180 days will be cancelled. If the unpaid remainder exceeds \$25,000, it will be redivided and distributed to locatable class members. If less than that amount, the funds will be directed to the East Bay Community Law Center. However, counsel has not provided a declaration establishing that none of them has an inappropriate relationship with the Center. That should be established by supplemental declaration.

The settlement contains release language covering all claims and causes of action, alleged or which could have reasonably been alleged based on the allegations in the operative pleading, including a number of specified claims. Under recent appellate authority, the limitation to those claims with the "same factual predicate" as those alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ("A court cannot release claims that are outside the scope of the allegations of the complaint.") "Put another way, a release of claims that goes beyond the scope of the allegations in the operative complaint' is impermissible." (*Id.*, quoting *Marshall v. Northrop Grumman Corp.* (C.D. Cal.2020) 469 F.Supp.3d 942, 949.)

Formal discovery was undertaken, resulting in the production of substantial documents. The matter settled after arms-length negotiations, which included a session with an experienced mediator.

Counsel also has provided an analysis of the case, and how the settlement compares to the potential value of the case, after allowing for various risks and contingencies. The substantive reach of the case is limited to a particular form of alleged violation, namely defendant's failure to pay operators for times when they were on call and subject to being called in to cover needed shifts. Plaintiffs contend that even if employees were not called in, the fact of being on call limited their choice of activities. Defendant contends that no payment was legally required for times when employees were not actually called in to report for duty.

The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code § 2699(e)(2) (PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory.")) Moreover, recent decisions may make it difficult for PAGA plaintiffs to recover statutory penalties, as opposed to actual missed wages. (See, e.g., *Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 937; but see *Gola v. University of San Francisco* (2023) 90 Cal.App.5th 548, 566-67.)

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K. Bieker
Court Executive Officer

Counsel state that notice of the settlement agreement was to be provided as soon as all signatures were obtained. There is no subsequent declaration, however, that that in fact was done. A supplemental declaration should be filed so stating.

B. Legal Standards

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801, including "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 state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction ... to the proposed settlement." (See also *Amaro*, 69 Cal.App.5th 521.)

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees". (*Id.*, at 64-65.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "The court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "Where the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutary purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

C. Attorney Fees

Plaintiff seeks one-third of the total settlement amount as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id.*, at 505.) Here, the preliminary figures provided show that the lodestar figure actually exceeds the fees sought. Following typical practice, however, the fee award will not be considered at this time, but only as part of final approval.

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K. Bleker
Court Executive Officer

Similarly, litigation and administration costs and the requested representative payments of \$7,500 each for the plaintiff will be reviewed at time of final approval. Criteria for evaluation of representative payment requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-07.

D. Discussion and Conclusion

As noted above, the Court requires a supplemental declaration on two points – submission of the settlement agreement to the LWDA, and absence of any affiliation between plaintiffs’ counsel and the *cy pres* beneficiary.

Subject to receipt of the supplemental declaration, the Court finds that the settlement is sufficiently fair, reasonable, and adequate to justify preliminary approval.

Counsel will be directed to prepare an order reflecting this entire tentative ruling, the other findings in the previously submitted proposed order, and to obtain a hearing date for the motion for final approval from the Department clerk by phone. Other dates in the scheduled notice process should track as appropriate to the hearing date. The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented. Plaintiffs’ counsel are to submit a compliance statement one week before the compliance hearing date. Five percent of the attorney’s fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court.

DATED: 10/5/2023

BY: _____

D. JOHNSON, DEPUTY CLERK

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**PROOF OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On October 10, 2023, I served the following document in the manner described below:

- **[PROPOSED] ORDER AFTER HEARING GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT & CONDITIONAL CLASS CERTIFICATION**

BY ELECTRONIC SERVICE: *By electronically mailing a true and correct copy through Leonard Carder's electronic mail system from ccoelho@leonardcarder.com to the email addresses set forth below.*

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 10, 2023 at Rodeo, California.



Cate L. Coelho