

1 Cristina Molteni (Bar No. 244715)  
cmolteni@moltenilaw.com  
2 MOLTENI EMPLOYMENT LAW  
100 Pine Street, Suite 1250  
3 San Francisco, California 94111  
Telephone: (415) 762-0270  
4 Facsimile: (415) 762-0271

5 *Attorney for Plaintiffs and the Proposed Class*  
6

7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
8 **CONTRA COSTA COUNTY**

9 JAVIER VEGA TOVAR and EDGAR  
10 RAMIRES, individually, and on behalf of  
all others similarly situated,

11 Plaintiffs,

12 v.

13 NIR WEST COAST, INC., dba  
14 NORTHERN CALIFORNIA ROOFING  
CO., GREGORY T. LYNN, and DOES 1  
15 through 50, inclusive,

16 Defendants.  
17  
18  
19  
20

**Case No.: MSC17-01600**

**CLASS ACTION**

**ORDER:**

- (1) PRELIMINARILY APPROVING  
CLASS ACTION SETTLEMENT;
  - (2) PROVISIONALLY CERTIFYING  
THE PROPOSED SETTLEMENT  
CLASS;
  - (3) DIRECTING CLASSWIDE  
DISTRIBUTION OF SETTLEMENT  
NOTICE; AND
  - (4) SETTING A HEARING DATE FOR  
FINAL APPROVAL
- 21  
22  
23  
24  
25  
26  
27

1 Plaintiffs Javier Tovar and Edgar Ramires move for approval of their class action and  
2 PAGA settlement. On December 11, 2019, the Court issued a tentative ruling requiring further  
3 documentation before a ruling could be made. A hearing was held on December 12, after which  
4 the Court directed that (1) financial information concerning defendant be provided to the Court  
5 for in camera review; and (2) plaintiffs counsel file a supplemental declaration addressing certain  
6 issues identified by the Court. Counsel provided the required information, and the Court now  
7 issues its ruling.

8 **Background:**

9 The original complaint was filed August 25, 2017. The operative Second Amended  
10 complaint, includes seven causes of action: failure to pay minimum wages, failure to pay for all  
11 hours worked, failure to pay overtime wages, failure to provide meal periods, waiting time  
12 penalties, failure to provide accurate wage statements, and failure to provide timely wage  
13 statements. The First amended complaint, filed August 7, 2018, added a cause of action for civil  
14 penalties under PAGA. The second amended complaint, filed October 22, 2019, after the  
15 settlement had been reached, added a cause of action for failure to provide rest periods.

16 The agreement, reflected in a “Joint Stipulation of Class Settlement,” provides a  
17 settlement class consisting of construction employees performing roofing work during the Class  
18 Period (August 25, 2013 to November 1, 2019), consisting of 204 persons. A gross settlement of  
19 \$485,000, non-reversionary (including a credit for \$5,000 for money already paid to some  
20 employees), will be paid to the Settlement Administrator. (Stipulation, Par. 14(c).) The gross  
21 settlement amount, however, will be paid over time: \$40,000 paid by October 1, 2020, followed  
22 by 36 payments of \$10,000, paid on the 15th of the month each month after preliminary approval  
23 is entered. In the event of non- payment, “[p]laintiff will have the option to file a Stipulation of  
24 Judgment with the Court if Defendant has failed to make timely payments of the monthly  
25 settlement amount for three (3) consecutive months and after Plaintiff have given 14 days’  
26 written notice to Defendants of the default.” (Stipulation, Par. 14(d).) An additional payment of  
27 \$80,000 paid later based on Defendant’s income during 2019, 2020 and 2021, to be paid after

1 filing of tax returns for those years. (Stipulation Par. 14(d)(1).) The employer's share of payroll  
2 taxes on the wage portions of the payments will be paid by Defendant, separate from the gross  
3 settlement amount. (Stipulation Par. 14(e).)

4 PAGA penalties would be \$24,000, resulting in a payment to the LWDA of \$18,000. A  
5 class representative incentive payment to Mr. Tovar only would not exceed \$10,000. Settlement  
6 administration costs are estimated at \$20,000, and shall not exceed that amount. (Stipulation, Par.  
7 14(i).) Litigation costs would not exceed \$19,000. Attorney fees would not exceed 30% of the  
8 fund, i.e., \$145,000. The net recovery for class would be \$272,500.

9 The notice to the class is provided, and the class members will not be required to file a  
10 claim. Various prescribed follow-up steps will be taken with respect to mail that is returned as  
11 undeliverable. (Stipulation, Par. 28.)

12 Checks would be mailed to the class members in three installments. The first would be  
13 paid within seven days after the settlement fund reaches \$160,000. (Stipulation, Par. 25.) (This  
14 would appear to be one year after preliminary approval.) A second installment would be paid  
15 within seven days after the settlement fund reaches \$320,000. The third installment will be sent  
16 after all installment payments have been received, i.e., 36 months after final approval. Fees and  
17 costs will be distributed proportionately with each set of payments to the class. If a check has  
18 not been cashed within 90 days, it would be cancelled (after sending a reminder postcard to the  
19 class member 30 days earlier). (Stipulation, Par. 14(f).) The additional funding for payroll taxes  
20 would be paid "at the time of each distribution." (Stipulation, Par. 24.) If negotiated checks are  
21 less than 95% of the settlement fund, the uncashed amounts will be paid to the remaining class  
22 members on a pro rata basis. (Stipulation, Par. 29.) If greater than 95% of the fund, the  
23 remaining funds would be paid to the Impact Fund as a cy pres recipient. (Id.)

24 Counsel's declaration attests that the LWDA was given notice of the proposed settlement  
25 at the same time the moving papers were submitted to the Court.  
26  
27

1 **Legal Standards:**

2 The primary determination to be made is whether the proposed settlement is “fair,  
3 reasonable, and adequate,” under *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801,  
4 including “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of  
5 further litigation, the risk of meaning class action status through trial, the amount offered in  
6 settlement, the extent of discovery completed and the state of the proceedings, the experience  
7 and views of counsel, the presence of a governmental participant, and the reaction ... to the  
8 proposed settlement.”

9 Because this matter also proposes to settle PAGA claims, the Court also must consider  
10 the criteria that apply under that statute. The Legislature’s express command that PAGA  
11 settlements be approved by the court necessarily implies that there is some substantive  
12 dimension to the review. (Labor Code § 2699(1).) The Court’s review, however, is somewhat  
13 hampered by the lack of guidance in the statute or case law concerning the basis upon which a  
14 settlement may be approved. The Court has found no binding authority, but one federal District  
15 Court has addressed the issue. In *O’Connor v. Uber Techs, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d  
16 1110, 1133, the court denied approval of class action settlements that included PAGA claims in  
17 part because the plaintiffs’ claims added up to as much as \$1 billion in PAGA penalties but  
18 parties settled those claims for \$1 million, or 0.1% of their alleged maximum value. As the court  
19 stated, “where plaintiffs bring a PAGA representative claim, they take on a special responsibility  
20 to their fellow aggrieved workers who are effectively bound by any judgment. [citation omitted]  
21 Such a plaintiff also owes responsibility to the public at large; they act, as the statute’s name  
22 suggests, as a private attorney general, and 75% of the penalties go to the LWDA ‘for  
23 enforcement of labor laws ... and for education of employers and employees about their rights and  
24 responsibilities under this code.’” (*Id.*, at 1134.) In that case, the LWDA itself filed a brief  
25 stating that “[i]t is thus important that when a PAGA claim is settled, the relief provided for  
26 under the PAGA be genuine and meaningful, consistent with the underlying purpose of the  
27 statute to benefit the public and, in the context of a class action, the court evaluate whether the

1 settlement meets the standards of being ‘fundamentally fair, reasonable, and adequate’ with  
2 reference to the public policies underlying the PAGA.” (*Id.*, at 1133.) The *Uber Techs* court  
3 noted that “a court may reduce the penalty when ‘to do otherwise would result in an award that is  
4 unjust, arbitrary and oppressive, or confiscatory.’” (*Id.*, at 1134, citing Labor Code § 2699(e)(2).)  
5 Nonetheless, the court noted that the plaintiff had provided no “coherent analysis” to justify the  
6 “relatively meager value” assigned to the PAGA claim.

7 California law provides some general guidance concerning judicial approval of any  
8 settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of*  
9 *California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement  
10 contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405,  
11 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, “[t]he court cannot surrender  
12 its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere  
13 puppet in the matter.” (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990)  
14 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always  
15 apply, because “[w]here the rights of the public are implicated, the additional safeguard of  
16 judicial review, though more cumbersome to the settlement process, serves a salutary  
17 purpose.” (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141  
18 Cal.App.4th 48, 63.)

19 **Attorney fees and incentive payment:**

20 Plaintiffs seek 30% of the total settlement amount as fees, relying on the “common fund”  
21 theory. Even a proper common fund-based fee award, however, should be reviewed through a  
22 lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal. 5th 480,503, the  
23 Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the  
24 percentage allocated is reasonable. It stated: “If the multiplier calculated by means of a lodestar  
25 cross-check is extraordinarily high or low, the trial court should consider whether the percentage  
26 used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the  
27 court is not necessarily required to make such an adjustment.” (*Id.*, at 505.) Following typical

1 practice, however, the fee award will not be considered at this time, but only as part of final  
2 approval.

3 Similarly, the request for a \$10,000 representative incentive payment would be  
4 considered at the final approval stage.

5 **Discussion:**

6 Counsel states that the gross recovery is 17% of the value of the “primary” claim, and  
7 9.6% of all claims, i.e., including “the more speculative claims for missed meal and rest periods,  
8 and wage statements and waiting time penalties.” Counsel provides a detailed analysis of  
9 calculation of the maximum value of the claims. The supplemental declaration provides  
10 information about the need to discount the claims, based on lack of evidence for some issues  
11 (e.g., concerning the length of the workshifts), and, primarily, concerning the financial status of  
12 the defendant. In essence, Defendant has financial difficulty, such that a bankruptcy filing could  
13 occur.

14 A somewhat unusual feature of this settlement is that the settlement funds will be paid  
15 over time. There will be an initial payment, 36 monthly installment payments, and a potential  
16 third payment of up to \$80,000. The only provision concerning a failure to pay is that if  
17 defendant misses three consecutive monthly payments, plaintiff may “file a stipulation of  
18 judgment.” In the supplemental declaration, counsel has described the stipulation more clearly.  
19 In addition, counsel has shown (and defense counsel concurred at oral argument), that the  
20 judgment is written such that the claims in this action will not be dischargeable in bankruptcy.  
21 This is a significant provision.

22 In addition, the Court is concerned that the extended time period for payment will  
23 increase the number of class members who cannot be contacted, but there appears to be no  
24 reasonable alternative.

25 Counsel attests to having obtained information showing defendant’s financial situation  
26 reviewed last three years of tax returns. (Molteni Dec., Par. 13.) This information was provided  
27 to the Court for in camera inspection, and will be returned to plaintiff. Without disclosing the

1 contents of the information, it supports counsel's expressed concerns.

2 Finally, if there is a potential cy pres recipient, counsel must comply with Code of Civil  
3 Procedure section 384, which will require that plaintiff submit an amended judgment at that time.  
4 In addition, pursuant to Code of Civil Procedure section 382.4, counsel for all parties shall advise  
5 the Court of whether they have “a connection to or a relationship with a nonparty recipient of the  
6 distribution that could reasonably create the appearance of impropriety as between the selection  
7 of the recipient of the money or thing of value and the interests of the class.”

8 **Preliminary Approval of Settlement Agreement:**

9 The Court finds on a preliminary basis that the proposed Stipulation—including the  
10 settlement amount, the process by which class members may object to or request exclusion from  
11 the settlement, and the settlement’s non-reversionary nature—appears at this stage to be  
12 fundamentally fair and adequate, and falls within the “range of reasonableness” and therefore  
13 grants preliminary approval of the settlement based upon the terms set forth in the Stipulation  
14 executed by the parties.

15 Based on a review of the papers submitted by plaintiffs, the Court finds that the  
16 Stipulation is the result of extensive arm’s-length negotiations with Defendants conducted after  
17 plaintiffs’ counsel had adequately investigated the claims and become familiar with the strengths  
18 and weaknesses of those claims. The assistance of employment mediator Francis J. Ortman in  
19 the settlement process supports the Court’s conclusion that the Stipulation is non-collusive. The  
20 Court finds the Stipulation to be presumptively valid, subject to objections that may be raised at  
21 the Final Fairness and Approval Hearing. In making this preliminary finding, the Court  
22 considered the nature of the claims, the amounts and kinds of benefits paid and received in the  
23 Stipulation, the allocation of settlement payments among the class members, and the fact that  
24 Defendants do not admit any liability and do not characterize this Stipulation of Settlement as an  
25 admission of liability as to any claim that was or could have been asserted by any party, that the  
26 Stipulation represents a compromise of the parties’ respective positions rather than the result of a  
27 finding of liability at trial. The Court further preliminarily finds that the terms of the Stipulation

1 have no obvious deficiencies and do not improperly grant preferential treatment to any individual  
2 class member.

3 Accordingly, the Court preliminarily finds that the Stipulation was entered into in good  
4 faith, pursuant to section 877.6 of the California Code of Civil Procedure.

5 **Class Certification:**

6 Pursuant to section 382 of the Code of Civil Procedure, in light of the proposed  
7 Stipulation, the Court hereby finds that the prerequisites for conditional certification of a  
8 settlement class have been met and preliminarily certifies the following class for settlement  
9 purposes only (the "Settlement Class"):

10 All current and former non-exempt construction employees who worked for  
11 Defendant NIR West Coast, Inc., dba Northern California Roofing Co. in the State of  
California at any time from August 25, 2013 to November 1, 2019.

12 Solely for purposes of the Stipulation of Settlement, the Court finds that the certification  
13 of the Settlement Class is warranted under the Code of Civil Procedure, section 382, because:

14 (a) the proposed class is ascertainable and so numerous that joinder of all members of the class is  
15 impracticable; (b) there are predominant questions of law or fact common to the proposed class,  
16 and there is a well-defined community of interest among members of the proposed class with  
17 respect to the subject matter of the action; (c) the claims of Class Representative Javier Vega  
18 Tovar ("Class Representative") are typical of the claims of the members of the proposed class;  
19 (d) the Class Representative will fairly and adequately protect the interests of the proposed Class;  
20 (e) a class action is superior to other available methods for an efficient adjudication of this  
21 controversy; and (f) plaintiff's counsel is qualified to serve as counsel for the class.

22 Solely for purposes of this Stipulation of Settlement, the Court hereby provisionally  
23 appoints Cristina Molteni of Molteni Employment Law as Class Counsel, having determined that  
24 she is an experienced and skilled attorney capable of fairly and adequately representing the  
25 interests of the Settlement Class;

26 Solely for purposes of this Stipulation of Settlement, the Court hereby provisionally  
27 appoints plaintiff Javier Vega Tovar as representative of the Settlement Class and finds him to be



1 fair and adequate representative of the interests of the Settlement Class with claims typical of  
2 Settlement Class Members.

3 **Notice to Potential Settlement Class Members:**

4 As set forth by the Stipulation, a hearing (the “Final Fairness Hearing”) will be held  
5 before the Court to determine:

- 6 a. whether the proposed settlement, on the terms and conditions provided for in the  
7 Stipulation, should be finally approved by the Court in a Final Award as fair, reasonable,  
8 and adequate, including consideration of any timely filed objections;
- 9 b. whether Class Counsel has fairly and adequately represented the interests of the  
10 Settlement Class;
- 11 c. whether the claims pending before this Court should be dismissed on the merits and  
12 with prejudice in light of the proposed settlement;
- 13 d. whether the application for attorney’s fees, expenses, PAGA payment, settlement  
14 administrator fees, Class Representative service award, to be submitted by Class Counsel  
15 in connection with the proposed settlement should be approved; and
- 16 e. such other matters as the Court may deem necessary or appropriate.

17 The Final Fairness Hearing may be postponed, adjourned, or continued by order of the Court  
18 without further notice to the Settlement Class. The Court also may finally approve the proposed  
19 Stipulation of Settlement at or after the Final Fairness Hearing (with any modifications agreed to  
20 by the Parties) without further notice to the Settlement Class. The Court will carefully scrutinize  
21 all relevant information (including the results of the notice campaign, “opt out” rates, and class  
22 members’ response to the Settlement, including any objections) at the Final Fairness and  
23 Approval Hearing to determine whether the proposed settlement is fair, reasonable, and adequate  
24 for the Class.

25 The Court hereby approves the parties’ designation of CPT Group as settlement  
26 administrator to perform the functions described in the Stipulation and exhibits thereto, but  
27 reserves the approval of the settlement administration fees until the Final Fairness and Approval

1 Hearing. The Court notes that the settlement provides that such costs will be paid from the Total  
2 Settlement Amount and shall be approximately \$20,000.

3 As set forth in greater detail in the Stipulation, Par. 19, within twenty (20) days of the  
4 date of entry of this Preliminary Approval Order, and in accordance with the Stipulation, the  
5 settlement administrator shall cause to be mailed, via first-class postage, copies of the Class  
6 Notice and Information Form, the form and content of which is hereby approved, to all members  
7 of the Settlement Class for whom a last-known address can be identified through reasonable  
8 effort. The Envelope to be mailed the Class Notice and the Sign to be posted at the workplace are  
9 also approved in form and content.

10 The Class Notice to be provided is the best practicable notice under the circumstances  
11 and is reasonably calculated to apprise Settlement Class Members, in clear, concise and easily  
12 understood language, of:

- 13 a. the pendency and nature of the litigation, including the claims asserted;
- 14 b. the terms and conditions of the Stipulation of Settlement;
- 15 c. appropriate information about Class Counsel's forthcoming application for attorney's  
16 fees and costs award and forthcoming requests for incentive award for the Class  
17 Representative;
- 18 d. Settlement Class Members' right to object to or exclude themselves from the  
19 proposed Settlement or to enter an appearance through an attorney if the Settlement  
20 Class Member so desires;
- 21 e. the time and manner for requesting exclusion; and
- 22 f. the full text of the release and the binding effect of the Final Award and any Final  
23 Order and Judgment that may be entered by the Court on Settlement Class Members.

24 The Notice is reasonable and constitutes due, adequate, and sufficient notice of the  
25 proposed Stipulation of Settlement to all persons affected by and/or entitled to participate in the  
26 proposed Settlement or the Final Fairness Hearing, in full compliance with the Due Process  
27 Clause of the United States Constitution.

1 All members of the Settlement Class who wish to opt out of the Settlement Class must do  
2 so by sending timely, written notice of their election to opt out to the settlement administrator at  
3 the address set forth in the Notice. To be considered timely, and thereby effectively exclude a  
4 person from the Settlement Class, the envelope delivering a completed, valid opt-out request for  
5 such person must be postmarked by no later than ninety (90) days of the notice date.

6 Any member of the Settlement Class who does not submit a valid opt-out request by the  
7 opt-out deadline, or who does not otherwise comply with the agreed-upon opt-out procedures  
8 approved by the Court, shall be a Settlement Class Member and shall be included in such  
9 Settlement Class and, if the proposed Stipulation of Settlement is approved and becomes  
10 effective, shall be bound by all the terms and provisions of the settlement agreement, including,  
11 but not limited to the releases described therein, whether or not such Settlement Class Member  
12 shall have objected to the proposed settlement and whether or not such Settlement Class Member  
13 participates in the settlement fund or the other benefits to the Settlement Class provided by the  
14 Stipulation of Settlement.

15 Accordingly, the Motion for Preliminary Approval of Class Action Settlement is  
16 **GRANTED** and the Court hereby adopts the Implementation Schedule for further proceedings  
17 as follows:

19 Deadline for <i>Defendants to Provide Settlement Administrator with Database of Class Member Contact Data</i>	[10 calendar days after order preliminarily approving settlement]  December 30, 2019
22 Deadline for Settlement Administrator to Mail the <i>Class Notices and Class Member Information Forms</i> to Class Members	[20 calendar days after order preliminarily approving settlement]  January 9, 2020
25 Deadline for Class Members to Postmark <i>Requests for Exclusion or "Opt Outs"</i>	[90 calendar days after Mailing of Class Notices and Information Forms]  April 9, 2020

1 2 3	Deadline for Class Members to Postmark <b><i>Objections</i></b>	[90 calendar days after Mailing of Class Notices and Information Forms]  April 9, 2020
4 5 6	Deadline for Class Counsel to <b><i>File Motion for Final Approval of Settlement</i></b> , Motion for Attorneys' Fees, Costs, PAGA Payment, Service Payments, and Settlement Administrator Costs	[at least 16 court days prior to the Final Fairness and Approval Hearing]  April 28, 2020
7 8 9	<b><i>Final Fairness and Approval Hearing</i></b>	May 21, 2020

10  
11 **IT IS SO ORDERED.**

12 **PDF Version Signed by Both Counsel.**

13 Dated: December 19, 2019.



Hon. Edward G. Weil  
Judge of the Superior Court, Contra Costa County

15  
16 **APPROVED AS TO FORM.**

17 **Plaintiffs' Counsel and Class Counsel:**

18 Dated: December 18, 2019.

MOLTENI EMPLOYMENT LAW

19  
20 By: \_\_\_\_\_  
21 Cristina Molteni  
22 Attorneys for Plaintiffs

23 **Defendant's Counsel:**

24 Dated: December 18, 2019.

WEINTRAUB TOBIN CHEDIAK COLEMAN GRODIN  
LAW CORPORATION

25  
26 By: \_\_\_\_\_  
27 Lukas J. Clary  
Attorney for Defendants