SUPERIOR COURT, STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

TAMIKA WALKER, et al., individuals, on behalf of themselves and on behalf of all persons similarly situated, Plaintiffs, v. DJO, LLC, et al., Defendants.	Case No.: 22CV400335 ORDER GRANTING PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT Dept. 7

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiffs Tamika Walker and Shannon Peete allege that Defendant DJO, LLC, which makes orthopedic devices, failed to provide employees with compliant meal and rest breaks, failed to pay minimum and overtime wages, issued noncompliant wage statements, and committed other wage and hour violations.

Before the Court is Plaintiffs' motion for final approval of settlement, which is unopposed. As discussed below, the Court GRANTS the motion.

I. BACKGROUND

Plaintiffs began employment with Defendant in September 2019 and ended their employment in April 2022. (First Amended Class Action Complaint ("FAC"), ¶ 3.) Both Plaintiffs were employed by Defendant as hourly, non-exempt employees. (*Ibid*.)

According to Plaintiffs, they were sometimes required to work while clocked out for their meal breaks and they were not paid to participate in required drug and other testing or COVID-19 screening. (FAC, ¶ 8.) And, Defendant utilized an unlawful rounding policy resulting in employees not being paid for all hours worked. (*Id*.) Further, while employees routinely earned non-discretionary incentive wages, overtime pay and meal and rest period premium pay was paid at their base pay rate rather than the regular rate of pay. (*Id*., ¶ 10.) Defendant also required employees to use their personal cellular phones for work purposes without compensation. (*Id*., ¶ 23.)

Based on these allegations, Plaintiffs assert, in the operative First Amended Complaint, putative class claims for: (1) violation of Business and Professions Code section 17200, et seq.; (2) failure to pay minimum wages, in violation of Labor Code sections 1194, 1197, and 1197.1; (3) failure to pay overtime wages, in violation of Labor Code section 510, et seq.; (4) failure to provide meal periods, in violation of Labor Code sections 226.7 and 512 by and the relevant Industrial Wage Commission order; (5) failure to provide rest breaks, in violation of Labor Code sections 226.7 and 512 by and the relevant wage order; (6) violation of Labor Code section 226 by failing to provide accurate itemized wage statements; (7) failure to reimburse employees for required expenses under Labor Code section 2802; (8) failure to provide wage when due under Labor Code sections 201 through 203; (9) failure to pay sick wages in violation of Labor Code 201 through 204, 233, and 246, and (10) a representative claim for PAGA penalties (Lab. Code, § 2698, et seq.).[1]

[1] Plaintiffs initially filed a class action complaint raising no PAGA claim in Case No. 22CV400335. Thereafter, they filed a PAGA only action in Case No. 22CV401621. The cases

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

---

have now been consolidated and the operative First Amended Complaint, filed May 11, 2023, asserts both classand PAGA claims.

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) 596 U.S. 639.)

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 CLASS

For settlement purposes only, Plaintiffs request the following class be certified:

All individuals who currently or previously have worked for Defendant in California, including both Defendant's employees and temporary workers employed by third-party staffing agencies and assigned to work for Defendant, in non-exempt positions at any time during the Class Period of August 2, 2018 to July 11, 2023.

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.)

At preliminary approval, the Court determined that Plaintiffs had demonstrated by a preponderance of the evidence (1) an ascertainable class, (2) a well-defined community of interest among the class members and (3) that a class action provides substantial benefits to both litigants and the Court. Consequently, the Court will certify the class for settlement purposes as requested.

IV. TERMS AND ADMINISTATION OF SETTLEMENT

At preliminary approval, the non-reversionary gross settlement amount was $1,500,000. However, because the escalator provision in the parties' agreement was triggered, the gross settlement amount has increased to $1,950,515.97. Attorney fees of up to $650,171.99 (one-third of the gross settlement), litigation costs of up to $21,500, and $12,430.88 in administration costs will be paid from the gross settlement. One hundred fifty thousand dollars of the gross settlement amount will be allocated to PAGA penalties, 75 percent of which ($112,500) will be paid to the LWDA, leaving 25 percent ($37,500) for the aggrieved employees. The named plaintiffs seek incentive awards of $10,000 each for a total of $20,000. The net settlement amount of $1,096,413.10 will be allocated to the 1,609 participating class members (i.e., those

who did not submit timely and valid requests for exclusion) proportionally based on their pay periods worked during the class period. The PAGA payment will be allocated to aggrieved employees on a pro rata basis based on their number of pay periods worked during the PAGA period of August 2, 2022 to July 11, 2023.

The highest individual settlement payment is estimated to be approximately $5,344.92, the lowest $20.72, and the average $681.85. The highest individual PAGA payment is estimated to be $208.18, the lowest $1.78, and the average $39.60. For tax purposes, settlement payments will be allocated 20 percent to wages and 80 percent to penalties and interest. The employer's share of payroll taxes will be paid in addition to the gross settlement. Funds associated with checks uncashed after 180 days will be paid to the California Controller's Unclaimed Property Fund in the name of the class member, which class counsel contends will leave no unpaid residue subject to the requirements of Code of Civil Procedure section 384, subdivision (b).

In exchange for the settlement, class members who do not opt out will release "all class claims pled, or that could have been pled, in the Operative Complaint and PAGA Notice, based on the factual allegations contained therein which occurred during the Class Period." As the Court determined in its order preliminarily approving the settlement, the release is appropriately tailored to the factual claims at issue. (See *Amara v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.) And the PAGA release is appropriately limited to "all PAGA claims pled, or that could have been pled, in the Operative Complaint and PAGA Notice, based on the factual allegations contained therein which occurred during the PAGA Period as to the Aggrieved Employees(,)" not including the underlying wage and hour claims. Consistent with the statute, aggrieved employees will not be able to opt out of the PAGA portion of the settlement.

The notice period has now been completed. According to the declaration of case manager Cassandra Polites with settlement administrator ILYM Group, Inc. ("ILYM") submitted

in support of the instant motion, on August 24, 2023, ILYM received from Defendant's counsel the names and identifying information (including last known mailing address) for each settlement class member and subsequently processed these items against the National Change of Address database to confirm and update the relevant information. While Defendant had estimated at preliminary approval that the class consists of approximately 458 class members who collectively worked a total of 37,000 workweeks during the class period, the actual class list submitted to ILYM contained 1,609 individuals who worked a total of 52,924 work weeks. This triggered the escalator clause of the parties' settlement agreement and when prompted by ILYM, Defendant elected to increase the gross settlement amount pursuant to this clause.

On January 11, 2024, the class Notice Packet was mailed, both in English and Spanish, via first class mail to all 1,609 individuals contained in the class list provided to ILYM. The deadline to submit a request for exclusion, a challenge to the amount of workweeks listed, or an objection to the settlement was March 11, 2024.

As of the date of Ms. Polites' declaration, March 14, 2024, 326 Notice Packets have been returned, 14 of which included a forwarding address. ILYM performed a skip trace on the 312 returned packets that did not have forwarding address, and obtained 186 updated addresses. The foregoing packets have been re-mailed. At present, 126 Notice Packets remain undeliverable. ILYM has not received any requests for exclusion, objections to the settlement, or workweek disputes.

At preliminary approval, the Court found that the proposed settlement provides a fair and reasonable compromise to Plaintiffs' claims, and that the PAGA settlement is genuine, meaningful, and fair to those affected. It finds no reason to depart from these findings now, especially considering that there are no objections. Therefore, the Court finds that the settlement is fair and reasonable for the purposes of final approval.

V. ATTORNEYS FEES, COSTS AND INCENTIVE AWARD

As articulated above, Plaintiffs' counsel seeks a fee award of $650,171, or one-third of the gross settlement amount, which is not an uncommon contingency fee allocation in a wage and hour class action. This award is facially reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiffs also provide a lodestar figure of $235,046.25, based on 304 hours at billing rates of $450 to $995, resulting in a multiplier of 2.8.[2] This is within range of multiplier's that courts typically approve. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488, 503–504 (*Laffitte*) [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13]; *Wershba, supra*, 91 Cal.App.4th at p. 255 ["[m]ultipliers can range from 2 to 4 or even higher"]; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051, fn. 6 [stating that multipliers ranging from one to four are typical in common fund cases and citing the court's own survey of large settlements finding "a range of 0.6–19.6, with most (20 of 24, or 83%) from 1.0–4.0 and a bare majority (13 of 24, or 54%) in the 1.5–3.0 range"].)

"While the percentage method has been generally approved in common fund cases, courts have sought to ensure the percentage fee is reasonable by refining the choice of a percentage or by checking the percentage result against a lodestar- multiplier calculation." (*Laffitte, supra*, 1 Cal.5th 480, 494-495.) Applying this latter approach, "the percentage-based fee will typically be larger than the lodestar based fee. Assuming that one expects rough parity between the results of the percentage method and the lodestar method, the difference between the two computed fees will be attributable solely to a multiplier that has yet to be applied. Stated another way, the ratio of the percentage-based fee to the lodestar-based fee implies a multiplier,

[2] Plaintiffs' counsel explains that it will be performing additional work that is not included in this lodestar amount but if factored in, would result in a 2.5 lodestar multiplier cross-check.

and that implied multiplier can be evaluated for reasonableness. If the implied multiplier is reasonable, then the cross-check confirms the reasonableness of the percentage-based fee; if the implied multiplier is unreasonable, the court should revisit its assumptions. (*Laffitte, supra,* 1 Cal.5th at p. 496, quoting Walker & Horwich, *The Ethical Imperative of a Lodestar Cross-check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases* (2005) 18 Geo. J. Legal Ethics 1453, 1463.) As described by the California Supreme Court, "[i]f the multiplier calculated by means of a lodestar crosscheck 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." (*Laffitte, supra,* 1 Cal.5th at 505.)

Here, the multiplier sought by Plaintiffs' counsel is well within the acceptable range and is supported by the percentage cross-check. As such, the Court finds counsel's requested fee award is reasonable.

Plaintiffs' counsel also seeks $21,500 in litigation costs, which is the maximum permitted by the settlement agreement and is below the costs actually incurred by counsel. This amount is reasonable and therefore approved. The $12,430.88 in administrative costs are below the limit provided by the agreement ($15,000) and are approved.

Finally, Plaintiffs request incentive awards of $10,000 each. To support these requests, Plaintiffs submit declarations describing their efforts on the cases. The Court finds that the class representatives are entitled to enhancement awards and the amounts requested are reasonable.

VI. CONCLUSION

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiffs' motion for final approval is GRANTED. The following class is certified for settlement purposes only:

All individuals who currently or previously have worked for Defendant in California, including both Defendant's employees and temporary workers employed by third-party staffing agencies and assigned to work for Defendant, in non-exempt positions at any time during the Class Period of August 2, 2018 to July 11, 2023.

Judgment will be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiffs and the members of the class will take from their complaint only the relief set forth in the settlement agreement and this order and judgment. Pursuant to Rule 3.769(h) of the California Rules of Court, the Court will retain jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **December 19, 2024 at 2:30 P.M.** in Department 7. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted pursuant to Code of Civil Procedure section 384, subdivision (b); the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

DATED: April 18, 2024

CHARLES F. ADAMS
Judge of the Superior Court