Tentative Rulings for February 8, 2023
Department 403

For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)
The above rule also applies to cases listed in this "must appear" section.

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

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(Tentative Rulings begin at the next page)

Tentative Rulings for Department 403

Begin at the next page

(40)

Tentative Ruling

Re: ***Delicious Foods LLC v. Wildwood Packing and Cooling***
Superior Court Case No. 15CECG03406

Hearing Date: **February 8, 2023 (Dept. 403)**

Motion: Plaintiff Delicious Food's LLC's motion to tax costs of Giumarra Bros. Fruit Company

Tentative Ruling:

To grant in part and deny in part, taxing defendant Giumarra's costs for Mediation, in the amount of $1,250.00, which allows Defendant's costs in the total of $33,003.79.

If oral argument is timely requested, the matter will be heard on Thursday, February 16, 2023 at 3:00 p.m. in Dept. 403.

Explanation:

Because Plaintiff does not dispute Giumarra's request for its "Filing and Motion fees" ($1,115.00), "Jury Fees" ($150.00), or "Deposition Costs" ($1,777.85), those costs are not taxed. At issue are Defendant Giumarra's request for its expert witness fees under Code of Civil Procedure section 998, subdivision (c)(1) ($27,485.50), its "Fees for Electronic Filing or Service" ($541.44), and its "Other" costs, which include costs of mediation ($1,250.00) and Court Call ($1,934.00).

On March 2, 2018, Giumarra served a Statutory Offer to Compromise pursuant to Code of Civil Procedure section 998 to Plaintiff (Exhibit 3 to Giumarra's opposition) offering to resolve the case in exchange for a waiver of costs and waiver of malicious prosecution as to Plaintiff. (Exhibit 2 to Giumarra opposition). After a series of demurrers, Plaintiff was left with three causes of actions to proceed to trial. These were operative at the time the section 998 offer was served. (See Exhibit 8 to the Opposition of Giumarra). The expert witness fees are of issue because of that offer.

Though Defendants ultimately prevailed on standing issues via their motion for judgment on the pleadings, the defendants prepared for trial and retained an expert to opine on Plaintiffs' claimed damages. Dr. Joseph Penberra reviewed all of the documents, pleadings, and discovery responses in this case, along with the tax returns for Sunsweet Fresh, and produced a report regarding his findings in this matter. These are the expert fees in dispute. Dr. Penberra was retained in March 2022, after the section 998 offer. He performed all of his work evaluating any potential damages in this case between March 21, 2022, and May 23, 2022. (Decl. of Evan Koch, para. 4, Exhibit 2.)[1]

[1] Counsel for Giumarra represents that defendants jointly retained Dr. Penberra, with Giumarra paying his entire bill. Thus his costs were included by Giumarra alone in its Memorandum of Costs, post judgment. (Opposition declaration of Evan Koch at paras. 3, 4).

Dr. Penberra's statement of hours and charges is attached to Giumarra's opposition to the Motion to Tax Costs, filed January 4, 2023. (Exhibit 2.) Dr. Penberra did all of his work evaluating any potential damages in this case between March 21, 2022, and May 23, 2022.

The statement for services makes reference to his reviewing "pleadings" as well as a "drop box", "materials" and "documents", without specificity. Time was also spent in meetings, phone calls and preparing to testify. Testimony was not required since the case was resolved on motion. Defendant Giumarra's opposition does not inform as to what particular materials were reviewed by Dr. Penberra (except for "tax returns" and "depositions").

Plaintiff relies on *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 538-539, for the proposition that defendant's Cost Memo was improper without attaching the section 998 offer. After trial, Behr, the prevailing plaintiff filed her memorandum of costs, including her expert witness fees. The court denied Redmond's motion to strike the request for expert fees. On appeal, Redmond contended the court's ruling was error, and Behr did not dispute Redmond's position. This case is distinguishable. There, Plaintiff Behr did not challenge defendant's position that Behr failed to support her memorandum of costs with the section 998 offer. It is unclear why plaintiff did so. Perhaps she never provided the offer to compromise even after the other party filed a motion to tax. This case should not be read to suggest an offer to compromise must in every case be initially attached to a cost memorandum.

Jones v. Dumrichob (1998) 64 Cal.App.4th, 1258, 1267 specifically endorses the opposite approach. Nothing needs to be attached to the memo of costs, by way of documentation. Then, if memo or cost or underlying documents are an issue, a motion to tax is appropriate to bring that to the court's attention. (*Id*. at page 1267.) Here, unlike *Behr*, once Plaintiff filed the motion to tax, Defendant's opposition provided additional documentation.

A properly verified memorandum of costs is considered prima facie evidence that the costs listed in the memorandum were necessarily incurred. (*Wilson v. Board of Retirement* (1959) 176 Cal.App.2d 320, 323.) Documentation must be submitted only when a party dissatisfied with the costs claimed challenges them by filing a motion to tax costs. (*Bach v. County of Butte* (1989) 217 Cal.App.3d 294, 308.) The approach used in *Jones v. Dumrichob*, *supra*, 64 Cal.App.4th at 1267 is used here where Plaintiff, unlike *Behr v. Redmond*, supra, 538-539, does dispute the request for expert fees. Defendant was not required to attach the section 998 offer to its costs bill.

Defendant relies on Code of Civil Procedure section 998 to support their claim for recovering expert witness fees. This statute permits the recovery of expert witness fees when a defendant has served a written offer to compromise, which the Plaintiff does not accept and the plaintiff fails to obtain a more favorable judgment. (Code of Civ. Proc., § 998, subds. (b) and (d).)

By its motion, Plaintiff argues the expert fees are exorbitant but does not challenge the section 998 offer itself based on reasonableness. (*Santantonio v. Westinghouse Broadcasting* Co. (1994) 25 Cal.App.4th 102, 117.) Plaintiff does not detail why the

section 998 offer was not accepted. Plaintiff does not discuss the posture of the case or what was known/unknown at that time.

Plaintiff also does not discuss specific charges or methods used by Dr. Penberra. Plaintiff does not challenge Dr. Penberra's credentials or argue the use of an expert at that stage of the litigation was inappropriate. The court regards this as an acknowledgement that these points have no merit. Based on the lack of such challenge, the section 998 offer is assumed to be reasonable.

In *Mon Chong Loong Trading Corp*. (2013) 218 Cal.App.4th 87, 94 defendant appealed a denial of a motion to tax costs following a voluntary dismissal. The court noted "Section 998 does not require that the party that has submitted a valid and reasonable offer (here, the defendant) achieve any specific result; the discretionary award of fees is triggered "[i]f ...plaintiff fails to obtain a more favorable judgment or award ...." (§ 998 subd. (c)(1), italics added.) By its plain language, it requires that the plaintiff who refused the reasonable settlement offer obtain a more favorable judgment or award in order to avoid possible liability for section 998 fees."

Defendant Giumarra's section 998 offer was legally considered rejected 30 days after service. (Code Civ. Proc. § 998, subd. (b)(2)). Because Giumarra prevailed via Judgment on the Pleadings, and because Plaintiff took nothing by way of the Third Amended Complaint, Plaintiff did not obtain a "more favorable" result than what had been offered in Giumarra's section 998 offer. Therefore, Giumarra's expert costs are not taxed.

The remaining costs claimed by Defendant Giumarra are Fees for Electronic Filing or Service" ($541.44), and its "Other" costs, which include costs of mediation ($1,250.00) and CourtCall ($1,934.00).

Plaintiff argues the electronic filing or service fees are permitted only if "through an electronic filing service provider if the court requires or orders electronic filing or service of documents." (Code of Civ. Procedure § 1033.5.) Plaintiff asserts the court did not so direct. However, pursuant to Code of Civil Procedure section 1010.6(g) and Fresno Superior Court Local Rule 4.1.2, documents filed by represented parties in all civil cases must be filed electronically unless the Court excuses the parties from doing so. Here, defendant was represented by counsel, and thus required to incur the fees for electronic filing. The amount of $148.85 fees for electronic filing will not be taxed. (Code of Civil Procedure § 1010.6(g).)

As to the mediation on November 29, 2022, Plaintiff argues it was merely convenient rather than court ordered. Generally, only court-ordered mediation costs have been allowed to a prevailing party. (*Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1207-1209.) The mediation was mutually agreed to by the parties. At that time, the parties could have, but apparently did not, make an agreement about how fees would be handled in the event the case did not settle. Under the documentation provided, these costs are taxed.

Regarding CourtCall, this procedure promotes the efficiency of the judicial process by avoiding the disruption that can come from travel delays and related

problems. It makes more likely that the court can adhere to its schedule and not have to delay or continue cases. In addition, counsel for Giumarra has its office in Southern California. CourtCall made it cost-effective and efficient for it to represent its client. Counsel's declaration is sufficient proof to support a finding of fact that these were reasonable costs. (*Ladas v. California State Auto Assn.* (1994) 19 Cal.App.4th 1546, 1549.) CourtCall is not taxed.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JS **on** 2/2/2023 .
(Judge's initials) (Date)

(40)

Tentative Ruling

Re: ***Delicious Foods LLC v. Wildwood Packing and Cooling***
Superior Court Case No. 15CECG03406

Hearing Date: **February 8, 2023 (Dept. 403)**

Motion: Plaintiff Delicious Food's LLC's motion to tax costs of Wildwood Packing and Cooling

Tentative Ruling:

To grant in part and deny in part, taxing defendant Wildwood's costs for Mediation, in the amount of $1,250.00, Exhibit binders in the amount of $1,661.98 and Secretary of State/InFact fees of $129.95, which allows Defendant's costs in the total of $6,459.91.

If oral argument is timely requested, the matter will be heard on Thursday, February 16, 2023 at 3:00 p.m. in Dept. 403.

Explanation:

Plaintiff objects to the cost bill submitted by Defendant Wildwood for the categories of: "Other" ($2,725.95); for "models, enlargements and photocopies" ($1661.98); "Deposition costs" ($3,321.06); and "Filing Fees" ($1,035)[2]. To the extent Plaintiff objects for lack of specificity or a breakdown, Defendant has provided this information in its opposition to Plaintiff's motion to tax. The prevailing party is not required to attach actual bills to its Judicial Council Cost Bill. (*Jones v. Dumrichob* (1998) 64 Cal.App.4th, 1258, 1267.)

Plaintiff did not object to the following costs, so they will not be taxed -- Jury Fees ($150.00), Service of Process ($459.00), and fees for electronic filing ($148.85), totaling $757.85. In addition, where Plaintiff did not object to similar costs claimed by Defendant Giumarra, an objection to Defendant Wildwood's costs is inappropriate. Thus Wildwood's Filing Fees in the amount of $1,035 will not be taxed because Defendant Giumarra's were not. Likewise, it is not logical that deposition costs are allowable for one defendant (Giumarra) and not the other. With Defendant Wildwood's opposition filed August 29, 2022, the detail sought by Plaintiff has been provided. (Code of Civil Procedure §§ 1033.5(a)(3) and 1033.5(c)(1).) Wildwood's deposition costs in the amount of $3,321.06 will not be taxed.

The declaration of Michael J.F. Smith dated August 29, 2022, states that the $1,661.98 for "models, enlargements and photocopies" was incurred for trial exhibit

[2] $541.44 in electronic filing fees would be costs necessary to defend this action and required pursuant to Code of Civil Procedure § 1010.6(g). A service filing fee is required with each electronic filing.

binders. (Smith Decl., Exhibit E.) These costs were incurred about 25 days before the first day of trial on May 9, 2022. The case was disposed of by the granting of a Motion for Judgment on the Pleadings on May 31, 2022.

In his declaration, however, counsel does not address whether the exhibit binders were used by or useful to the trier of fact, when and in what context of the case. Defendant has not placed the costs of the binder among those reimbursable under Code of Civil Procedure section 1033.5, subdivision (a)(13). The reimbursement of un-used trial exhibit binders is instead a matter for the court's discretion under Code of Civil Procedure section 1033.5, subdivision (c)(4).

In *Applegate v. St. Francis Lutheran Church* (1994) 23 Cal.App.4th 361, 363-364, costs of unused trial binders were allowed under Code of Civil Procedure section 1033.5(c)(4). That plaintiff dismissed the case on the first day of trial. Here, the case was not dismissed, rather, Defendant Giumarra, joined by Defendant Wildwood, filed a motion for Judgment on the Pleadings after trial began on May 9, 2022.[3] The judgment in favor of Defendants was signed on May 31, 2022. Unlike *Applegate v. St. Francis Lutheran Church*, *supra*, 23 Cal.App.4th 361, 363-364, three days of trial were had, based on court records, although counsel's declaration states only that: "These costs were necessary in defending this action filed by Plaintiff and required pursuant to Code of Civil Procedure section 1010.6(g). A service filing fee is required with each electronic filing." (Smith Declaration, August 29, 2022, paragraph 8.)

In exercising its discretion, the court considers the absence of particulars provided by defense counsel on how/if the binders were used, the number of days prior to trial the binders were prepared, and the fact that the Motion of Judgment on the pleadings, unlike the dismissal on the day of trial seen in *Applegate v. St. Francis Lutheran Church, supra,* 23 Cal.App.4th 361, was not an unexpected development for Defendant. Given those considerations, the motion is granted to tax the $1,661.98.

In the "other" category, defendant claims $2,720.95 in "other" fees and costs, which included:

a. CourtCall fees of $1,348.00;
b. Mediator fee of $1,250.00;
c. Copies of documents from California Secretary of State: $28.00;
d. IncFact.com fees of $89.95; and a
e. Certification of Status from the California Secretary of State: $5.00

In the case of Court Call, Plaintiff correctly notes there is no direct authority in Code of Civil Procedure section 1033.5 for the recovery of those costs. However, this procedure promotes the efficiency of the judicial process by avoiding the disruption that can come from travel delays and related problems. It makes more likely that the court can adhere to its schedule and not have to delay or continue cases. Court Call makes it cost-effective and efficient for attorneys to represent their clients. Counsel's declaration is

[3] May 16 and 17, 2022 were the second and third trial days, per Court records. However, Defendant describes these as dates the motion for Judgment on the Pleadings was heard. (Opposition of Defendant Wildwood, filed August 29, 2022, page 2.)

sufficient proof to support a finding of fact that these were reasonable costs. (*Ladas v. California State Auto Assn.* (1994) 19 Cal.App.4th 1546, 1549.)

As to the mediation on November 29, 2022, Plaintiff argues it was merely convenient rather than court ordered. Generally, only court-ordered mediation costs have been allowed to a prevailing party. (*Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1207-1209.) The mediation was mutually agreed to by the parties. At that time, the parties could have, but apparently did not, make an agreement about how fees would be handled in the event the case did not settle. Under the documentation provided, these costs are taxed.

The remainder of the fees sought as "other costs" are discussed in counsel's declaration of August 29, 2022, paragraph 10, as being paid to the California Secretary of State for copies ($28.00), for Certification of Status ($5.00) and to"IncFact.com" ($89.95). The reference to "IncFact.com" is not explained nor is it stated what documents were procured. The declaration by counsel simply states that these "were necessary in defending this action" and that counsel "kept records of each payment in our normal course of business and billed our client accordingly." The invoices attached as Exhibit F show these records were sought by counsel on April 26, 2021. There is no further explanation.

In exercising its discretion under Code of Civil Procedure section 1033.5(c)(4), the court considers the absence of particulars provided by defense counsel regarding these fees and the documents procured, as well as the ambiguity created by the materials being sought nearly a year before trial. Given those considerations, the $129.95 is taxed.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JS **on** 2/2/2023 .
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Dominguez v. Huante, et al.***
Superior Court Case No. 19 CECG04293

Hearing Date: February 8, 2023 (Dept. 403)

Motion: Plaintiff's Applications for Default Judgment

Tentative Ruling:

To continue the hearing to March 30, 2023, at 3:30 p.m. in Dept. 403 to allow Plaintiff to file additional documents in support of the request for default judgment. All requested documents to be filed on or before March 20, 2023.

If oral argument is timely requested, the matter will be heard on Thursday, February 16, 2023 at 3:00 p.m. in Dept. 403.

Explanation:

Statement of Damages

Plaintiff has failed to provide the Court a copy of her statement of damages served on each defendant on January 26, 2020.

Plaintiff's exhibits in support of her application for default judgment filed on October 28, 2021 included statements of damages for each defendant dated September 21, 2021 and served by mail on September 22, 2021. (Default Hearing Brief, Exhs. G and H.) These statements are null and cannot be considered as they were served after defaults were entered against the defendants. (Code Civ. Proc. § 425.11(c).) Default was entered against Rafael Huante on March 10, 2021. Default was entered against David Huante on April 16, 2021.

Without the disclosure of the amount demanded on the statement of damages, the Court cannot determine whether the amount of judgment requested is proper. Relief granted on default cannot exceed amount demanded in the separate statement. (Code Civ. Proc. §580(a); *Greenup v. Rodman* (1986) 42 Cal.3d 822, 824 [demand sets ceiling on recovery].)

Costs Awarded on Default Judgment

The proposed judgment and mandatory Judicial Council CIV-100 forms to be considered for the upcoming default prove up hearing were filed on July 11, 0222 and reflect that costs are waived. On January 30, 2023 plaintiff filed a document with a breakdown of litigation costs. If plaintiff would like to submit updated CIV-100 forms for her Request for Court Judgment reflecting costs requested in the judgment they are to be submitted on or before March 20, 2023. The memorandum of costs should reflect costs grouped together based on the authority supporting the allowable cost. For example,

electronic filing fees allowable under Code of Civil Procedure 1033.5 subdivision (a)(14) should be a separate entry from filing fees allowable under subdivision (a)(1).

Any updated CIV-100 form must be on the most current 2023 forms.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JS on 2/7/2023.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Almaraz v. Brant***
Superior Court Case No. 20CECG03430

Hearing Date: February 8, 2023 (Dept. 403)

Motion: Motion for Approval of PAGA Settlement

Tentative Ruling:

To deny without prejudice. (Lab. Code § 2699, subd. (l)(2).)

If oral argument is timely requested, the matter will be heard on Thursday, February 16, 2023 at 3:00 p.m. in Dept. 403.

Explanation:

Under Labor Code section 2699, "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to [PAGA]. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court." (Lab. Code, § 2699, subd. (i)(2).)

The statute does not explain what exactly the trial court should consider when reviewing a proposed PAGA settlement. However, recently the Court of Appeal in *Moniz v. Adecco USA, Inc*. (2021) 72 Cal.App.5th 56 did provide some guidance. The court explained that "many federal district courts have applied the 'fair, reasonable, and adequate' standard from class action cases to evaluate PAGA settlements." (*Id.* at pp. 75–76.)

"Despite the fact that '"'a representative action under PAGA is not a class action'"', and is instead a 'type of qui tam action', a standard requiring the trial court to determine independently whether a PAGA settlement is fair and reasonable is appropriate. Class actions and PAGA representative actions have many differences, with one salient difference being that certain due process protections afforded to unnamed class members are not part of PAGA litigation because aggrieved employees do not own personal claims for PAGA civil penalties. Nonetheless, the trial court must 'review and approve' a PAGA settlement, and the Supreme Court has in dictum referred to this review as a 'safeguard[ ].' The Supreme Court has also observed that trial court approval 'ensur[es] that any negotiated resolution is fair to those affected.' When trial court approval is required for certain settlements in other qui tam actions in this state, the statutory standard is whether the settlement is 'fair, adequate, and reasonable under all the circumstances.' Thus, while PAGA does not require the trial court to act as a fiduciary for aggrieved employees, adoption of a standard of review for settlements that prevents 'fraud, collusion or unfairness', and protects the interests of the public and the LWDA in the enforcement of state labor laws is warranted. Because many of the factors used to evaluate class action settlements bear on a settlement's fairness—including the strength of the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely

duration of further litigation, and the settlement amount—these factors can be useful in evaluating the fairness of a PAGA settlement." (*Id*. at pp. 76–77, internal citations omitted.)

"Given PAGA's purpose to protect the public interest, we also agree with the LWDA and federal district courts that have found it appropriate to review a PAGA settlement to ascertain whether a settlement is fair in view of PAGA's purposes and policies. We therefore hold that a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate 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, internal citations and footnote omitted.)

On the other hand, "PAGA does not provide that aggrieved employees must be heard on the approval of PAGA settlements… PAGA provides no mechanism for aggrieved employees, including those pursuing PAGA lawsuits, to be heard in objection to another PAGA settlement. This concession is dispositive, and we will not read a requirement into a statute that does not appear therein." (*Id.* at p. 79, internal citation omitted.)

1. Notice to LWDA

The moving party has given notice of the settlement to the LWDA, so it may address the court regarding it, if it so chooses. (Lab. Code, § 2966, subd. (l)(2).) The proposed settlement was uploaded to the LWDA on September 23, 2022. (Elkin Decl. ¶ 7, Exh. B.)

2. Is the Settlement Fair, Adequate, and Reasonable?

As mentioned above, the Court of Appeal in *Moniz v. Adecco USA, Inc., supra*, 72 Cal.App.5th 56 stated that the trial court should review PAGA settlements to determine whether they are fair, adequate and reasonable. (*Moniz, supra*, at pp. 75-77.) "Because many of the factors used to evaluate class action settlements bear on a settlement's fairness—including the strength of the plaintiff's case, the risk, the stage of the proceeding, the complexity and likely duration of further litigation, and the settlement amount—these factors can be useful in evaluating the fairness of a PAGA settlement." (*Id.* at p. 77.)

As an initial matter, the court intends to reject the proposed allocation of the 25% aggrieved employees' share of the settlement solely to plaintiff. Under the general provisions of the PAGA scheme, 75% of the civil penalties recovered goes to the state while the remaining 25% is given to the "aggrieved employees." (Lab. Code, § 2699, subd. (i).) As explained by the United States Supreme Court,

> In any successful PAGA action, the LWDA is entitled to 75 percent of the award. § 2699(i). The remaining 25 percent is distributed among the employees affected by the violations at issue. [Citation.]

(*Viking River Cruises, Inc. v. Moriana, supra*, 142 S.Ct. 1906, 1914.)

The assertion that plaintiff, as the representative of the aggrieved employees bringing this action on their behalf, is entitled to the entire 25% share of the settlement allocated to the aggrieved employees is contrary to the plain language of the PAGA statute, defining an "aggrieved employee" as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Lab. Code § 2699, subd. (c), emphasis added.)

The authority for this proposed distribution is *Cunningham v. Leslie's Poolmart, Inc.* (C.D.Cal June 25, 2013) 2013 WL 3233211, *6, interpreting Labor Code section 2699, subdivision (i) as intending only those employees who initiated the claim under PAGA as the "aggrieved employees" to whom the 25% of penalties are to be distributed. The footnote to this holding specifies that the court was provided with no case law or authority directly addressing how the penalties were to be distributed. (*Id*. at p. *6, fn. 1.) *Cunningham's* interpretation is not reflected in subsequent, published authority. (*Moorer v. Noble L.A. Events, Inc. (*2019) 32 Cal.App.5th 736, review den. May 15, 2019.) In *Moorer v. Noble L.A. Events, Inc., supra,* 32 Cal.App.5th at page 744, the Second Appellate District affirmed trial court's dismissal of plaintiff's PAGA action, rejecting a proposed default judgment allocating the entire 25% of the aggrieved employees share to the named plaintiff individually. The court reasoned that the allocation to all aggrieved employees consistent with the statutory scheme wherein all aggrieved employees are bound by the judgment. (*Id*. at 742.) Moreover, a PAGA action "'is fundamentally a law enforcement action designed to protect the public and not benefit private parties.'" (*Id*. at 743, quoting *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 381, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) __ U.S. __, __ [142 S.Ct. 1906]; accord, *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) To allow plaintiff to collect the entire share of aggrieved employees' penalties is against the intent of PAGA to not benefit private parties.

Additionally, such an allocation is inconsistent with the terms of the settlement. The settlement agreement defines "Aggrieved Employees" as "all Brant's non-exempt employees." (Elkins Decl., Exh. A, "Settlement Agreement and Release of Claims," Recitals, ¶ A.) The consideration described in the settlement agreement likewise describes the aggrieved employees' share of the settlement being divided pro rata based on the workweeks during the relevant period.

> In consideration of the execution of the Agreement, and for Employee's performance of the covenants and promises made herein, Brant agrees to pay the … "Settlement Sum" [] toward full and complete settlement of the PAGA Action … . … From the net Settlement Sum, Brant shall pay 75% to the LWDA and 25% to the Aggrieved Employees (based on their pro rata share of the workweek data), within 15 days of the Effective Date. The term "Effective Date" refers to the date upon which the Court grants the Parties' joint stipulation approving the Settlement and dismissing the PAGA Action.
>
> Given the size of the pro rata amounts going to the Aggrieved Employees, Brant will add the share of the Settlement Sum going to the Employees as an additional line item on their pay checks, on the soonest reasonably practicable payroll cycle, and provide a declaration to

Employee's counsel: under penalty of perjury, that the payments to the Employees have been made.

(Elkins Decl., Exh. A, "Settlement Agreement and Release of Claims," § 4.)

Therefore, the court is disinclined to order the requested distribution the entire percentage allocated to the aggrieved employees only to the employee who brought the action.

a. Strength of the Case

Little information of substance is provided regarding the strength of the case. In addition to eighteen causes of action brought against defendants for Labor Code violations in an individual capacity and related to plaintiff's alleged wrongful termination, the Complaint alleges a sole representative cause of action for penalties under PAGA based on violations of Labor Code sections 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, and 2802. (Complaint, ¶¶ 19, 177.) There is no evidence submitted with the motion supporting the alleged underlying Labor Code violations. The discussion of the weaknesses of the case merely references defendant's denials.

The decision to settle the claims includes the fact that defendant Brant, the primary owner and operator of Trust-All Roofing passes away during the pendency of this action. The settlement is being paid from Mr. Brant's estate which limits the amount of funds available for payment of any settlement or judgment against the defendant. However, some discussion of the strengths and weaknesses of the case beyond the fact that defendant denies the constitutionality of PAGA and disputes the underlying facts is necessary to justify a settlement in any amount.

b. Stage of the Proceeding

A presumption of fairness exists where the settlements is reached through arm's length mediation between adversarial parties, where there has been investigation and discovery sufficient to allow counsel and the court to act intelligently, and where counsel is experienced in similar litigation. (*Dunk v. Ford Motor Company* (1996) 48 Cal.App.4th 1794, 1802.)

There is no evidence regarding pre-settlement discovery, counsel merely states that the parties attended mediation on April 28, 2022 and that plaintiff and defendants executed a settlement agreement and release on April 28, 2021 [sic]. (Elkin Decl. ¶ 5.) No information is provided as to what information was provided by defendant, if any, or otherwise possessed by plaintiff's counsel, in order to assess the value of the claims.

While the case settled after mediation, and the passing of Steven Brant was likely a significant motivating factor in the settlement of this action, plaintiff should inform the court of what discovery or exchange of information, if any, occurred prior to settlement.

c. Risks of Litigating Case through Trial

Counsel notes that there will be savings in time and expense by parties in not continuing to litigate the claims for penalties and that there is no guarantee of an outcome on the PAGA claims at trial, and the changing statutory law on PAGA which risks prevailing on liability and recovery of penalties. (Elkin Decl., ¶ 6.) Litigating a complex PAGA action is inherently expensive, and the litigation could continue beyond entry of judgment if either party appealed adverse rulings. (*Ibid*.) Given the nature of the cross-complaint challenging the PAGA statute itself, there was an increased likelihood of protracted litigation in the event the action could not be settled. This factor warrants a discount to the claims in favor of settlement.

Additionally, given the source of payment is the remaining estate of decedent Brant after creditor's claims, there is also a risk that the estate would be unable to satisfy any judgment against it. This factor likewise warrants a discount to the claims in favor of settlement.

d. Amount of Settlement

The gross settlement is a minimum of $60,000, but to assess the reasonableness of this amount, the court needs a valuation of the total potential penalties.

There is no representation of the potential value of the claims, or estimated average payment to each employee as a starting point to determine the reasonableness of the settlement amount.

Another missing foundational fact is that there is no declaration from defendant providing admissible evidence of the number of employees and pay periods involved. The settlement agreement stated this information would be provided with the motion for approval. (Elkin Decl., Ex. A, "Settlement Agreement and Release of Claims," § 1(b).)

Plaintiff notes that there is a risk that the trial court would exercise its discretion to reduce the amount of penalties even if plaintiff prevailed at trial. That is perhaps likely, but plaintiff must supply a solid starting point before the court can determine that the settlement is fair, adequate and reasonable under the circumstances.

e. Experience and Views of Counsel

Plaintiff's counsel has not provided evidence in the declaration with this motion to allow the court to assess counsel's experience in class and representative litigation. Likewise, there is no representation that the settlement is fair, adequate and reasonable under the circumstances. Therefore, this factor weighs against approval without the submission of additional evidence.

f. Government Participation

Defendant Brandt filed a cross complaint against Xavier Becerra, then-Attorney General of State of California, Labor Commissioner Lilia Garcia Brower, and Secretary of California Labor and Workforce Development Agency Julia A. Su, and the California Labor and Workforce Development Agency, challenging the constitutionality of California's PAGA statute, however it does not appear as though the state cross-

defendants participated in the mediation resulting in the global settlement. This factor does not favor either approval or disapproval of the settlement.

g. Attorney's Fees and Costs

The settlement agreement provides that plaintiff's counsel would get up to $21,000 (35% of the total gross recovery) in attorney's fees. (Elkin Decl. ¶¶ 5, 6, Exh. A, "Settlement Agreement and Release of Claims," § 4.)

Courts have approved awards of fees in class actions that are based on a percentage of the total common fund recovery. (*Laffitte v. Robert Half Internat.* (2016) 1 Cal.5th 480, 503.) It appears that the same reasoning would apply to PAGA settlements, which bear similarities to class actions. However, the court may also perform a lodestar calculation to double check the reasonableness of the fee request. (*Id.* at pp. 504-506.)

The declaration of Michel Elkin does not include evidence of the attorney fees or hours to allow the court to compare the percentage of the fund against the lodestar. The court is unable to determine if the fees are reasonable for the work performed and should not approve them at this time.

The motion seeks the approval of $2,303.66 in costs to plaintiff's counsel. (Elkin Decl. ¶¶ 8, 9.) Although the costs are supported with invoices, the language of the "Settlement Agreement and Release of Claims" does not include language that would allow the court to award costs to plaintiff. (See, "Settlement Agreement and Release of Claims," §§ 4 ,10.) Section 4, 'Consideration" states that "[e]ach party shall bear their own attorney's fees and costs." Section 10, "No Attorney's Fees and Costs" states: "Except as otherwise set forth herein, the Parties will bear their own respective costs and fees, including attorneys' fees incurred in connection with the PAGA Action and the negotiation and execution of this Agreement." The agreement sets forth the attorneys' fees that can be requested from the settlement but does not include an allowance for costs. As such, the court does not intend to approve the reimbursement of costs sought from the settlement

h. Incentive Payment to Plaintiff

The settlement does not provide for an enhancement payment from the PAGA settlement to the individual plaintiff. This factor weighs in favor of approval of the settlement.

i. Scope of the release

> … PAGA's statutory scheme and the principles of preclusion allow, or "authorize," a PAGA plaintiff to bind the state to a judgment through litigation that could extinguish PAGA claims that were not specifically listed in the PAGA notice where those claims involve the same primary right litigated. Because a PAGA plaintiff is authorized to settle a PAGA representative action with court approval (§ 2699, *(l)*(2)), it logically follows that he or she is authorized to bind the state to a settlement releasing claims

> commensurate with those that would be barred by res judicata in a subsequent suit had the settling suit been litigated to judgment by the state.

(*Moniz v. Adecco USA, Inc.*, *supra*, 72 Cal.App.5th 56, 83.)

Here, while broad, the release at section 6 of the settlement agreement is limited essentially to the same primary right and PAGA penalties that could be pursued by the LWDA, predicated on the same PAGA claims asserted in this action. Further, section 8 of the release specifies that the agreement does not release any claims that cannot be released as a matter of law. This factor weighs in favor of approval.

3. Conclusion

The allocation of the settlement as requested is the primary reason the court does not intend to approve the settlement at this time. Further information regarding the strength of the case, amount of the settlement and support for the attorney fees requested is necessary to assess whether the settlement, when allocated to all aggrieved employees, is fair, adequate, and reasonable.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JS on 2/6/2023.
(Judge's initials) (Date)

(40) **Tentative Ruling**

Re: ***In re: Nathen Chavez, a minor***
Court Case No. 21CECG03574

Hearing Date: February 8, 2023 (Department 403)

Motions: Minor's Compromise

Tentative Ruling:

To deny without prejudice. In the event that oral argument is requested the minor is excused from appearing.

If oral argument is timely requested, the matter will be heard on Thursday, February 16, 2023 at 3:00 p.m. in Dept. 403.

Explanation:

Petitioner did not fully comply with the changes required by the Court's order of November 3, 2022. Petitioner shall:

File a new declaration of counsel:

To explain whether counsel explored whether either defendant was insured, and, if there was insurance, explain the absence of insurance involvement in the case settlement. Counsel should also explain why one defendant is not contributing to the settlement.

To explain the basis for arriving at $17,500 as the amount of settlement. On what information is it concluded that $17,500 is adequate for the minor's suffering and in his best interest?

File an amended Petition and proposed Orders that:

Consistently fix attorneys' fees at 25% or $4,375. Attorney's fees have been corrected on the declaration to conform to the Court's prior order, but not on the Amended Petition (page 6, line 16c). Corrects the calculations in the Petition's paragraph 16, as attorney's fees are stated twice and in different amounts.

Correct the Petition regarding the balance due the minor. At paragraph 16 f, there is a balance due to the minor $12,392.34. The previously filed Order to Deposit and Order approving, are not updated and show the amount to the minor as $9,767.34.

Provide for a court filing fee of $435.

Provide medical evidence of the minor's recovery from the injury. It has been 3 years since the boot was removed from the ankle fracture.

Provide a corrected balance due to the minor. For example, on the Petition at 16f, the amount is $12,392.34 whereas on the proposed Orders, the amount is $9,767.34.

Provide new and corrected proposed Orders (MC-355 and MC-351.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JS on 2/6/2023.
(Judge's initials) (Date)