Tentative Rulings for December 12, 2024
Department 502

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.

23CECG01236 ***Pelayo v. Nations Roof West, LLC*** **is continued to Wednesday, February 26, 2025, at 3:30 p.m. in Department 502.**

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Tentative Rulings for Department 502

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Tentative Ruling

Re: ***Lisa Gibbs v. Saint Agnes Medical Center***
Superior Court Case No. 23CECG04725

Hearing Date: December 12, 2024 (Dept. 502)

Motion: Defendant Chinnapa Reddy Nareddy, M.D.'s Demurrer

Tentative Ruling:

To sustain the demurrer to each cause of action, without leave to amend.

Defendant Chinnapa Reddy Nareddy, M.D. is directed to submit directly to this court, within ten (10) days of service of the minute order, a proposed judgment dismissing it from this action.

Explanation:

Immunity under Federal Public Readiness and Emergency Preparedness Act, 42 U.S.C. §§ 247d-6d, 247d-6e ("PREP Act")

The PREP Act offers "covered person[s]" immunity "from suit and liability" for claims "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure[.]" (42 U.S.C. § 247 d-6d(a)(1).) Such immunity "applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure[.]" (*Id*. § 247d-6d (a)(2)(B).) The Act's immunity lies dormant until the Secretary of Health and Human Services "makes a determination that a disease … constitutes a public health emergency" and "make[s] a declaration, through publication in the Federal Register," that the Act's immunity "is in effect[.]" (*Id*. § 247d-6d(b)(1).)

In March 2020, the Secretary declared that COVID-19 "constitutes a public health emergency" and that "immunity as prescribed in the PREP Act" was "in effect" for the "manufacture, testing, development, distribution, administration, and use of the Covered Countermeasures." (Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198, 15202 (Mar. 17, 2020).)

"[T]he sole exception to the immunity from suit and liability of covered persons … shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct … by such covered person." (42 U.S.C., § 247d-6d(d)(1).) Such an action "shall be filed and maintained only in the United States District Court for the District of Columbia." (*Id*. § 247d-6d(e)(1).)

Defendant contends that he is immune under the PREP Act, because he is a "covered person" under the Act, the use of the drug Remdesivir is a "covered countermeasure," and plaintiff's claims are for loss "caused by, arising out of, relating to,

or resulting from the administration to or the use by an individual of a covered countermeasure." (*Id*. § 247d-6d(a)(1).)

- *Covered Persons*

The definition of a "covered person" under the PREP Act includes manufacturers, distributors and program planners of covered countermeasures, as well as their officials, agents and employees, and any "qualified person who prescribed, administered, or dispensed" a covered countermeasure. (*Id*. § 247d-6d(i)(2).) A program planner includes any person "who supervised or administered a program with respect to the administration, dispensing, distribution, provision, or use of a security countermeasure or a qualified pandemic or epidemic product, including a person who has established requirements, provided policy guidance, or supplied technical or scientific advice or assistance or provides a facility to administer or use a covered countermeasure in accordance with a declaration under subsection (b)." (*Id*. § 247d-6d(i)(6).) Also, "[t]he term 'person' includes an individual, partnership, corporation, association, entity, or public or private corporation, including a Federal, State, or local government agency or department." (*Id*. § 247d-6d(i)(5).)

Here, defendant doctor undoubtedly falls within the definition of a "covered person" under the PREP Act, as it is alleged Dr. Nareddy was the admitting physician, that Dr. Nareddy followed the Remdesivir protocol, and that Dr. Nareddy signed the report diagnosing the decedent with COVID-19 and including the plan to administer Remdesivir to the decedent. (Complaint, ¶¶ 39-41.)

- *Covered Countermeasure*

A "covered countermeasure" means "a qualified pandemic or epidemic product"; "a security countermeasure"; a "drug ..., biological product ..., or device ... that is authorized for emergency use in accordance with section 564, 564A, or 564B of the Federal Food, Drug, and Cosmetic Act"; or a "respiratory protective device that is approved by the National Institute for Occupational Safety and Health ... and that the Secretary determines to be a priority for use during a public health emergency declared under section 247d of this title." (*Id.* § 247d-6d(i)(1).) A "qualified pandemic or epidemic product" is defined as:

> [A] drug ..., biological product, ... or device ... that is (i) manufactured, used, designed, developed, modified, licensed, or procured to (I) diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic or (II) limit the harm such a pandemic or epidemic might otherwise cause; (ii) ... manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by [such a drug, biological product, or device]; or (iii) a product or technology intended to enhance the use or effect of [such] a drug, biological product, or device.

(*Id*. § 247d-6d(i)(7)(A).)

Plaintiff appears to concede that Remdesivir was a covered countermeasure under the PREP Act. Plaintiff's argument is that the PREP Act cannot apply because there is no claim for loss based on administration of a covered countermeasure, which is discussed below.

- *Nexus*

Plaintiff claims that the PREP Act does not apply because plaintiff does not allege a loss caused by administration of a covered countermeasure, but rather claims the loss is based on acts taking place before the provision of a covered countermeasure. This argument lacks merit. The PREP Act articulates it is applicable for claims "for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual" of a covered countermeasure or its use in combination with other treatments. (42 U.S.C. § 247d-6d(a)(1).) Here, plaintiff's claims are that decedent's physicians followed the Remdesivir protocol, failed to disclose alternative treatment options, and that following the Remdesivir protocol, without consent or disclosure of alternative treatments, resulted in harm. (Complaint, ¶¶ 12, 40-45, 51, 57-60, 68, 73, 76-79.) While plaintiff attempts to color these acts in a way to bring them outside the scope of the PREP Act, it is still apparent in the Complaint that the claims for loss arise out of the administration of a covered countermeasure. Accordingly, absent a claim of willful misconduct, the immunity afforded by the PREP Act applies to defendant.

- *Willful Misconduct*

The term "willful misconduct" is defined as "an act or omission that is taken—[¶] (i) intentionally to achieve a wrongful purpose; [¶] (ii) knowingly without legal or factual justification; and [¶] (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit." (42 U.S.C. § 647d-6d(c)(1)(A).) Such an action "shall be filed and maintained only in the United States District Court for the District of Columbia…" (*Id*. § (e)(1).); be plead with particularity (*Id*. § (e)(3).); and filed with verification by the plaintiff under oath, with certification by either a physician who did not treat the person on whose behalf the complaint was filed or medical records documenting the injury and causal connection. (*Id*. § (e)(4).) Moreover, an individual must exhaust the statutory remedies available under 42 U.S.C.A. section 247d-6e(a) prior to filing a civil action for alleged willful misconduct. (*Id*. § (d)(1).) Lastly, in interpreting its plain language, "[t]he text of the statute shows that Congress intended a federal claim … for willful misconduct claims…" (*Saldana v. Glenhaven Healthcare LLC* (9th Cir. 2022) 27 F.4th 679, 688.)

Despite plaintiff's contention that defendant's failure to disclose risks attendant to Remdesivir was intentional and designed to achieve a wrongful purpose (see e.g., Complaint, ¶¶ 9, 28, 51, 55, 68, 71, 74), the essence of plaintiff's complaint arises from the administration of Remdesivir to the decedent, which cannot be characterized as "inaction". Accordingly, plaintiff's own pleadings establish that this court does not have jurisdiction on her claims.

Voluntary Participation

Next, plaintiff relies on 42 U.S.C.A. section 247d-6e to argue that participation in the PREP Act is voluntary and that plaintiff never participated in the immunities afforded by the PREP Act. Plaintiff's argument is entirely without merit. The relevant provision of 42 U.S.C.A. section 247d-6e provides as follows:

> The Secretary shall ensure that a State, local, or Department of Health and Human Services plan to administer or use a covered countermeasure is consistent with any declaration under 247d-6d of this title and any applicable guidelines of the Centers for Disease Control and Prevention and that potential participants are educated with respect to contraindications, the voluntary nature of the program, and the availability of potential benefits and compensation under this part.

(*Id*. § (c).)

However, this section describes the voluntary nature of participation in the administrative compensation fund designated as the "Covered Countermeasure Process Fund" "for purposes of providing timely, uniform, and adequate compensation to eligible individuals for covered injuries directly caused by the administration or use of a covered countermeasure…" (*Id*. § (a).) Nothing in the statute suggests that plaintiff's voluntary participation in the PREP Act is required in order to afford immunity to the defendant. Nor has plaintiff provided any authority to support such a contention.

For the above reasons, the defendant's demurrer is sustained to each cause of action for which it is asserted, without leave to amend.

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: KCK on 12/09/24.
(Judge's initials) (Date)

(34)

Tentative Ruling

Re: ***Cynthia Porraz v. Quality Group Home, Inc.***
Superior Court Case No. 24CECG01665

Hearing Date: December 12, 2024 (Dept. 502)

Motion: by Defendant to Compel Arbitration of Plaintiff's Individual Claims and to Strike Class Allegations

Tentative Ruling:

To grant defendant's motion to compel arbitration of plaintiff's individual claims and stay plaintiff's court action pending the arbitration of plaintiff's claims. To deny defendant's motion to strike the class allegations of the complaint.

Explanation:

Motion to Compel Arbitration

"[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement - either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see Code Civ. Proc. § 1281.2, subds. (a), (b)) - that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal v. Great Western Fin. Securities Corp*. (1996)14 Cal. 4th 394, 413.) Thus, in ruling on a motion to compel arbitration, the court must first determine whether the parties actually agreed to arbitrate the dispute, and general principles of California contract law guide the court in making this determination. (*Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534.)

In the case at bench, defendant Quality Group Homes, Inc. has presented evidence of plaintiff having signed an arbitration agreement on October 26, 2021. (Romero Decl., ¶ 2, Exh. 1.) Plaintiff does not challenge the existence of the agreement but does challenge its enforceability. Plaintiff asserts the agreement is unconscionable and should not be enforced.

Procedural Unconscionability

The doctrine of unconscionability has " 'both a "procedural" and a "substantive" element,' the former focusing on ' "oppression" ' or ' "surprise" ' due to unequal bargaining power, the latter on ' "overly harsh" ' or ' "one-sided" ' results." (*Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal.4th 83, 114.) To invalidate an arbitration agreement, the court must find both procedural and substantive unconscionability. (*Id*.

at p. 122; *Stirlen v. Supercuts, Inc*. (1997) 51 Cal.App.4th 1519, 1533; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.)

Plaintiff contends that the arbitration provision is procedurally unconscionable as a contract of adhesion, is "buried" in the 21-page handbook without a separate acknowledgment, does not make available the rules governing the arbitration, and allows defendant to unilaterally change the terms of the agreement without notice.

Here, the contract was drafted by the employer and preprinted for plaintiff's signature. As such it is a contract of adhesion and supports finding some amount of procedural unconscionablity. However, courts frequently enforce employment arbitration agreements that are contracts of adhesion, as long as they are not also substantively unconscionable. "Arbitration clauses in employment contracts have been upheld despite claims that the clauses were unconscionable because they were presented as part of an adhesion contract on a take-it-or-leave-it basis. In finding the arbitration clause in *Lagatree* was not unconscionable, the court noted that, 'as *Gilmer* and its progeny make clear, the compulsory nature of a predispute arbitration agreement does not render the agreement unenforceable on grounds of coercion or for lack of voluntariness.'" (*Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1292, citations omitted.)

The evidence presented by plaintiff supports minimal procedural unconscionability. Although plaintiff argues the arbitration agreement was buried in the handbook, the arbitration section was set apart with a bolded heading of "Arbitration Agreement" and acknowledged by a separate signature of plaintiff following a paragraph specifically stating she agrees with the policies, procedures, rules and regulations, including "the AT-Will and Arbitration Policies." (RJN, Exh. 1, p. 12.) Plaintiff has presented no evidence to support her argument that the agreement was "buried." There is no evidence plaintiff was not aware of the presence of the arbitration agreement within the handbook to contradict her signature acknowledging her agreement with the at-will and arbitration policies.

The failure to attach the AAA rules where they are available on the internet does not support finding procedural unconscionability. (*Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1472; *Lane v. Francis Capital Mgmt. LLC* (2014) 224 Cal.App.4th 676, 689-690.) That AAA has since renamed its rules was not shown to prevent plaintiff from finding the AAA Employment Rules should she have desired to.

Plaintiff has not presented authority for the argument that the employer having reserved the right to modify the agreement being procedurally unconscionable. In reply, defendant provides authority that such language would be lawful. (*Avery v. Integrated Healthcare Holdings, Inc*. (2013) 218 Cal. App. 4th 50, 61 ["An arbitration agreement between an employer and an employee may reserve to the employer the unilateral right to modify the agreement."].)

Substantive Unconscionablity

Mandatory arbitration clauses in employment contracts are enforceable if they provide essential fairness to the employee. (*Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at pp. 90-91; see also *24 Hour Fitness v. Superior Court*

(1998) 66 Cal.App.4th 1199, 1212 [arbitration clause in employee handbook was not unconscionable where it provided all parties with substantially same rights and remedies].) In the employment context, an agreement must include the following five minimum requirements designed to provide necessary safeguards to protect unwaivable statutory rights where important public policies are implicated: 1) a neutral arbitrator; 2) adequate discovery; 3) a written, reasoned, opinion from the arbitrator; 4) identical types of relief as available in a judicial forum; and 5) that undue costs of arbitration will not be placed on the employee. (*Armendariz, supra,* 24 Cal.4th at p. 102.)

Plaintiff argues these minimum standards are not met because there is no requirement of a neutral arbitrator, no discussion of how arbitration fees are allocated, and is silent as to what discovery is permitted. The agreement's providing for an arbitrator selected by mutual agreement of the parties does not support plaintiff's interpretation that the arbitrator mutually agreed upon is not neutral. The agreement's silence on the payment of arbitration fees or costs also does not support the plaintiff's interpretation that she would bear these costs. (*Little v. Auto Stiegler, Inc*. (2003) 29 Cal.4th 1064, 1082; *Armendariz*, *supra*, 24 Cal.4th a p. 113.) The agreement's silence on the subject of discovery leaves the AAA Employment Rules controlling, which provides authority for the arbitrator to allow discovery as necessary for "a full and fair exploration of the issues in dispute." (Defendant's RJN, Exh. 1[1], "Employment Arbitration Rules and Mediation Procedures," p. 14, Item 9.) The court understands this to mean that the arbitrator can decide on the scope of discovery, not that no discovery will be permitted. Both parties' discovery rights are at the arbitrator's discretion which does not suggest there will not be adequate discovery.

Accordingly, the court finds the arbitration agreement meets the minimum requirements set forth in *Armendariz*.

Plaintiff's additional arguments that the agreement is substantively unconscionable are unpersuasive and some are inconsistent with the terms of the agreement. The language of the agreement does not waive administrative claims but states, "[n]othing in this agreement shall be construed as precluding any employee from filing a charge or complaint with the [EEOC], [DFEH], [NLRB] or any other similar state or federal agency." (Romero Decl., Exh. 1, p. 10, Item VII.) There is also no "implicit" waiver of PAGA where the language of the agreement specifically excludes claims within the jurisdiction of the California Labor Commissioner from the agreement. (*Id*. at p. 9, Item I and p. 10, Item V.) Plaintiff has not presented evidence to support that the venue of Fresno County is somehow unconscionable as applied to plaintiff. The language of the confidentiality provision does not preclude plaintiff from disclosing the subject matter with counsel, witnesses, experts, the arbitrator, and the court and does not appear to effect on her ability to conduct discovery to support her claims. (*Id*. at p. 10, Item IV.)

[1] Defendant's Request for Judicial Notice is granted. The court notes that the provisions for discovery have not changed from the former "National Rules for the Resolution of Employment Disputes" now renamed "Employment Arbitration Rules and Mediation Procedures" by AAA. (See, Pezashkpour Decl., Exh. 1, "National Rules for the Resolution of Employment Disputes," Item 7.)

The agreement purports to limit the time to bring non-statutory claims to one year from the date the claim arose or within one year of the termination of employment. (Romero Decl., Exh. 1, p. 9, Item I.) Although plaintiff's statute-based claims would not fall within the one-year limitation for non-statutory claims, such a limitation is substantively unconscionable. However, the court may sever out the unconscionable provision and enforce the remainder of the agreement. "[C]ourts may liberally sever any unconscionable portion of a contract and enforce the rest when: the illegality is collateral to the contract's main purpose; it is possible to cure the illegality by means of severance; and enforcing the balance of the contract would be in the interests of justice." (*Ramirez v. Charter Communications, Inc.* (2024) 16 Cal.5th 478, 517.)

Here, the provision is collateral to the rest of the arbitration agreement and its presence does not infect the rest of the agreement with unconscionability. Severing the clause from the rest of the agreement would not affect the other portions of the agreement or require rewriting the terms of the agreement. Therefore, the court intends to sever the clause limiting the time to bring non-statutory claims and enforce the remainder of the agreement.

Defendant has met its burden of demonstrating the existence of a valid arbitration agreement covering the claims of plaintiff's complaint. Plaintiff has not met her burden of showing that the agreement is unconscionable. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) The motion to compel plaintiff to arbitrate her individual claims is granted.

Motion to Strike

"The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: (a) Strike out any irrelevant, false, or improper matter inserted in any pleading, (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ. Proc., § 436.)

The court must assume that the allegations of the complaint are true for the purposes of ruling on a motion to strike, no matter how unlikely or difficult to prove the allegations may be. (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 53.)

Defendant moves to strike the class allegations based on the plaintiff having agreed to arbitrate her individual claims. Although the resolution of plaintiff's claims through arbitration may ultimately affect her standing as a representative plaintiff for the putative class, as alleged the class allegations are not improper or otherwise subject to strike. The motion to strike is denied.

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: KCK on 12/10/24.
(Judge's initials) (Date)

(35)

Tentative Ruling

Re: ***Jessica Villa v. Sante Health System, Inc.***
Superior Court Case No. 22CECG01115/COMPLEX

Hearing Date: December 12, 2024 (Dept. 502)

Motion: By Plaintiff Jessica Villa for Final Approval of Class Action Settlement

Tentative Ruling:

To grant final approval of the class action settlement, costs, class representative enhancement payment, PAGA payment, and settlement administrator's fees. To grant and approve an attorney fees award in the reduced amount of $55,022.00. Plaintiff Jessica Villa is directed to submit a new proposed order.

To set a status conference for Tuesday, July 8, 2025, 3:30 p.m. in Department 502.

Explanation:

1. Class Certification

The court has already granted the motion for preliminary approval and certification of the class and found that the class is sufficiently numerous and ascertainable to warrant certification for the purpose of approving the settlement. There is no reason for the court to reconsider its decision granting certification of the class. Therefore, the court certifies the class for the purpose of final approval of the settlement.

2. Settlement

a. Legal Standards

"When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and class counsel will breach the fiduciary obligations they owe to the absent class members. As a result, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." (*Koby v. ARS National Services, Inc.* (9th Cir. 2017) 846 F. 3d 1071, 1079.)

"[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement . . . The courts are supposed to be the guardians of the class." (*Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal. App. 4th 116, 129.)

"[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the . . . court must be sufficiently developed." (*Id*. at p. 130.) The court must be leery of a situation where "there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see." (*Id*. at p. 129.)

b. Fair and Reasonable

Previously, the parties submitted the Joint Stipulation of Settlement, which contemplated a release of the claims brought by this action in exchange for $435,000.00. The gross settlement would thereon be apportioned for attorney's fees, costs of suit, and costs to administer the settlement. The settlement administrator confirms that there are 52 class members, who collectively worked 6,673 "Workweeks". The court preliminarily approved these terms, and notice to the putative class of these amounts was given.

The settlement was reached after arm's length negotiations during a mediation with an experienced mediator, which weighs in favor of finding that the settlement was fair, adequate, and non-collusive. In addition, class counsel are experienced in class litigation, and provided information as to their assessments of the strength of plaintiffs' case, the risk, expense and complexity of the litigation, and the extent of analysis conducted. Thus, class counsels' opinion that the settlement is fair, adequate, and reasonable is entitled to considerable deference. There is also no evidence that the settlement is the product of collusion. Therefore, the court continues to find that the proposed settlement amount is fair, adequate and reasonable.

3. Attorney's Fees and Costs

Counsel for plaintiff Jessica Villa ("Plaintiff") seeks an award of $145,000.00 in attorney's fees, or one-third of the gross settlement, plus $11,000.00 in court costs. The agreement provides for an award of up to 1/3 of the total gross settlement. Therefore, the request for attorney's fees is consistent with the agreement.

The California Supreme Court in *Laffitte v. Robert Half Intern. Inc*. (2016) 1 Cal.5th 480 held that a court has discretion to grant attorney's fees in class actions based on a percentage of the total recovery. (*Id*. at pp. 503-504.) However, the trial court may also use a lodestar calculation to double check the reasonableness of the fee award. (*Id*. at pp. 504-506.) The choice of a fee calculation is generally one within the discretion of the trial court, the goal under either approach being the award of a reasonable fee to compensate counsel for their efforts. (*Id.* at p. 504.) If the comparison between the percentage and lodestar calculations produced an imputed multiplier indicating that the percentage fee will reward counsel for their services at an extraordinary rate even accounting for the factors customarily used to enhance a lodestar fee, the trial court will have reason to reexamine its choice of a percentage. (*Ibid.*)

The court previously considered submissions by counsel regarding the fee award on Plaintiff's motion for preliminary approval. Counsel renews their request for an award

of $145,000 based on 177.6 hours billed across what appears to be four timekeepers. Samuel Wong appears to have a billing rate of $950 per hour; Jessica Campbell appears to have a billing rate of $800 per hour; Fawn Bekam appears to have a billing rate of $600 per hour; and Kashif Haque appears to have a billing rate of $950 per hour. These rates are excessive. The reasonable hourly rate is that prevailing in the community for similar work. (*PCLM Group v. Drexler* (2000) 22 Cal.4th 1085, 1095.) These are significant departures compared to local rates. The court sets Wong's and Haque's rate at $500; Campbell's rate at $400, and Bekam's rate at $350 per hour.

Following careful review, the court notes some concerning discrepancies between the previously filed time records. There are several entries that are new by Campbell in 2022; changed as to who was the timekeeper; and changed as to amount of time. (Campbell Decl., Ex. 3, pp. 1, 3, 4.) In spite of these changes, the court proceeds. Many correspondence entries are vaguely described as to shroud any evaluation of reasonableness as opposed to purely clerical. (*E.g.*, *id.*, Ex. 3, p. 2 [emails to opposing counsel regarding mediation].) Some of these vague entries are actually clerical. (*E.g.*, *id.*, Ex. 3, p. 1 [correspondence with opposing counsel's administration regarding setting telephone call]; *see also id.*, Ex. 3, p. 4 [call clerk to reserve motion date].) Some entries are double-billed meetings between firm members, the substance of which appears to be educational in principle. (*E.g.*, *id.*, Ex. 3, p. 2.) Some tasks appear to be billed disproportionately for the work involved. Approximately 57 hours were spent analyzing and preparing a mediation brief, in addition to the engagement of an expert. (*E.g.*, *id.*, Ex. 3, pp. 2, 3.) Some tasks are billed in contrast to the stated years of experience on simple motions. (*E.g.*, *id.*, Ex. 3, p. 4 [research regarding sanctions].) Some entries have no application of legal expertise. (*E.g.*, *id.*, Ex. 3, p. 5 [correspondence regarding coverage for hearing, review docket, draft notice and order regarding remote appearance].)

Based on the above, the court does not credit 50.5 hours. With the reduction to the hourly rates, the court sets the lodestar at $50,020.00. Accordingly, counsel seeks a lodestar multiplier of 2.9.

As stated by the California Supreme Court regarding lodestar multipliers, sometimes referred to as fee enhancements:

> …the trial court is *not required* to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in the appropriate case; moreover, the party seeking a fee enhancement bears the burden of proof. In each case, the trial court should consider whether, and to what extent, the attorney and client have been able to mitigate the risk of nonpayment, e.g., because the client has agreed to pay some portion of the lodestar amount regardless of outcome. It should also consider the degree to which the relevant market compensates for contingency risk, extraordinary skill, or other factors under *Serrano III*. We emphasize that when determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar. The factor of extraordinary skill, in particular, appears susceptible to improper double counting; for the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar. A more difficult

> legal question typically requires more attorney hours, and a more skillful and experienced attorney will command a higher hourly rate. (*See Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999, 1004, 185 Cal.Rptr. 145.) Indeed, the " 'reasonable hourly rate [used to calculate the lodestar] is the product of a multiplicity of factors ... the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case.' " (*Ibid*.) Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable. Nor should a fee enhancement be imposed for the purpose of punishing the losing party. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138-1139 [emphasis original].)

Once a lodestar is fixed, the lodestar may be adjusted based on certain factors, including: (1) the novelty and difficulty of the questions involved; (2) the skill displayed in presenting them; (3) the extent to which the nature of the litigation precluded other employment by the attorneys; and (4) the contingent nature of the fee award. (*Id.* at p. 1132, *citing Serrano v. Priest (Serrano III)* (1977) 20 Cal.3d 25, 49.)

The court acknowledges the contingent nature of the fee award sought. The court finds that the claims in this action are typical to all wage and hour claims regarding minimum wage, overtime wages, meal periods, rest periods, and itemized statements. There were no demonstrated deviations from the typical course these actions generally follow: the making of the claim, some informal discovery, some data analysis, a mediation, and a settlement. (*E.g.*, Campbell Decl., ¶¶ 10-12.) The court awards a 1.1 multiplier in recognition of the contingent risk borne by counsel. The final award of attorney fees is therefore $55,022.00.

The request for $11,000.00 in court costs is approved as noticed.

4. Payment to Class Representative

Plaintiff seeks approval of a $5,000 "service payment". Incentive payments to class representatives are routinely awarded in class action wage and hour settlements, and similar payments have been approved in other cases. Here, Plaintiff submits a declaration explaining the general terms the work she did on the case, including providing information about work history and Defendant's practices and operations, assisting in investigation and reviewing documents, and bore the risk of litigation. The court approves a $5,000 payment to plaintiff Jessica Villa.

5. Payment to LWDA under PAGA

Plaintiff also seeks approval of $62,333.00 to be paid to settle the PAGA claim, 75 percent of which will be paid to the LWDA pursuant to Labor Code section 2699, subdivision (i). The amount to be paid to settle the PAGA claim appears to be reasonable. In addition, the LWDA has been served with a copy of the settlement as well as

preliminary and final approval motions, and it has not objected to the request to approve the settlement. Therefore, the court finds that the payment to settle the PAGA claim is reasonable and approves it.

6. Payment to Class Administrator

Plaintiff seeks approval for administrative costs of $6,250.00. The administrative costs cover the work performed in sending out class notices, tracking down missing class members, handling questions from class members and parties, and sending out payments to class members, as well as providing declarations in support of the motions for class settlement approval.

The court notes that the original bid was for a class not to exceed 100 members. At 52, the class is far smaller than the projection. Moreover, the administrator notes that none of the notices were returned or marked undeliverable. Finally, the "invoice" attached to the declaration by the settlement administrator as Exhibit B is actually the original bid, dated September 29, 2023. (Salinas Decl., ¶ 17, and Ex. B thereto.) In spite of these observations, while the amount appears to be high, the court approves administration costs of $6,250.00.

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: KCK on 12/11/24.
(Judge's initials) (Date)