

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE GONZALEZ,
Plaintiff,
v.
CORECIVIC OF TENNESSEE, LLC and
CORECIVIC, INC.,
Defendants.

No. 1:16-cv-01891-DAD-JLT

ORDER DENYING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT

(Doc. Nos. 30, 40)

This matter comes before the court on plaintiff’s unopposed motion for preliminary approval of a class action settlement. Plaintiff filed the motion on April 13, 2018. (Doc. No. 30.) A hearing was held on the matter on May 15, 2018, with attorneys Peter Dion-Kindem and Lonnie Blanchard appearing on behalf of plaintiff and the putative class, and attorney Paul Gleason appearing on behalf of defendants. (Doc. No. 33.) Following the hearing, the court issued a minute order on May 16, 2018 directing the parties to filed supplemental briefing within 30 days addressing several specified topics. (Doc. No. 34.) Plaintiff timely filed this supplemental brief on June 15, 2018. (Doc. No. 40.) For the reasons discussed below, the court denies preliminary approval of this class action settlement.

/////
/////

1 **BACKGROUND**

2 This case concerns various wage-and-hour claims brought on behalf of prison guards and
3 other workers at several of defendants’ private prison facilities. Plaintiff moves for this court’s
4 approval of a global settlement resolving claims brought in both this lawsuit and another action
5 pending before this court, Richards v. CoreCivic of Tennessee, LLC, No. 1:17-cv-01094-LJO-
6 JLT.

7 Plaintiff alleges he was a corrections officer at defendants’ privately-operated California
8 City Correctional Center from April 2011 to November 23, 2013, at which point he was laid off
9 when the operations of the facility were transferred to the State of California. (Doc. No. 1 at 18–
10 19.) Plaintiff alleges class members were required to pass through three different security gates
11 and undergo significant screening, as well as check in with shift supervisors, all prior to being
12 permitted to clock in at work. (Doc. No. 1 at 22–23.) Similarly, when leaving at the end of their
13 shift, class members were required to clock out prior to going back through the three security
14 gates. (Id. at 23.) According to plaintiff., this process took approximately 10 to 15 minutes
15 before a shift, and 10 minutes after each shift. (Id.) Because of this, the defendants allegedly
16 failed to appropriately pay class members both the minimum wage and overtime. (Id. at 23–24.)

17 Additionally, the complaint alleges that plaintiff and other class members were not
18 permitted to leave their posts for meal or rest breaks, except to quickly go to the bathroom. (Id. at
19 25–26.) Because class members regularly worked more than 10 hours in a shift, they were
20 frequently entitled to at least two meal breaks on numerous shifts, which were not provided to
21 them. (Id. at 26.) Similarly, class members were not permitted to take rest breaks, though
22 frequently they worked shifts of more than 10 hours, which would typically afford them three rest
23 breaks. (Id. at 27.) Plaintiff also seeks accompanying waiting time penalties and damages for
24 unfair business practices. (Id. at 27–29.)

25 **LEGAL STANDARD**

26 1. Rule 23 Settlements

27 Rule 23 mandates that, “[t]he claims, issues, or defenses of a certified class may be
28 settled, voluntarily dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P.

1 23(e). The following procedures apply to the court’s review of the proposed settlement:

2 The court must direct notice in a reasonable manner to all class
3 members who would be bound by the proposal.

4 If the proposal would bind class members, the court may approve it
5 only after a hearing and on finding that it is fair, reasonable, and
adequate.

6 The parties seeking approval must file a statement identifying any
7 agreement made in connection with the proposal.

8 . . .

9 Any class member may object to the proposal if it requires court
10 approval under this subdivision (e); the objection may be
11 withdrawn only with the court’s approval.

12 Id.

13 “Courts have long recognized that settlement class actions present unique due process
14 concerns for absent class members.” In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935,
15 946 (9th Cir. 2011) (citation and internal quotations omitted). To protect the rights of absent
16 class members, Rule 23(e) requires that the court approve all class action settlements “only after a
17 hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2);
18 Bluetooth, 654 F.3d at 946. However, when parties seek approval of a settlement agreement
19 negotiated prior to formal class certification, “there is an even greater potential for a breach of
20 fiduciary duty owed the class during settlement.” Bluetooth, 654 F.3d at 946. Thus, the court
21 must review such agreements with “a more probing inquiry” for evidence of collusion or other
22 conflicts of interest than what is normally required under the Federal Rules. Hanlon v. Chrysler
Corp., 150 F.3d 1011, 1026 (9th Cir. 1998); see also Lane v. Facebook, Inc., 696 F.3d 811, 819
(9th Cir. 2012).

23 Review of a proposed class action settlement ordinarily proceeds in three stages. See
24 MANUAL FOR COMPLEX LITIGATION (4th) § 21.632. First, the court conducts a preliminary
25 fairness evaluation and, if applicable, considers class certification. Second, if the court makes a
26 preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms,
27 the parties are directed to prepare the notice of certification and proposed settlement to the class
28 members. Id. (noting that if the parties move for both class certification and preliminary

1 approval, the certification hearing and preliminary fairness evaluation can usually be combined).
2 Third, the court holds a final fairness hearing to determine whether to approve the settlement. *Id.*;
3 see also *Narouz v. Charter Commc 'ns, LLC*, 591 F.3d 1261, 1266–67 (9th Cir. 2010). Though
4 Rule 23 does not explicitly provide for such a procedure, federal courts generally find preliminary
5 approval of settlement and notice to the proposed class appropriate if the proposed settlement
6 “appears to be the product of serious, informed, non-collusive negotiations, has no obvious
7 deficiencies, does not improperly grant preferential treatment to class representatives or segments
8 of the class, and falls within the range of possible approval.” *Lounibos v. Keypoint Gov’t Sols.*
9 *Inc.*, No. 12-cv-00636-JST, 2014 WL 558675, at *5 (N.D. Cal. Feb. 10, 2014) (quoting *In re*
10 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007)); see also *NEWBERG ON*
11 *CLASS ACTIONS* § 13:13 (5th ed. 2011); *Dearaujo v. Regis Corp.*, Nos. 2:14-cv-01408-KJM-AC,
12 2:14-cv-01411-KJM-AC, 2016 WL 3549473 (E.D. Cal. June 30, 2016) (“Rule 23 provides no
13 guidance, and actually foresees no procedure, but federal courts have generally adopted [the
14 process of preliminarily certifying a settlement class].”). While it is not a court’s province to
15 “reach any ultimate conclusions on the contested issues of fact and law which underlie the merits
16 of the dispute,” a court should weigh, among other factors, the strength of a plaintiff’s case; the
17 risk, expense, complexity, and likely duration of further litigation; the extent of discovery
18 completed; and the value of the settlement offer. *Chem. Bank v. City of Seattle*, 955 F.2d 1268,
19 1291 (9th Cir. 1992); see also *Officers for Justice v. Civil Serv. Comm’n of City & Cty. of S.F.*,
20 688 F.2d 615, 625 (9th Cir. 1982).

21 2. FLSA Settlements

22 “The FLSA establishes federal minimum-wage, maximum-hour, and overtime guarantees
23 that cannot be modified by contract.” *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69
24 (2013). Because an employee cannot waive claims under the FLSA, they may not be settled
25 without supervision of either the Secretary of Labor or a district court. See *Barrentine v. Ark-*
26 *Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *Beidleman v. City of Modesto*, No. 1:16-cv-
27 01100-DAD-SKO, 2018 WL 1305713, at *1 (E.D. Cal. Mar. 13, 2018); *Yue Zhou v. Wang’s*
28 *Rest.*, No. 05-cv-0279 PVT, 2007 WL 2298046, at *1 n.1 (N.D. Cal. Aug. 8, 2007). Employees

1 may bring collective actions under the FLSA, representing all “similarly situated” employees, but
2 “each employee [must] opt-in to the suit by filing a consent to sue with the district court.” Does I
3 thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1064 (9th Cir. 2000); see also Jones v.
4 Agilysys, Inc., No. C 12–03516 SBA, 2014 WL 108420, at *2 (N.D. Cal. Jan. 10, 2014).

5 The Ninth Circuit has not established criteria for district courts to consider in determining
6 whether an FLSA settlement should be approved. *Dunn v. Teachers Ins. & Annuity Ass’n of Am.*,
7 No. 13-CV-05456-HSG, 2016 WL 153266, at *3 (N.D. Cal. Jan. 13, 2016). However, district
8 courts in this circuit have frequently applied a widely-used standard adopted by the Eleventh
9 Circuit, which looks to whether the settlement is a fair and reasonable resolution of a bona fide
10 dispute. *Id.*; see also *Lynn’s Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352–53 (11th
11 Cir. 1982); *Selk v. Pioneers Mem’l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1172 (S.D. Cal.
12 2016); *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1333 (N.D. Cal. 2014); *Yue Zhou*, 2007 WL
13 2298046, at *1. “A bona fide dispute exists when there are legitimate questions about the
14 existence and extent of Defendant’s FLSA liability.” *Selk*, 159 F. Supp. 3d at 1172 (internal
15 quotation marks and citation omitted). A court will not approve a settlement of an action in
16 which there is certainty that the FLSA entitles plaintiffs to the compensation they seek, because
17 doing so would shield employers from the full cost of complying with the statute. *Id.*

18 Once it is established that there is a bona fide dispute, courts often apply the Rule 23
19 factors for assessing proposed class action settlements when evaluating the fairness of an FLSA
20 settlement, while recognizing that some of those factors do not apply because of the inherent
21 differences between class actions and FLSA actions. *Khanna v. Inter-Con Sec. Sys., Inc.*, No.
22 CIV S-09-2214 KJM, 2013 WL 1193485, at *2 (E.D. Cal. Mar. 22, 2013). To determine whether
23 the proposed FLSA settlement is fair, adequate, and reasonable, courts in this circuit have
24 balanced factors such as:

25 the strength of the plaintiffs’ case; the risk, expense, complexity,
26 and likely duration of further litigation; the risk of maintaining class
27 action status throughout the trial; the amount offered in settlement;
28 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.

1 Khanna v. Intercon Sec. Sys., Inc., No. 2:09-CV-2214 KJM EFB, 2014 WL 1379861, at *6 (E.D.
2 Cal. Apr. 8, 2014), order corrected, 2015 WL 925707 (E.D. Cal. Mar. 3, 2015); see also
3 Almodova v. City & County of Honolulu, Civil No. 07-00378 DAE-LEK, 2010 WL 1372298, at
4 *4 (D. Haw. Mar. 31, 2010), recommendations adopted by 2010 WL 1644971 (D. Haw. Apr. 20,
5 2010) (adopting class action settlement factors in evaluating a FLSA collective action settlement
6 even though some of those factors will not apply). District courts in this circuit have also taken
7 note of the “unique importance of the substantive labor rights involved” in settling FLSA actions
8 and adopted a “totality of circumstances approach that emphasizes the context of the case.” Selk,
9 159 F. Supp. 3d at 1173. With this approach, a “district court must ultimately be satisfied that the
10 settlement’s overall effect is to vindicate, rather than frustrate, the purposes of the FLSA.” Id.
11 Following this approach, the district court’s “[o]bligation is not to act as caretaker but as
12 gatekeeper,” so that FLSA “settlements do not undermine the Act’s purposes.” Goodwin v.
13 Citywide Home Loans, Inc., No. SACV 14-866-JLS (JCGx), 2015 WL 12868143, at *2 (C.D.
14 Cal. Nov. 2, 2015) (quoting *Goudie v. Cable Commc’ns, Inc.*, No. CV 08-507-AC, 2009 WL
15 88336 at *1 (D. Or. Jan. 12, 2009)). Settlements that reflect a fair and reasonable compromise of
16 issues that are actually in dispute may be approved to promote the efficiency of encouraging
17 settlement of litigation. *McKeen-Chaplin v. Franklin Am. Mortg. Co.*, No. C 10-5243 SBA, 2012
18 WL 6629608, at *2 (N.D. Cal. Dec. 19, 2012).

19 As recognized by the Ninth Circuit, some district courts within this circuit have
20 questioned the propriety of allowing an FLSA collective action to proceed in the same case as a
21 Rule 23 class action. See *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1093 (9th Cir. 2011)
22 (noting that the question of whether a Rule 23 class action can “co-exist with a related collective
23 action under the FLSA . . . has divided district courts in our circuit”); *Murillo v. Pac. Gas & Elec.*
24 *Co.*, 266 F.R.D. 468, 471-73 (E.D. Cal. 2010) (collecting cases). Nevertheless, other district
25 courts have allowed hybrid FLSA / Rule 23 actions to proceed to settlement, particularly where
26 the funds and claims are treated separately. See, e.g., *Thompson v. Costco Wholesale Corp.*, No.
27 14-cv-2778-CAB-WVG, 2017 WL 697895, at *8 (S.D. Cal. Feb. 22, 2017) (noting that “courts
28 that have approved settlements releasing both FLSA and Rule 23 claims generally do so only

1 when the parties expressly allocate settlement payments to FLSA claims”); *Millan v. Cascade*
2 *Water Servs., Inc.*, No. 1:12-cv-01821-AWI-EPG, 2016 WL 3077710, at *1–2 (E.D. Cal. May 31,
3 2016); *Moore v. Fitness Int’l, LLC*, No. 3:12–CV–1551–LAB–NLS, 2013 WL 3189080, at *8,
4 n.6 (S.D. Cal. June 21, 2013) (observing that the FLSA does not permit collective claims brought
5 under it to be treated in the same manner as a class under Rule 23).

6 ANALYSIS

7 As will be discussed below, the proposed settlement in this case suffers from several
8 deficiencies. Moreover, because of the lack of clarity surrounding the value of the claims alleged
9 in this action, the court cannot meaningfully review the substantive fairness of the settlement. For
10 these reasons, the court cannot grant preliminary approval of the proposed class settlement.
11 There is no one issue which compels the court to reach this decision. Rather, the numerous
12 considerations set forth below lead the court to this conclusion.

13 1. Inclusion of FLSA Claims is Improper Here

14 Numerous aspects of plaintiff’s proposed inclusion of FLSA claims in this settlement
15 concern the court. First, neither plaintiff in either of the settling cases here has alleged an FLSA
16 claim. Indeed, the inclusion of an FLSA claim in this case only arose after the court observed at
17 oral argument on the pending motion that the settlement agreed to release FLSA claims, even
18 though none had been alleged in the complaints. Thereafter, seemingly to support the settlement
19 agreement’s waiver of FLSA claims, plaintiff’s counsel orally requested permission at the hearing
20 to amend the complaint to add a FLSA claim for purposes of settling it. The parties have since
21 lodged a proposed first amended complaint as an exhibit to their amended settlement agreement
22 in which a FLSA claim is alleged for the first time. (Doc. No. 40-1 at 56–72.)

23 In the court’s view, this approach raises red flags in large part because it appears plaintiff
24 agreed to settle the FLSA claim before he ever considered litigating it. Therefore, the court
25 directed plaintiff to file supplemental briefing addressing “how amending the complaint to
26 include FLSA claims would resolve the issue of waiver of FLSA claims, without separate
27 compensation being negotiated as part of the parties’ settlement for the value of those claims.”
28 (Doc. No. 34.) In the subsequently filed supplemental briefing, plaintiff explains that the parties

1 have now agreed to amend the settlement agreement to designate \$100,000 of the settlement as
2 representative of the damages for the FLSA claims. (Doc. No. 40 at 10–12.) To be clear, this
3 amount is simply designated and set aside from the already agreed-to total settlement amount;
4 plaintiff did not negotiate an additional \$100,000 in FLSA damages as part of the settlement.
5 Plaintiff explains this amount “is reasonable given that the FLSA claims being released are a
6 much smaller subset of, duplicative of and fundamentally subsumed by the California state law
7 claims being released.” (Id. at 11.) This statement highlights significant issues with plaintiff’s
8 approach to the FLSA claims and is at least suggestive of possible collusion between the settling
9 parties.

10 Plaintiff’s approach to settling the FLSA claims here is apparently premised on the
11 assumption that a single plaintiff cannot recover for violations of both the FLSA and state wage-
12 and-hour laws, because the former are duplicative of and “fundamentally subsumed” by the latter.
13 District courts in the Ninth Circuit, however, have held the opposite in concluding the FLSA does
14 not pre-empt state law wage claims and that a plaintiff may recover damages under each statute
15 separately. See *Carillo v. Schneider Logistics, Inc.*, No. CV 11-8557 CAS (DTBx), 2013 WL
16 12124123, at *5–6 (C.D. Cal. May 13, 2013) (“[S]tate laws providing rights duplicative of
17 existing rights under the FLSA in no way conflict with congressional purpose, and are not
18 preempted.”); *Ulin v. Lovell’s Antique Gallery*, No. C-09-03160 EDL, 2011 WL 13153112, at
19 *1–2 (N.D. Cal. Aug. 19, 2011) (denying a motion to alter or amend judgment based on the
20 assertion that the plaintiff received duplicative recovery by recovering under both state labor law
21 and the FLSA); *Valencia v. Del Rio West Pallet Co. Inc.*, No. CIV. S–09–1228 FCD EFB, 2009
22 WL 2407400, at *1 (E.D. Cal. Aug. 4, 2009) (noting that FLSA and state law overtime claims are
23 not duplicative of one another for multiple reasons, including because the FLSA provides for the
24 award of liquidated damages while state law does not); see also *Tegtmeier v. PJ Iowa, L.C.*, 189
25 F. Supp. 3d 811, 818 (S.D. Iowa 2016) (distinguishing between “parallel claims” and “duplicative
26 claims,” and noting the former exist where the legal right is independent of the FLSA, though it
27 applies identical standards, while the latter “occur where state law offers a cause of action that
28 allows a plaintiff to vindicate substantive rights conferred by federal law”). To be sure, this is not

1 a fully settled area of the law: some courts have concluded the FLSA does pre-empt at least
2 certain state wage statutes, see *Bell v. 1220 Mgmt. Grp., LLC*, No. 17-cv-22479, 2018 WL
3 3054795, at *2 (S.D. Fla. June 20, 2018), while others have concluded that, although state wage
4 claims are not pre-empted, the plaintiff must choose between duplicative recoveries, see
5 *Rukavitsyn v. Sokolov Dental Labs., Inc.*, No. 2:12-cv-02253-JAR, 2012 WL 3066578, at *6 (D.
6 Kan. July 27, 2012). However, this divergence of opinion among courts demonstrates there is
7 room for argument. The law is not so clear—or at the least, this court has been cited no authority
8 establishing its clarity on this point—that plaintiff can readily say these damages are duplicative
9 and would not be awardable if litigated.

10 It may well be that plaintiff did not originally allege FLSA claims in this action because
11 he believed they lacked worth. Indeed, in the supplemental briefing, plaintiff notes that the
12 central wage-and-hour claim alleged in the operative complaint concerns plaintiff being forced to
13 undergo security screenings prior to clocking in and after clocking out. (Doc. No. 40 at 11.)
14 While such claims are arguably compensable under state law, plaintiff notes the Supreme Court
15 has held that “time spent going through security measures [is] not compensable ‘hours worked’
16 under federal law.” (Id.) Therefore, according to plaintiff, “the damage value of the FLSA
17 claims related to the hours worked for the Security Measures Claims, if any, is at least non-
18 existent and at best completely subsumed by the damage value of the California state law claims.”
19 (Id. at 11–12.) While the second part of that statement is not clearly true, the court accepts
20 plaintiff’s stated belief that there was no value to any FLSA claims.¹ However, this would
21 suggest that the \$100,000 the parties designated for payment of FLSA claims is entirely arbitrary.

22 These atypical circumstances create a potentially indelible stain for the settlement
23 agreement as drafted, because they point toward collusion between the parties. Again, the first
24 reference to FLSA claims in this litigation was in the waiver set forth in the original settlement

25 ¹ In *Integrity Staffing Solutions, Inc. v. Busk*, ___ U.S. ___, ___, 135 S. Ct. 513 (2014), the
26 Supreme Court held that anti-theft security screening procedures for packers in an Amazon
27 warehouse were not “integral and indispensable to the principal activities that an employee is
28 employed to perform,” and were therefore not compensable under the FLSA. *Integrity Staffing
Sols., Inc.*, 135 S. Ct. at 519. Whether this holding is distinguishable from any issue presented in
this case is not a question the court must resolve at this time.

1 agreement. Plaintiff did not allege FLSA claims and only requested leave to amend the complaint
2 when questioned at oral argument about the propriety of settling claims he had not alleged.
3 Plaintiff then set an apparently arbitrary value for those new claims that did not increase the
4 overall amount of the settlement. In doing so, plaintiff explained that these claims were
5 duplicative and could not be recovered upon for that reason, despite significant authority
6 suggesting otherwise. This sequence of events raises a substantial concern on the part of the court
7 that it was defendants who insisted these claims be included as part of this settlement, and
8 plaintiff merely acquiesced to this request because he never intended to litigate the FLSA claims.

9 Moreover, plaintiff’s explanation that the FLSA claims were meritless on their face
10 essentially confirms the inference that it was defendants who insisted on their inclusion in the
11 waiver. This explanation highlights why these claims are inappropriate to include in the
12 settlement of this case. If plaintiff believed such claims so lacked merit and worth that they
13 should not even be alleged, plaintiff could not possibly represent the best interests of any class
14 members who might be eligible to participate in a FLSA settlement. Moreover, amending a
15 complaint to add a claim that plaintiff believes is meritless and has a “non-existent” value may
16 violate Rule 11. See Fed. R. Civ. P. 11(b)(2) (noting legal contentions must be “warranted by
17 existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or
18 for establishing new law”). In any event, it is apparent the court cannot approve any FLSA
19 settlement here because there appears to be no bona fide dispute about FLSA liability: instead,
20 plaintiff effectively concedes defendant is not liable under the FLSA. Without a bona fide
21 dispute about FLSA liability, the court cannot approve a settlement of those claims. *See Lynn’s*
22 *Food Stores, Inc.*, 679 F.2d at 1352–53; *Selk*, 159 F. Supp. 3d at 1172; *Nen Thio*, 14 F. Supp. 3d
23 at 1333; *Yue Zhou*, 2007 WL 2298046, at *1.

24 Even if the court were to attempt to construe plaintiff’s representations as stating a bona
25 fide dispute does exist, plaintiff has not supplied the court any information about what the
26 potential damages for the FLSA claims are or whether liquidated damages were awardable.² It is

27 ² As the Ninth Circuit has observed, under the FLSA, “[d]ouble damages are the norm; single
28 damages the exception.” *Haro v. City of Los Angeles*, 745 F.3d 1249, 1259 (9th Cir. 2014).

1 therefore impossible for the court to analyze whether the settlement amount is a fair and
2 reasonable compromise of those claims. See Khanna, 2013 WL 1193485, at *2; McKeen-
3 Chaplin, 2012 WL 6629608, at *2. In short, the inclusion of FLSA claims in this settlement
4 militates against approval.

5 2. Valuation of the Settlement

6 Separate and apart from the apparently arbitrary value assigned to plaintiff's new FLSA
7 claim, the court's analysis is further stymied by issues related to the valuation of the other claims
8 alleged by plaintiff, particularly the PAGA claims.

9 a. Valuation of the PAGA Claims

10 The total proposed settlement here is for \$3,002,606.46, with an estimated \$1,699,606.46
11 to be distributed amongst 1,076 class members. (Doc. No. 30-4 at 7.) In calculating the
12 maximum potential recovery for the class, plaintiff's counsel initially declared that the total
13 potential recovery for the "hours worked" claim was approximately \$4.5 million; the total value
14 for the meal and rest break claims was approximately \$9 million; and the total penalties sought
15 under California Labor Code §§ 203 and 226(e) was approximately \$2.2 million. (Id. at 9–10.)
16 The total potential recovery initially reported by plaintiff's counsel was therefore approximately
17 \$15.7 million.³ As discussed further below, plaintiff's counsel has since decreased their
18 estimation of the value of this case. Nonetheless, using the original reported value, a settlement
19 of approximately \$3 million would represent a recovery of approximately 20 percent of the case's
20 total potential value. While this is not a terribly high percentage, it is not outside the range of
21 possible approval. See, e.g., *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)
22 (finding a settlement for one-sixth of the value of the case to be fair and adequate); *Brown v. CVS*
23 *Pharmacy, Inc.*, No. CV15–7631 PSG (PJWx), 2017 WL 3494297, at *4 (C.D. Cal. Apr. 24,
24 2017) (approving a settlement for approximately 27 percent of the possible recovery); *Glass v.*

25 _____
26 ³ Confusingly, the pending motion suggested these figures were only for the members of
27 Subclass 1, as it was originally constructed. (See Doc. No. 30-1 at 14) (noting these are the
28 claims "for the class members at the Cal City and San Diego facilities"). The settlement
subclasses have since been reformulated and are discussed further below, but counsel's estimated
value of the claims remains unclear.

1 UBS Fin. Servs., Inc., No. C-06-4068 MMC, 2007 WL 221862, at *4 (N.D. Cal. Jan. 26, 2007)
2 (approving a settlement for approximately 25 to 35 percent of the potential recovery).

3 However, elsewhere in plaintiff’s initial motion, class counsel indicated that “[p]laintiff’s
4 counsel has estimated potential PAGA [Private Attorneys General Act] exposure of over \$36
5 million.” (Doc. No. 30-1 at 32.) Though the operative complaint in this lawsuit does not allege
6 PAGA claims,⁴ it is clear PAGA penalties are a part of this case, because a portion of the
7 settlement is specifically designated as a PAGA penalty. (See Doc. No. 30-4 at 34) (indicating
8 that \$300,000 of the settlement will be designated as PAGA penalties, and 75 percent of that, or
9 \$225,000, will go to the Labor and Workforce Development Agency (“LWDA”)). Nonetheless,
10 plaintiff’s counsel did not apparently include the PAGA penalties in estimating the total value of
11 the case. Doing so would have lowered the value of the settlement from approximately 20
12 percent to approximately 6 percent of the suit’s total value. Because of this, on May 16, 2018, the
13 court requested further briefing on the authority for the proposition that PAGA penalties should
14 not be considered in the total estimated value of the class claims. (Doc. No. 34.) Plaintiff filed
15 supplemental briefing on June 15, 2018 but addressed this point only to a limited extent.⁵ (See
16 Doc. No. 40 at 5–10.) There, plaintiff’s counsel explains the initial estimated claims value of \$36
17 million included the “stacking” of many potential PAGA penalties. (Id. at 9.) According to the
18 supplemental briefing, this type of stacking “has frankly never been awarded by any Court in
19 California in anything close to that kind of magnitude.” (Id.) Plaintiff’s counsel now estimates
20 the “unstacked” value of the PAGA penalties to be \$1.4 million if a penalty of \$50 per pay period

21 ⁴ The motion for preliminary approval indicates that the Richards lawsuit sought PAGA
22 penalties. (Doc. No. 30-1 at 10.) The docket in that case reflects that while the original
23 complaint did not contain PAGA claims, an amended complaint filed on February 11, 2018 did
24 add such a claim. See Richards, No. 1:17-cv-01094-LJO-JLT, Doc. No. 1 at 12–26; Doc. No. 25
25 at 1.

26 ⁵ The bulk of this supplemental briefing addressed the amount set aside under the parties’
27 settlement as a PAGA penalty, and a comparison of the amount to that set-aside in other
28 settlements. (See Doc. No. 40 at 5–9.) This analysis misapprehends the nature of the court’s
inquiry. The court is concerned that plaintiff’s counsel failed to include the value of any PAGA
claims in estimating the total value of this case for purposes of settlement. The court has yet to
reach, and therefore has not yet developed any concerns over, the sufficiency of the percentage of
the settlement fund designated as a PAGA penalty in this case.

1 were to be applied, \$2.8 million if the penalty were \$100 per pay period, and \$4.2 million if the
2 penalty were \$150 per pay period. (Doc. No. 40-1 at 5.)

3 The California Legislature enacted the PAGA in 2004 to address a chronic shortage of
4 government resources to pursue enforcement of the California Labor Code. See *Iskanian v. CLS*
5 *Transp. L.A., LLC*, 59 Cal. 4th 348, 379 (2014). The California Supreme Court explained the
6 general framework of the PAGA as follows:

7 Under this legislation, an “aggrieved employee” may bring a civil
8 action personally and on behalf of other current or former
9 employees to recover civil penalties for Labor Code violations.
10 (Lab. Code, § 2699, subd. (a).) Of the civil penalties recovered, 75
percent goes to the Labor and Workforce Development Agency,
leaving the remaining 25 percent for the “aggrieved employees.”
(*Id.*, § 2699, subd. (i).)

11 *Id.* at 380 (quoting *Arias v. Superior Court*, 46 Cal. 4th 969, 980–81 (2009)). In a PAGA action,
12 the state is the real party in interest, and the action is “fundamentally a law enforcement action
13 designed to protect the public and not to benefit private parties.” *Id.* at 387 (quoting *Arias*, 46
14 Cal. 4th at 986). A PAGA plaintiff thus has “the same legal right and interest as state labor law
15 enforcement agencies” and the action “functions as a substitute for an action brought by the
16 government itself.” *Id.* (quoting *Arias*, 46 Cal. 4th at 986); see also *Culley v. Lincare Inc.*, 236 F.
17 *Supp. 3d* 1184, 1191 (E.D. Cal. 2017) (observing that “PAGA allows employees to stand in the
18 shoes of the LWDA and recover civil penalties for labor code violations”).

19 While the damages awarded under PAGA do not inure entirely to the benefit of the class,
20 courts have held that the full amount of the awardable penalties should be considered in
21 establishing the fairness of the settlement. “Just because the State would receive [seventy-five
22 percent of the penalty] doesn’t mean it’s not part of the penalty. To the contrary, a PAGA
23 plaintiff stands in the shoes of the State in enforcing its wage and hour laws.” *Cotter v. Lyft, Inc.*,
24 176 F. *Supp. 3d* 930, 942 (N.D. Cal. 2016). “[I]t makes no sense to simply erase the State’s
25 portion of the recovery when estimating the maximum value of the claim.” *Id.* A plaintiff
26 bringing a representative PAGA action not only owes a duty to their “fellow aggrieved workers,”
27 but “also owes responsibility to the public at large; they act, as the statute’s name suggests, as a
28 private attorney general.” *O’Connor v. Uber Techs., Inc.*, 201 F. *Supp. 3d* 1110, 1133–34 (N.D.

1 Cal. 2016) (rejecting a proposal to settle PAGA claims for \$1 million where counsel previously
2 valued them at over \$1 billion); see also *Brown*, 2017 WL 3494297, at *4 (including PAGA
3 payments in evaluating the class’s maximum potential recovery); *Viceral v. Mistras Grp., Inc.*,
4 No. 15-cv-02198-EMC, 2016 WL 5907869, at *9 (N.D. Cal. Oct. 11, 2016) (“[W]hile the Court
5 is mindful of the need to safeguard the statutory purposes of PAGA and to ensure that the parties
6 do not use a PAGA claim as a mere bargaining chip, and while the Court would ordinarily be
7 highly skeptical of a settlement that amounts to a tiny fraction of the value of the PAGA claim,
8 under the unusual and peculiar circumstances of this case where Plaintiffs face a substantial risk
9 of recovering nothing on either the PAGA or class claims, the Court concludes that the settlement
10 of the PAGA claim is reasonable in the context of the settlement as a whole.”); *Ceja-Corona v.*
11 *CVS Pharmacy, Inc.*, No. 1:12-cv-01868-AWI-SAB, 2014 WL 5500948, at *9 n.2 (E.D. Cal. Oct.
12 30, 2014), findings and recommendations withdrawn due to mootness, 2014 WL 6607959.

13 Here, plaintiff’s current valuation of the PAGA claims is a significant impediment to
14 approving the settlement. The PAGA statute provides that, unless a penalty amount is
15 specifically provided elsewhere in the Labor Code, “the civil penalty is one hundred dollars
16 (\$100) for each aggrieved employee per pay period for the initial violation and two hundred
17 dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.” Cal.
18 Labor Code § 2699(f)(2). Plaintiff’s counsel estimated PAGA penalties at a rate of \$50 per pay
19 period (\$1.4 million), \$100 per pay period (\$2.8 million), and \$150 per pay period (\$4.2 million).
20 (Doc. No. 40-1 at 5.) Plaintiff’s counsel has omitted any calculation of PAGA penalties at the
21 statutory rate, which is higher than the three they have offered. Because the statutory penalty is
22 \$200 per pay period, the court will assume that the unstacked value of the PAGA penalties is \$5.6
23 million, or four times the rate calculated by counsel at \$50 per pay period. Accepting this value, a
24 settlement of \$3 million would represent approximately 14 percent of the value of the case.

25 Moreover, these representations about the appropriateness of “stacking” merely
26 compound the problem. If counsel did not believe stacked penalties could or would ever be
27 realistically awarded, it is unclear why counsel initially represented to the court that the PAGA
28 penalties were worth that much. Moreover, “stacking” PAGA penalties is not inappropriate under

1 California law and, therefore, there is no obvious reason to use “unstacked” calculations to
2 estimate the value of the case. See, e.g., *O’Connor v. Uber Techs., Inc.*, Nos. 13-cv-03826-EMC,
3 15-cv-00262-EMC, 2016 WL 3548370, at *7 (N.D. Cal. June 30, 2016) (noting that “[p]laintiffs
4 ignore the potential for stacking of PAGA penalties” and therefore their estimate of PAGA
5 penalties “does not appear to rest on an accurate foundation”); *Schiller v. David’s Bridal, Inc.*,
6 No. 1:10-cv-00616 AWI SKO, 2010 WL 2793650, at *6 (E.D. Cal. July 14, 2010) (noting that
7 courts include stacked PAGA penalties in calculating the amount in controversy). Trial courts
8 certainly do retain discretion concerning the amount of PAGA penalties to be awarded.⁶ See Cal.
9 Labor Code § 2699(e)(2) (noting “a court may award a lesser amount than the maximum civil
10 penalty amount specified by this part if, based on the facts and circumstances of the particular
11 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
12 confiscatory”). However, plaintiff has not adequately explained why, in attempting to set out the
13 total potential value of the claims in this case, he both “unstacked” them and suggested they
14 might only be worth a quarter of the statutory penalty.

15 Finally, even the various numbers provided by plaintiff still do not add up. Since stacked
16 PAGA penalties are awardable, it is appropriate for the court’s analysis to start with the
17 assumption that they could be awarded in establishing the total value of the case. The operative
18 complaint in this matter alleged three separate claims which could serve as the basis for PAGA
19 penalties,⁷ concerning a failure to provide appropriate meal periods or rest periods, and a failure

20
21 ⁶ That said, some award of PAGA penalties is mandatory and a trial court does not have
22 discretion to refuse such penalties in their entirety. See *Moreno v. Autozone, Inc.*, No. C05-04432
23 MJJ, 2007 WL 1650942, at *3–4 (N.D. Cal. June 5, 2007); *Amaral v. Cintas Corp.* No. 2, 163
24 Cal. App. 4th 1157, 1210–11 (2008).

25 ⁷ Plaintiff also alleged claims for waiting time penalties pursuant to Labor Code § 203 and for
26 violation of California’s Business and Professions Code § 17203. (Doc. No. 1 at 16.) The PAGA
27 by its terms excludes penalties for either of these claims. The former of these provisions
28 specifically provides for a penalty, and therefore cannot provide the basis for imposition of
further PAGA penalties. See Cal. Labor Code § 2699(f) (establishing a penalty for “all provisions
of this code except those for which a civil penalty is specifically provided”) (emphasis added).
The latter of these provisions is not part of the Labor Code. See Cal. Labor Code § 2699(a)
(authorizing citizen suits where a “provision of this code . . . provides for a civil penalty to be
assessed and collected by the Labor and Workforce Development Agency”) (emphasis added).

1 to pay for all hours worked. (See Doc. No. 1 at 16.) The court still cannot determine what
2 plaintiff's counsel considered in estimating the stacked value of the PAGA penalties, since \$36
3 million is not an obvious multiple of any of values plaintiff's counsel provided, nor is it an
4 obvious multiple of the court's assumed unstacked value of \$5.6 million. Counsel has failed to
5 provide an adequate explanation that reconciles these numbers.

6 A trial court's discretion to reduce PAGA penalties might be a reason to ultimately
7 discount the value of PAGA claims, perhaps even significantly, in reaching a settlement.
8 However, before the court could exercise that discretion it would have to know the actual
9 estimated values of the PAGA claims. More critically, the court must be convinced that the
10 plaintiff knows the value of the claims he proposes to settle and can adequately explain why he
11 has discounted them in reaching that settlement. The inconsistencies in the valuation of the
12 PAGA penalties set forth above suggest either that plaintiff has not been entirely forthcoming or
13 is unaware of the true value of the PAGA claims. Either circumstance casts doubt on the basic
14 fairness of the settlement. The court is particularly concerned about plaintiff's downplaying of
15 the originally-asserted value of these penalties in its more recent briefing. The failure to
16 adequately explain why PAGA penalties were not considered in the analysis of the total value of
17 the suit and the subsequent failure to explain how even those later estimated penalties were
18 calculated, forestalls the court from any real evaluation of the reasonableness of this settlement.

19 b. Difference in Estimated Amounts

20 Additional concerns are raised by the fact that the estimated value of the substantive
21 claims has changed throughout the briefing of the pending motion. Plaintiff's counsel estimated
22 the total value of the three claims alleged by plaintiff at \$15.7 million in the initial motion for
23 preliminary approval. (Doc. No. 30-4 at 9–10.) In a supplemental declaration, counsel now
24 states the total estimated value of those claims at \$15.1 million. (Doc. No. 40-1 at 3.) Counsel
25 does not explain why the estimated value of the claims differs by \$600,000, which is equal to 20
26 percent of the settlement's value and 4 percent of the value of the estimated claims. Though this
27 might be inconsequential if adequately explained, this downward variance reinforces the court's
28 concerns. Should plaintiff again seek approval of a settlement in this matter, counsel is strongly

1 encouraged to show their work.

2 3. Existence of Other PAGA Suit and Opposition to Intervention

3 A further wrinkle to this settlement is the existence of another suit expressly pursuing
4 PAGA claims that is currently pending in San Diego County Superior Court. As the parties and
5 the court are aware, the plaintiff in that ongoing suit moved to intervene in this action as of right,
6 asserting that only he had standing to bring PAGA claims related to the Labor Code violations
7 alleged in these suits. (Doc. No. 39.) While the court denied that motion (see Doc. No. 47), the
8 very existence of the other suit raises some additional concerns regarding the negotiated
9 settlement in this case. The state court PAGA case was apparently filed on July 25, 2016. (Doc.
10 No. 39-2 at 19.) That case predated the filing of this one by several months. (See Doc. No. 30-4
11 at 5) (noting this case was originally filed in the Kern County Superior Court on October 17,
12 2016). The parties to this lawsuit participated in a mediation on December 11, 2017, which did
13 not result in a settlement. (Id. at 6.) Shortly thereafter, on January 5, 2018, the plaintiff in
14 Roberts sought leave to amend to add a PAGA claim for the first time. Roberts, No. 1:17-cv-
15 01094-LJO-JLT, Doc. No. 17. Defendants opposed the granting of leave to amend on the basis
16 that the plaintiff in Roberts had not complied with the exhaustion requirements of PAGA. Id. at
17 Doc. No. 19. Leave to amend was granted and a first amended complaint alleging PAGA claims
18 was filed in Roberts on February 11, 2018. See id. at Doc. No. 25. A settlement was reached via
19 subsequent private negotiations that continued following the parties' mediation (see Doc. No. 30-
20 5 at 6), and though it is unclear when the settlement was reached in principal, a memorandum of
21 understanding was signed on March 22, 2018. (See Doc. No. 28 at 2.)

22 The procedural posture of the addition of PAGA claims to this case paints a mixed
23 picture. The fact that no party sought to add PAGA claims to this case until after the
24 commencement of settlement negotiations and a full day mediation had been completed suggests
25 the claims may have been added as part of a negotiating tactic, rather than out of a genuine intent
26 to litigate them. This suggestion is enhanced by the inconsistencies in the value placed upon
27 these claims, discussed above. However, because the motion to amend the complaint and add
28 PAGA claims was contested, the court does not infer that the addition of the PAGA claims was a

1 collusive effort between the settling parties.

2 That said, the court is also mindful of the assertions made by the attempted intervenor in
3 this case, Jose Gonzales. Although intervention was denied, the attempted intervenor did
4 represent that the potential value of the PAGA penalties was more than \$50 million, far exceeding
5 even the highest value plaintiff’s counsel here had originally placed on the claim, and much
6 higher than the value now being ascribed to the PAGA penalties by plaintiff. (See Doc. No. 39-1
7 at 11.) While the court does not assume the attempted intervenor’s estimates are necessarily
8 accurate, the significant difference between the valuations raises the specter that PAGA penalties
9 may have been included in this settlement as a bargaining chip, rather than as an earnestly-
10 litigated claim.

11 4. Overbroad Waiver

12 Beyond the questionable inclusion of FLSA claims in this settlement, the waiver of claims
13 in the amended agreement remains generally overbroad. Under the definition of “Released
14 Claims,” the settlement agreement recites:

15 All claims, wage and hour claims, rights, demands, liabilities and
16 causes of action of any nature or description arising during the
17 Settlement Class Period and arising from the facts, theories of
18 liability and claims asserted in or contemplated by the Actions
19 and/or the claims that could have been asserted based on the facts
20 ascertained or alleged in the Actions, including without limitation,
21 any and all statutory, constitutional, contractual or common law
22 claims for wages, damages, unpaid costs, penalties, liquidated
23 damages, punitive damages, interest, attorneys’ fees, litigation
24 costs, restitution, and equitable or other relief based on the
25 following categories: (a) any and all claims involving any alleged
26 failure to pay the minimum wages required by state or federal law;
27 (b) any and all claims arising under state or federal law involving
28 any alleged failure to pay employees for all hours worked,
including but not limited to any claim for minimum, straight time,
or overtime wages; (c) any and all claims arising under state or
federal law involving any alleged failure to pay overtime wages,
including but not limited to any claim involving “off the clock”
work, any claim involving payment of wages based on CoreCivic’s
defined workday or workweek, and any claim involving the failure
to correctly calculate or include bonuses, other incentive pay, or
compensation of any kind in the “regular rate” of pay; (d) any and
all claims arising under state or federal law involving any alleged
failure to properly provide meal periods and/or authorize and permit
rest periods, to pay premiums for missed, late, short, unprovided,
on-duty, or interrupted meal and/or rest periods, or to pay such
premiums at the regular rate of compensation; (e) any and all claims

1 involving any alleged failure to keep accurate records or to issue
2 proper wage statements to employees; (f) any and all claims
3 involving any alleged failure to timely pay wages, including but not
4 limited to any claim of violation of Labor Code §§ 201 or 202, and
5 any claim for waiting time penalties under Labor Code § 203; (g)
6 any and all claims involving any alleged failure to reimburse for
7 necessary business expenses under Labor Code §§ 2800 or 2802,
8 including but not limited to any claim for failure to provide and/or
9 reimburse for uniform items and uniform maintenance; (h) any and
10 all claims for unfair business practices in violation of Business and
11 Professions Code sections 17200, et seq.; and (i) any and all
12 penalties pursuant to the Private Attorneys General Act (“PAGA”)
13 of 2004 (collectively, the “Released Claims”). The Released
14 Claims include, but are not limited to, all claims arising under the
15 California Labor Code (including, but not limited to, sections 201,
16 201.3, 202, 203, 204, 210, 218.5, 218.6, 221, 225.5, 226, 226.3,
17 226.7, 227.3, 246, 256, 450, 510, 511, 512, 516, 558, 1174, 1174.5,
18 1182.12, 1194, 1194.2, 1197, 1197.1, 1197.2, 1198, 1199, 2800,
19 2802, 2698, 2699, 2699.3); the Wage Orders of the California
20 Industrial Welfare Commission; California Business and
21 Professions Code section 17200 et seq.; California Civil Code
22 §§ 3336 and 3294; the California common law of contract; and
23 federal common law. Members of the Settlement Class who opt-in
24 to the Fair Labor Standards Act (“FLSA”) claims portion of the
25 Settlement expressly waive and release any FLSA claims, whether
26 known or unknown, arising during the Settlement Class Period and
27 reasonably related to the claims and allegations in the Action. The
28 release excludes the release of claims not permitted by law.

16 (Doc. No. 40-1 at 14–15) (emphasis added).

17 Aspects of the opening language of this release appear at first glance to narrow its scope.
18 (See *id.* at 14) (“All claims . . . arising during the Settlement Class Period and arising from the
19 facts, theories of liability and claims asserted in or contemplated by the Actions and/or the claims
20 that could have been asserted based on the facts ascertained or alleged in the Actions”) (emphasis
21 added). However, this same language sets the stage for the overbroad list of claims that follows,
22 as it releases claims arising from the facts alleged as well as claims “that could have been asserted
23 based on the facts ascertained . . . in the Actions.” (*Id.*) (emphasis added). The release then lists
24 claims that are included within that definition “without limitation.” (*Id.*) This list includes many
25 claims apparently unconnected to this case, such as “any claim involving the failure to correctly
26 calculate or include bonuses, other incentive pay, or compensation of any kind in the ‘regular
27 rate’ of pay.” (*Id.*) The agreement also specifically releases “any and all claims involving any
28 alleged failure to reimburse for necessary business expenses . . . , including but not limited to any

1 claim for failure to provide and/or reimburse for uniform items and uniform maintenance.” (Id. at
2 15.) Notably, plaintiff has never asserted in this action that defendants failed to include bonuses
3 or incentives in calculating overtime or failed to reimburse for business expenses. Certainly, no
4 information has been presented to the court about the potential value of any such claims. The
5 court therefore assumes plaintiff and his counsel did not litigate or conduct discovery with respect
6 to any such claims.

7 Beyond these obvious examples, the agreement also releases all claims under any
8 provision of the California Labor Code, including 36 specifically delineated provisions, as well as
9 other entire areas of law, such as “federal common law.” (Id. at 14–15.) Such a release is
10 overbroad, even without a detailed analysis of every provision of the California Labor Code,
11 since plaintiff only alleged three substantive claims in this action, one derivative claim under the
12 California Business and Professions Code, and one claim for waiting time penalties. While these
13 release provisions might arguably be limited slightly by the language narrowing the released
14 claims to those based on facts asserted in the complaint, the language expanding this definition to
15 those “that could have been asserted based on the facts ascertained . . . in the Actions” renders
16 that uncertain. (Id. at 14.)

17 Aside from these overbreadth problems, the description of the claims released creates
18 serious due process issues with respect to absent class members. The court questions how an
19 absent class member, who received none of the discovery in this case, would know what claims
20 could be “based on . . . facts ascertained” in this case and therefore “could have been asserted” in
21 this case, even though they were never alleged or litigated? Without knowing what facts were
22 ascertained during this case, an absent class member has no way of knowing what claims they are
23 agreeing to release. This raises significant due process concerns. See *Phillips Petroleum Co. v.*
24 *Shutts*, 472 U.S. 797, 811–12 (1985) (holding that, to satisfy due process, notice “must be the best
25 practicable, ‘reasonably calculated, under all the circumstances, to apprise interested parties of the
26 pendency of the action and afford them an opportunity to present their objections’”) (quoting
27 *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)); *Allen v. Bedolla*, 787 F.3d
28 1218, 1223 (9th Cir. 2015) (noting the “unique due process concerns for absent class members”

1 and commenting that “the district court has a fiduciary duty to look after the interests of those
2 absent class members”) (quoting Hanlon, 150 F.3d at 1026); Logan v. Hargraves, No. CV-04-
3 0214-FVS, 2008 WL 11425713, at *2 (E.D. Wash. Sept. 25, 2008) (“[W]here the terms of a
4 settlement involve the release of claims, the settlement notice must clearly identify the claims
5 being released.”); Bowman v. UBS Fin. Servs., Inc., No. C-04-3525 MMC, 2007 WL 1456037, at
6 *1 (N.D. Cal. May 17, 2007) (observing due process requires that “the options available to class
7 members and the consequences of their elections be detailed with sufficient clarity to afford
8 absent members a realistic opportunity to evaluate alternative options available to them”)
9 (quoting McCubbrey v. Boise Cascade Home & Land Corp., 71 F.R.D. 62 (N.D. Cal. 1976)).

10 In every settlement, it will be in defendants’ interest to frame the release of claims as
11 broadly as possible. Further, if the settlement is for a sufficient amount, plaintiff may be induced
12 to acquiesce to an overly broad release of claims, since it releases claims plaintiff had no interest
13 in litigating in any event. A release of claims that is as broadly drafted as the one in question
14 here, however, cannot be approved by the court, where it does not reasonably track the allegations
15 of the complaint. See Kempen v. Matheson Tri-Gas, Inc., No. 15-cv-00660-HSG, 2016 WL
16 4073336, at *9 (N.D. Cal. Aug. 1, 2016) (“Courts in this district routinely reject proposed class
17 action settlement agreements that try to release all claims in a wage-and-hour case relating to
18 compensation as overbroad and improper.”); Boyd v. Avanquest N. Am. Inc., No. 12-cv-04391-
19 WHO, 2015 WL 4396137, at *1 (N.D. Cal. July 17, 2015) (denying preliminary settlement
20 approval because “there are ‘obvious deficiencies’ in the proposed Settlement Agreement,”
21 “namely, the overly broad release provision”); McKeen-Chaplin v. Franklin Am. Morg. Co., No.
22 C 10-5243 SBA, 2012 WL 6629608, at *5 (N.D. Cal. Dec. 19, 2012) (disapproving an FLSA
23 settlement in part because the release provision did “not track the breadth of the allegations in this
24 action and releases unrelated claims”); Bond v. Ferguson Enters., Inc., No. 1:09-cv-01662 OWW
25 MJS, 2011 WL 284962, 2011 WL 284962, at *7 (E.D. Cal. Jan. 25, 2011) (noting that the
26 proposed release was overbroad because it did “not appropriately track the extent and breadth of
27 Plaintiffs’ allegations in this case and releases unrelated claims of any kind or nature that class
28 members may have against defendants”); see also Christensen v. Hillyard, Inc., No. 13-cv-04389

1 NC, 2014 WL 3749523, at *1 (N.D. Cal. July 30, 2014) (rejecting settlement approval because
2 release of claims was “overly broad”); *Tijero v. Aaron Bros., Inc.*, No. C 10–01089 SBA, 2013
3 WL 60464, at *9 (N.D. Cal. Jan. 2, 2013) (same).⁸

4 Here, defendants sought a broad waiver from plaintiff, which included claims plaintiff did
5 not allege, did not litigate, and did not believe had any value. Moreover, it would not be possible
6 for absent class members to know the extent of the claims they are releasing, given the language
7 of the settlement agreement. While plaintiff might not see a downside in waiving claims he had
8 no interest in litigating, this is the sort of behavior about which reviewing courts must be vigilant,
9 because it is suggestive of collusion. See, e.g., *Belew v. Brink’s, Inc.*, 721 Fed. App’x 734, 735
10 (9th Cir. 2018) (“One indication of collusion is an overbroad release of claims.”)⁹; *Ambrosino v.*
11 *Home Depot U.S.A., Inc.*, No. 11cv1319 L(MDD), 2014 WL 1671489, at *2 (S.D. Cal. Apr. 28,
12 2014) (“Courts have found that overly broad release provisions, which release a Defendant from
13 all claims to settle their wage claims, including claims that are unrelated to the claims asserted in
14 the complaint, are improper in FLSA and class action settlements.”); *Adderley v. Nat’l Football*
15 *League Players Ass’n*, No. C 07–00943 WHA, 2009 WL 4250786, at *2 (N.D. Cal. Nov. 23,
16 2009) (noting the settlement was approved only after numerous revisions of the release provision
17 to narrow its scope); see also *Hendricks v. Starkist Co.*, No. 13-cv-00729-HSG, 2016 WL
18 692739, at *4 (N.D. Cal. Feb. 19, 2016) (“The Court found counsels’ statements at the final
19 fairness hearing further cause for concern. Counsels’ repeated avowals that a conspiratorial-
20 underfilling ‘claim does not exist,’ and that ‘there wasn’t evidence of it, [and] it wasn’t brought
21 up,’ are hard to square with the final-hour amendment expressly requiring the class to release

22
23 ⁸ Similar concerns attend the release of FLSA claims. See *Selk*, 159 F. Supp. 3d at 1178 (“Courts
24 review the scope of any release provision in a FLSA settlement to ensure that class members are
25 not pressured into forfeiting claims, or waiving rights, unrelated to the litigation. The concern is
26 that an expansive release of claims would effectively allow employers to use employee wages—
27 wages that are guaranteed by statute—as a bargaining chip to extract valuable concessions from
employees.”); see also *Moreno v. Regions Bank*, 729 F. Supp. 2d 1346, 1352 (M.D. Fla. 2010)
28 (“[A] pervasive release in an FLSA settlement confers an uncompensated, unevaluated, and
unfair benefit on the employer.”).

⁹ Citation to this unpublished case is appropriate pursuant to Ninth Circuit Rule 36-3.

1 conspiratorial-underfilling claims.”) (internal citations omitted). Here, the overly broad release of
2 claims that have not been litigated, alleged, or valued, and which class members cannot know the
3 full extent of, is a deficiency that prevents the court from approving this settlement.

4 5. The Shifting and Inconsistent Class and Subclass Definitions

5 Lastly, the court notes that the definition of the class and the subclasses in the initial
6 settlement agreement was inconsistent, and that the definitions of the subclasses in the amended
7 settlement agreement have now changed. The operative complaint in this case alleges five
8 different subclasses, all comprised of all non-exempt California employees of defendants: (1)
9 those who were not paid for time spent undergoing security checks; (2) those who worked more
10 than eight hours a day or forty hours a week and were not paid overtime; (3) those who were not
11 appropriately paid for meal breaks; (4) those who did not receive compliant rest breaks; and (5)
12 those who were members of the other subclasses but left defendants’ employment within three
13 years of the complaint’s filing. (Doc. No. 1 at 19–20.) Approval was initially sought for a class
14 settlement that certified three separate subclasses: (1) non-exempt employees in specified
15 positions at the California City Correctional Facility, the San Diego Detention Center, and the
16 Otay Mesa Detention Center; (2) non-exempt employees at the California City Correctional
17 Facility and San Diego Detention Center who did not work in the positions specified in the first
18 subclass; and (3) any non-exempt employees working at defendants’ facilities located at 2727
19 Boston Avenue, San Diego, California or 551 South Street, San Diego, California. (Doc. No. 30-
20 1 at 11.) This was potentially inconsistent with the overarching “Settlement Class,” defined as
21 “all non-exempt employees who were employed by Defendant in California at any time during
22 the Settlement Class Period.” (Id.) It is unclear how many facilities defendants operated in
23 California during the class period, but the company’s website suggests there are seven currently
24 operating. See CoreCivic, http://www.corecivic.com/facilities?state=CA&hs_name= (last visited
25 Sept. 6, 2018). If so, and since the subclasses covered only employees at five facilities, the
26 overarching class may have covered individuals who were not part of any subclass. Given the
27 broad release language, those individuals would have released all labor law claims despite
28 receiving no compensation from the settlement.

1 In response to the court’s request for supplemental briefing about the formulation of the
2 subclasses and division of settlement proceeds between them, the parties amended the settlement
3 agreement. In doing so, they divided the class into four new subclasses: (1) all non-exempt
4 employees in California; (2) all non-exempt employees at the California City Correctional
5 Facility in certain specified positions “who executed an On Duty Meal Period Agreement”; (3) all
6 non-exempt employees who worked at the California City Correctional Facility, San Diego
7 Detention Center, or Otay Mesa Detention Center; and (4) all non-exempt employees who opt-in
8 to the settlement and therefore release FLSA claims. (Doc. No. 40-1 at 22–23.) The overarching
9 settlement class definition remains the same as in the initial settlement agreement. Thus, in the
10 amended version of the settlement agreement, there is no inconsistency between the overarching
11 class definition and the definitions of the subclasses, because Subclass 1 is coterminous with the
12 overarching class definition. However, this amendment enlarged the proposed subclasses by
13 apparently expanding the number of facilities and workers covered by the subclass definitions.
14 Subclass 1 grew from an estimated 607 subclass members to an estimated 1,076 subclass
15 members; Subclass 2 grew from 199 to 213 subclass members; and Subclass 3 grew from 336 to
16 806 members. (Compare Doc. No. 30-1 at 11 with Doc. No. 40-1 at 22–23.) It seems likely there
17 is some overlap between the subclass definitions, and some individual employees may belong to
18 more than one of the subclasses. However, the parties have not clearly explained how many total
19 class members there are and what level of overlap, if any, there is between the subclasses. Should
20 the parties attempt to seek approval of a new, revised settlement, the court strongly encourages
21 them to be clear about the anticipated number of total class members, the breakdown of those
22 class members into subclasses, and the reasons for subdividing the class members and awarding
23 funds in the manner described.

24 5. The Settlement Agreement Suffers from Deficiencies and Cannot Be Preliminarily
25 Approved

26 Class action settlements must be taken as a whole, and a district court is not free to
27 evaluate the settlement agreement piecemeal. See *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th
28 Cir. 2003) (“It is the settlement taken as a whole, rather than the individual component parts, that

1 must be examined for overall fairness,’ and ‘[t]he settlement must stand or fall in its entirety.’”) (quoting Hanlon, 150 F.3d at 1026); *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1035 (N.D. Cal. 2016); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 583 (N.D. Cal. 2015). The Ninth Circuit has consistently instructed district courts to subject settlements negotiated prior to class certification to increased scrutiny. See *Koby v. ARS Nat’l Servs., Inc.*, 846 F.3d 1071, 1079 (9th Cir. 2017) (“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.”); *Bluetooth*, 654 F.3d at 946–47 (noting that the court must review settlements negotiated prior to class certification for additional, subtle signs of collusion); Hanlon, 150 F.3d at 1026 (“The dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court designated class representative, weigh in favor of a more probing inquiry than may normally be required under Rule 23(e).”); see also *Allen*, 787 F.3d at 1223–24 (noting that, while substantive review of a settlement is deferential, the Ninth Circuit holds “district courts to a higher procedural standard when making [the] determination of substantive fairness” and “[t]hat procedural burden is more strict when a settlement is negotiated absent class certification”).

27 Considering the settlement in its totality here, the court cannot approve this settlement on even a preliminary basis. As explained above, the inclusion or attempted inclusion of FLSA claims in the settlement of this case is problematic in numerous ways: (1) such claims have never been alleged or litigated; (2) counsel appears to have written off any recovery under the FLSA based on the belief that it would be duplicative of the state law claims, even though no established authority has been cited demonstrating this to be the case; (3) counsel believes these claims are substantively meritless, but nonetheless proposes to add and settle them in this action; and (4) the value assigned to the claims is arbitrary, apparently because counsel believes they lack merit. Moreover, the late inclusion of these claims in the settlement agreement strongly suggests they were added only at defendants’ insistence so that they would be covered in the broad release that has been proposed.

28 /////

1 In addition, plaintiff has offered contradictory and seemingly irreconcilable estimations of
2 the PAGA penalties available for this case. In attempting to explain why such penalties were not
3 included in counsel’s estimated valuation of the case, counsel has asserted that the PAGA
4 penalties were actually of less value than previously identified. Counsel then re-estimated the
5 PAGA penalties at an amount below the statutory rate for such penalties, without any adequate
6 explanation for why they would be awarded at those lower rates. (Doc. No. 40 at 10.) Because it
7 remains unclear to the court what PAGA penalties are potentially available in this case, the court
8 cannot begin to meaningfully review the sufficiency of the settlement. Additionally, plaintiff’s
9 counsel’s highest estimated value for the PAGA claims is approximately \$14 million less than the
10 valuation presented by the proposed intervenor. Though the court does not assume that the
11 proposed intervenor’s valuation of the PAGA claims is accurate, PAGA claims were only added
12 to this case after a mediation session had taken place in this action and settlement talks were
13 underway, suggesting they may have been added as a bargaining chip, rather than an earnestly-
14 litigated claim.

15 Moreover, the release of claims in this case is overbroad. It absolves defendants of
16 liability not only for those claims which were brought or could have been brought based on the
17 facts alleged in the complaint, but also all claims which could have been brought based on facts
18 ascertained during the case. This includes, without limitation, any and all claims under
19 California’s Labor Code, federal common law, and other areas of law. It specifically includes
20 claims that have no apparent relation to this case, such as claims related to the failure to include
21 bonus pay in overtime calculations and the failure to reimburse for business expenses. Because
22 the waiver of claims applies to any claims based on facts ascertained in this suit, it forestalls
23 absent class members—who have not been privy to the discovery produced in this action—from
24 knowing what claims they are waiving. This implicates significant due process concerns.

25 Finally, the valuation of the substantive claims alleged here has changed by more than a
26 half-million dollars over the course of the briefing on the pending motion for preliminary
27 approval. This coincides with a redefinition of the subclasses involved in the settlement that
28 appears to expand the number of facilities and employees covered. These modifications—which

1 suggest that counsel’s view of the case’s value has gone down while the number of workers
2 covered has gone up—have not been explained to the court’s satisfaction. The formulation of the
3 class and the subclasses, including the total members in each, any overlap between them, and the
4 logic underlying the division of the subclasses in this manner, should be clearly explained in any
5 subsequent attempts to settle this case.

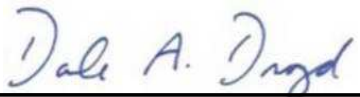
6 The court will not forestall further efforts by the parties to settle this matter. See *Class*
7 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the “strong judicial
8 policy that favors settlements, particularly where complex class action litigation is concerned”);
9 *Custom Led, LLC v. eBay, Inc.*, No. 12-cv-00350-JST, 2013 WL 4552789, at *9 (N.D. Cal. Aug.
10 27, 2013) (denying preliminary approval without prejudice). However, this settlement cannot be
11 approved without significant amendment. Plaintiff’s counsel should bear in mind that any further
12 motions to approve a settlement should fully and completely address how plaintiff’s counsel
13 valued the claims alleged, how the release provisions reasonably track the allegations of the
14 complaint, and explain why the settlement is fair and reasonable. This is particularly true if
15 settlement approval is sought prior to class certification. Moreover, all counsel are advised that a
16 subsequent settlement agreement which tracks the substance of those previously submitted—that
17 is, one which releases essentially the same broad swath of claims for the same amount of
18 money—will almost certainly not be approved. It appears to the court that counsel must
19 substantively renegotiate this settlement (either in terms of the claims settled, the amount paid to
20 the plaintiffs, or both) for it to pass muster.

21 CONCLUSION

22 For the reasons given above, the motions for preliminary approval (Doc. Nos. 30 and 40)
23 are denied without prejudice. This matter is referred back to the assigned magistrate judge for
24 further scheduling.

25 IT IS SO ORDERED.

26 Dated: September 12, 2018

27 
28 UNITED STATES DISTRICT JUDGE