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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

RAY DELGADO,  
Plaintiff,  
v.  
MARKETSOURCE, INC.,  
Defendant.

Case No. 17-CV-07370-LHK  
**ORDER APPROVING SECOND  
AMENDED SETTLEMENT**  
Re: Dkt. No. 84

Before the Court is Plaintiff’s motion for approval of the second amended settlement. On August 15, 2019, the Court held a hearing on Plaintiff’s motion. On August 26, 2019, Plaintiff filed a supplemental brief and the parties’ amended settlement. On August 27, 2019, Plaintiff filed a second supplemental brief and the parties’ second amended settlement. Having considered the parties’ submissions, the arguments at the August 15, 2019 hearing, the relevant law, and the record in this case, the Court GRANTS Plaintiff’s motion for approval of the second amended settlement.

**I. BACKGROUND**

**A. Factual Background**

Defendant “provide[s] outsource sales and marketing for other companies.” ECF No. 37-

1 1, Ex. D (“Wiley Depo.”), 25:16–18. Defendant employed Plaintiff as a district manager from  
2 April 2013 until April 18, 2017. ECF No. 37-5 (“Delgado Decl.”), ¶ 2. Plaintiff supervised  
3 employees who sold cellular phones inside Target stores. *Id.* ¶ 3. Plaintiff “was responsible for  
4 staffing these sales departments, as well as managing inventory and tracking supplies.” *Id.*  
5 Plaintiff terminated at least three of Defendant’s employees during Plaintiff’s employment with  
6 Defendant. ECF No. 42-1, Ex. E (“Delgado Depo.”), 112:21–117:20; 134:10–22.

7 **1. Defendant’s Policies and Practices for Paying Final Wage Statements**

8 Defendant pays its employees their wages via either electronic direct deposit or a paper  
9 check. Wiley Depo. 32:11–12. When Defendant fires an employee, Defendant distributes the  
10 employee’s final paycheck through similar means, via either direct deposit or a paper check sent  
11 overnight with Federal Express (“FedEx”). *Id.* at 162:23–25. According to Defendant’s policies,  
12 Defendant pays fired employees their final wages “in accordance with state law.” ECF No. 42-1,  
13 Ex. B; *see also* Wiley Depo. 135:2–15 (testifying that Defendant’s practice is for a fired employee  
14 to “have a check that day”). California law requires Defendant to pay fired employees their final  
15 wages “immediately.” Cal. Labor Code § 201.

16 In order to comply with California law, Defendant maintains the following policies and  
17 practices. Before a manager decides to terminate an employee, Defendant requires the manager to  
18 receive approval from Defendant’s human resources department. ECF No. 42-4 (“Wiley Decl.”),  
19 ¶ 9. Then, the manager must complete an Employee Status Form (“ESF”), which documents the  
20 employee’s name, termination date, and reason for termination. Wiley Depo. at 149:1–18.  
21 Defendant’s human resources department must authorize the ESF. *Id.* at 149:23–25. Eventually,  
22 the ESF is sent to Defendant’s payroll department to prepare the employee’s final paycheck. *Id.* at  
23 150:2–6. When Defendant pays final wages by direct deposit, the “final wages are typically . . .  
24 processed the day before the termination date such that the funds are in the employee’s bank  
25 account on the last day of employment.” Wiley Decl. ¶ 11. If using direct deposit might delay an  
26 employee’s receipt of final wages, or if the employee receives her regular wages by paper check,  
27 Defendant issues a paper check and sends it to the fired employee via overnight FedEx. *Id.*

1 Defendant’s Managers Guide to Paying Hourly Employees also includes instructions  
2 regarding the payment of final wages. ECF No. 42-3, Ex. A. The Managers Guide informs  
3 managers that “in some states”—including California—“an employee is due his or her final wages  
4 immediately upon termination.” *Id.* at 1, 4. As a result, the Managers Guide instructs managers to  
5 contact human resources “as soon as possible . . . when the manager makes the decision to  
6 terminate an employee.” *Id.* at 1. Plaintiff received an email from a payroll specialist reminding  
7 him to approve timecards for to-be-fired employees when submitting the ESF for those employees  
8 because “CA is immediate payout state.” ECF No. 42-1, Ex. G. Finally, Defendant’s payroll  
9 department maintains an internal document that lists “immediately” as the payout date for  
10 involuntarily terminated employees in California. ECF No. 42-4, Ex. C.

11 **2. Plaintiff’s Termination**

12 On April 18, 2017, Plaintiff had a meeting with his supervisor, Gary Slate, at which Slate  
13 informed Plaintiff of his termination. Delgado Decl. ¶ 5. Plaintiff was fired for misconduct. ECF  
14 No. 37-1, Ex. A. Plaintiff did not receive his final wage statement until April 19, 2017. Delgado  
15 Decl. ¶ 7; *see also id.*, Ex. A (Plaintiff’s bank records).

16 At this point, the parties’ accounts of Plaintiff’s termination diverge. Plaintiff asserts that  
17 Plaintiff’s termination was effective April 18, 2017. Plaintiff points to the ESF for Plaintiff’s  
18 termination, which lists April 18, 2017 in the “effectiveDate” field. ECF No. 37-1, Ex. A.

19 Defendant contends that Plaintiff was terminated effective Wednesday, April 19, 2017. In  
20 an email sent before Plaintiff’s termination, Plaintiff’s manager, Gary Slate, stated that “[t]he ESF  
21 and plan was for Wednesday.” ECF No. 42-3, Ex. C. Slate had originally planned to meet with  
22 Plaintiff on Wednesday, but Plaintiff was unavailable that day, so Slate and Plaintiff instead met  
23 on Tuesday. *Id.* Slate believes that he informed Plaintiff that Defendant was terminated effective  
24 April 19, 2017. ECF No. 42-3 (“Slate Decl.”), ¶ 10. Defendant also points to a confirmation  
25 email Slate received when first submitting Plaintiff’s ESF on April 12, 2017, in which the  
26 effective date for Plaintiff’s termination was listed as April 19, 2017. *Id.*, Ex. D. The email  
27 confirmation containing Plaintiff’s ESF includes, as part of a “Termination Checklist,” the

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1 instruction that “timely timecards are required so that we can ensure the processing of payroll  
2 remains compliant” for immediate payout states, including California. *Id.* (emphasis omitted).

3 **B. Procedural History**

4 On November 30, 2017, Plaintiff filed a putative class action complaint against Defendant  
5 in California Superior Court for the County of Santa Clara. ECF No. 1, Ex. 1 (“Compl.”).  
6 Plaintiff’s complaint alleged claims for (1) failure to provide accurate itemized wage statements in  
7 violation of California Labor Code § 226(a); (2) failure to pay all wages owed immediately upon  
8 termination in violation of California Labor Code §§ 201, 203; and (3) civil penalties pursuant to  
9 California’s Private Attorney General’s Act (“PAGA”). *Id.* ¶¶ 29–40.

10 On December 29, 2017, Defendant removed Plaintiff’s complaint to federal court pursuant  
11 to the Class Action Fairness Act, 28 U.S.C. §§ 1332, 1453. ECF No. 1.

12 On August 1, 2018, the parties stipulated to strike those portions of Plaintiff’s complaint  
13 alleging that Defendant violated California Labor Code § 226(a). ECF No. 26. In addition, the  
14 parties stipulated to strike Plaintiff’s § 226(a) allegations as a basis for Plaintiff’s PAGA claim.  
15 *Id.* at 2. Then, on September 5, 2018, the parties stipulated to dismiss Plaintiff’s § 226(a) claim  
16 and to strike Plaintiff’s §226(a) allegations from Plaintiff’s PAGA claim. ECF No. 33.

17 On December 20, 2018, the Court denied Plaintiff’s motion for class certification. ECF  
18 No. 46.

19 On April 29, 2019, the Court denied Defendant’s motion to strike Plaintiff’s PAGA claim.  
20 ECF No. 66.

21 On May 9, 2019, the parties filed a notice that the parties had resolved this action in its  
22 entirety. ECF No. 77. On May 10, 2019, the parties stated that the parties intended to file a  
23 stipulation to approve the parties’ PAGA settlement. ECF No. 79.

24 On June 24, 2019, Plaintiff filed the instant motion for settlement approval. ECF No. 84  
25 (“Mot.”). On August 15, 2019, the Court held a hearing on Plaintiff’s motion for settlement  
26 approval. ECF No. 98. At the hearing, the Court expressed concern that the release in the  
27 settlement appears to release PAGA claims not predicated on a violation of California Labor Code

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1 § 201. ECF No. 97 at 1–2. The parties agreed that clarification of the scope of the release would  
2 be helpful. *Id.* at 2. The parties also agreed to revise how the settlement allocates the settlement  
3 funds as between PAGA penalties and attorney’s fees and costs. *Id.*

4 On August 26, 2019, Plaintiff filed an amended settlement, supplemental brief, receipts or  
5 invoices for all expenses, and Plaintiff’s attorney Kristin Agnew’s contemporaneous billing  
6 records. ECF No. 99. On August 27, 2019, Plaintiff filed a second amended settlement and  
7 second supplemental brief. ECF Nos. 101 & 102.

8 **II. DISCUSSION**

9 **A. Settlement Approval**

10 “An employee bringing a PAGA action does so as the proxy or agent of the state’s labor  
11 law enforcement agencies, . . . who are the real parties in interest.” *Sakkab v. Luxottica Retail N.*  
12 *Am. Inc.*, 803 F.3d 425, 435 (9th Cir. 2015) (internal citations omitted). Thus, “[a]n action  
13 brought under the PAGA is a type of qui tam action.” *Id.* at 429. Because a PAGA action is  
14 brought as a proxy for law enforcement agencies, “[t]here is no requirement that the Court certify  
15 a PAGA claim for representative treatment like in Rule 23 . . . .” *Villalobos v. Calandri Sunrise*  
16 *Farm LP*, 2015 WL 12732709, at \*5 (C.D. Cal. July 22, 2015). However, because a settlement of  
17 PAGA claims compromises a claim that could otherwise be brought by the state, the PAGA  
18 provides that “court[s] shall review and approve any settlement of any civil action filed pursuant  
19 to [PAGA].” Cal. Labor Code § 2699(1)(2).

20 A party seeking approval of a PAGA settlement must simultaneously submit the proposed  
21 settlement to the LWDA to allow the LWDA to comment on the settlement if the LWDA so  
22 desires. The PAGA also states that courts may exercise their discretion to lower the amount of  
23 civil penalties awarded “if, based on the facts and circumstances of the particular case, to do  
24 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Cal.  
25 Labor Code § 2699(e)(2). Because state law enforcement agencies are the “real parties in interest”  
26 for PAGA claims, the Court’s task in reviewing the settlement is to ensure that the state’s interest  
27 in enforcing the law is upheld. *Sakkab*, 803 F.3d at 435.

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1 Other than the provisions discussed above, the PAGA does not establish a standard for  
 2 evaluating PAGA settlements. Indeed, the LWDA has stated that “[t]he LWDA is not aware of  
 3 any existing case law establishing a specific benchmark for PAGA settlements, either on their own  
 4 terms or in relation to the recovery on other claims in the action.” *Ramirez v. Benito Valley*  
 5 *Farms, LLC*, 2017 WL 3670794, at \*3 (N.D. Cal. Aug. 25, 2017) (quoting LWDA Response at 3,  
 6 *O’Connor v. Uber Techs.*, No. 13-CV-03826-EMC, Docket No. 736 (N.D. Cal. July 29, 2016)).  
 7 Ultimately, “neither the California Supreme Court, nor the California Courts of Appeal, nor the  
 8 [LWDA] has provided any definitive answer as to what the appropriate standard is for approval of  
 9 a PAGA settlement.” *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 971 (N.D. Cal.  
 10 2019) (quoting *Jordan v. NCI Grp., Inc.*, 2018 WL 1409590, at \*2 (C.D. Cal. Jan. 5, 2018)).

11 Given the lack of an express standard, several courts, including this Court, have applied  
 12 several of the factors in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), to  
 13 evaluate a PAGA settlement. *Ramirez*, 2017 WL 3670794, at \*3; *see O’Connor v. Uber Techs.*,  
 14 201 F. Supp. 3d. 1110, 1134 (N.D. Cal. 2016) (applying *Hanlon* factors to parties’ PAGA  
 15 settlement); *Rodriguez v. RCO Reforesting, Inc.*, 2019 WL 331159, at \*4 (E.D. Cal. Jan. 25, 2019)  
 16 (same); *Patel v. Nike Retail Servs., Inc.*, 2019 WL 2029061, at \*2 (N.D. Cal. May 8, 2019) (same).

17 The *Hanlon* factors, which are used to evaluate class action settlements, include (1) the  
 18 strength of the plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of further  
 19 litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered  
 20 in settlement; (5) the extent of discovery completed; (6) the expertise and views of counsel; (7) the  
 21 presence of government participation; and (8) the reaction of class members to the proposed  
 22 settlement. *See Hanlon*, 150 F.3d at 1026. Many of these factors are not unique to class action  
 23 lawsuits and bear on whether a settlement is fair and has been reached through an adequate  
 24 adversarial process. Thus, the Court finds that these factors are useful in evaluating a PAGA  
 25 settlement. However, three of the *Hanlon* factors—risk of maintaining class action status,  
 26 presence of a governmental participant, and reaction of class members—are not relevant to a  
 27 PAGA settlement that is not a class action and in which the LWDA is not involved.

1 For these reasons, the Court evaluates the second amended settlement in light of the PAGA  
2 requirement that the award not be “unjust, arbitrary and oppressive, or confiscatory.” Cal. Labor  
3 Code § 2699(e)(2). The Court also considers the five relevant *Hanlon* factors.

4 **1. “Unjust, Arbitrary and Oppressive, or Confiscatory” as to Defendant**

5 This factor favors approval of the second amended settlement. There is no indication that  
6 the second amended settlement would be “unjust, arbitrary and oppressive, or confiscatory.” Cal.  
7 Labor Code § 2699(e)(2). To the contrary, in the mediation process and the resulting second  
8 amended settlement, the parties recognized the potential burden of additional litigation. Defendant  
9 settled rather than continue litigating what Defendant views as an “exceedingly small matter.” *See*  
10 ECF No. 88 at 2.

11 **2. Strength of Plaintiff’s Case**

12 This factor favors approval. Courts have noted that legal uncertainty favors approval of a  
13 settlement. *See, e.g., Browning v. Yahoo! Inc.*, 2007 WL 4105971, at \*10 (N.D. Cal. Nov. 16,  
14 2007) (“[L]egal uncertainties at the time of settlement—particularly those which go to  
15 fundamental legal issues—favor approval.”). The Court denied Plaintiff’s motion for class  
16 certification and Defendant’s motion to strike the PAGA claim, but the merits of Plaintiff’s final  
17 wage allegations have not been tested. Moreover, the parties continue to dispute the  
18 circumstances of Plaintiff’s termination. *See* Mot. at 13.

19 **3. Risk, Expense, Complexity, and Likely Duration of Further Litigation**

20 This factor favors approval. Although the parties have engaged in motion practice to date,  
21 the parties settled before more expansive discovery occurred and, specifically, before Defendant  
22 was to provide PAGA-related discovery related to 25 employees terminated during the PAGA  
23 period. *See* ECF No. 71. Even if Plaintiff were to prove his PAGA claim for all employees, there  
24 is a risk that the Court could reduce PAGA penalties under California Labor Code § 2699(e)(2).  
25 Plaintiff could also fail to recover any penalties for eligible employees or the LWDA. *See* Agnew  
26 Decl. ¶¶ 18–21. For both parties, because the maximum value of the PAGA claim is \$96,300, as  
27 explained in more detail below, continued litigation presents an expense not commensurate with

1 the potential recovery. ECF No. 88 at 2. Thus, the second amended settlement provides a timely,  
2 certain, and meaningful recovery.

3 **4. Amount of Second Amended Settlement**

4 This factor favors approval. In a declaration, Plaintiff's attorney explains that the total  
5 valuation of Plaintiff's PAGA claim is \$96,300. Agnew Decl. ¶ 17. There are a maximum of 963  
6 employees eligible for PAGA penalties. Second Amended Settlement ¶ 1. Under PAGA,  
7 employees are eligible to recover \$100 for an initial violation and \$200 for a subsequent violation.  
8 Cal. Labor Code § 2699(f)(2). However, because the alleged violation in this case relates to  
9 payment of final wages, each employee was likely terminated only once and is entitled to penalties  
10 for only one violation. *See* Mot. at 14. Therefore, the maximum recovery per employee is \$100,  
11 for a total of \$96,300.

12 Pursuant to the second amended settlement, Defendant will pay a total of \$83,075, of  
13 which at least \$45,252.98 are allocated to PAGA penalties. Thus, the second amended settlement  
14 provides for approximately \$46.99 in PAGA penalties per employee, or a recovery equivalent to  
15 almost 47% of the PAGA claim's total valuation.

16 The Court also approves up to \$4,000 for settlement administration costs. The second  
17 amended settlement provides that if settlement administration costs fall below \$4,000, any residual  
18 funds will be paid toward PAGA penalties. Second Amended Settlement ¶ 5.5. Thus, the amount  
19 of PAGA penalties could be even higher.

20 Courts have "raised concerns about settlements of less than 1% of the total value of a  
21 PAGA claim." *Haralson*, 383 F. Supp. 3d at 973 (quoting *Jennings v. Open Door Mktg., LLC*,  
22 2018 WL 4773057, at \*9 (N.D. Cal. Oct. 3, 2018)). Nonetheless, some courts have approved  
23 PAGA recoveries in that range. *See, e.g., McLeod v. Bank of Am., N.A.*, 2018 WL 5982863, at \*4  
24 (N.D. Cal. Nov. 14, 2018) (approving PAGA settlement totaling 1.1% of total value). By contrast,  
25 the second amended settlement provides for penalties of almost 47% of Plaintiff's total valuation  
26 for the PAGA claim, and that amount could be even higher if settlement administration costs fall  
27 below \$4,000. Moreover, although courts have raised concerns about PAGA settlements where



1 the LWDA filed objections, *see O'Connor*, 201 F. Supp. 3d at 1135, Plaintiff filed his proposed  
2 settlement with the LWDA, and the LWDA has not filed any response. Therefore, the amount of  
3 the second amended settlement weighs in favor of approval.

4 **5. Extent of Discovery Completed and Stage of the Proceedings**

5 This factor weighs in favor of approval. The parties have completed significant discovery  
6 and litigated both a motion for class certification and a motion to strike the PAGA claim. *See* ECF  
7 Nos. 46, 56. Thus, both sides had a well-developed sense of the risks and benefits of continued  
8 litigation.

9 **6. Experience and Views of Counsel**

10 This factor favors approval. The parties here are represented by competent and  
11 experienced counsel who favor settlement. Plaintiff's primary attorney has litigated employment  
12 cases for 10 years and favors settlement because there are "legitimate open questions as to several  
13 issues" in the litigation. Agnew Decl. ¶ 18. Defendant favors settlement because the case is an  
14 "exceedingly small matter," in Defendant's view. ECF No. 88 at 2. Therefore, the views of  
15 counsel favor settlement.

16 **7. Conclusion**

17 Thus, each of the six relevant factors discussed above favors approval. The settlement of  
18 the PAGA claim in the instant case for a total of \$83,075 was reached only after multiple rounds  
19 of motion practice, substantial discovery, and negotiations involving counsel with significant  
20 experience in employment cases. Additionally, the \$45,252.98 allocated to PAGA penalties  
21 represents a significant percentage of the employees' possible recovery and vindicates California  
22 state law enforcement agencies' interest in enforcing the law. Moreover, the amount of PAGA  
23 penalties could be even higher if settlement administration costs fall below \$4,000. For these  
24 reasons, the Court finds that the second amended settlement is fair and reasonable and promotes  
25 the purposes of PAGA. Therefore, the Court GRANTS Plaintiff's motion for approval of the  
26 second amended settlement.

27 **B. Attorney's Fees and Costs**



1 education and experience justifies her billing rate. Plaintiff has also provided detailed billing  
2 records for Ms. Agnew that indicate that the hours spent on the instant litigation were justified.  
3 Agnew Supp. Decl., Ex. C. In addition, Ms. Agnew’s lodestar alone is sufficient to make the  
4 requested \$20,768.75 in attorney’s fees reasonable. Specifically, Ms. Agnew’s lodestar totals  
5 \$104,975. Thus, the requested \$20,768.75 represents a negative multiplier of 19.8%, and  
6 represents a significant discount from Plaintiff’s lodestar. Furthermore, Ms. Agnew’s lodestar  
7 does not account for work performed after Plaintiff filed the motion for preliminary approval or  
8 for the “dozens of hours” that other attorneys and staff spent working on the instant case.  
9 Therefore, the Court finds that the requested attorney’s fees award is justified.

10 Plaintiff’s counsel also requests reimbursement for \$9,105.05 in costs, which Plaintiff  
11 contends are justified by receipts and invoices attached to Ms. Agnew’s supplemental declaration.  
12 Agnew Supp. Decl. ¶ 6; *see id.*, Exs. E & F. Although most of Plaintiff’s costs are justified, the  
13 Court will not approve reimbursement of Plaintiff’s counsel’s business class airplane ticket from  
14 Los Angeles to San Jose, which cost \$493.96. The Court will also not approve reimbursement of  
15 Plaintiff’s counsel’s August 15, 2018 stay at The Fairmont San Jose, which is perhaps the most  
16 expensive hotel in San Jose. The base rate for Plaintiff’s counsel’s one-night stay was \$479 and  
17 the total charges for one night were \$558.28. *See* Agnew Supp. Decl., Ex. F. Although the Court  
18 will approve reimbursement of Plaintiff’s counsel’s September 17, 2018 stay at The Fairmont San  
19 Jose, which cost a base rate of \$336, the Court encourages Plaintiff’s counsel to seek more  
20 reasonably priced accommodations in San Jose in the future. With the above deductions, the  
21 Court approves reimbursement to Plaintiff’s counsel for \$8,053.27 in costs.

22 Plaintiff has achieved a result that vindicates the state’s interest in enforcing wage and hour  
23 laws, as Defendant has agreed to pay a total of \$83,075, with at least \$45,252.98 paid as civil  
24 penalties under PAGA. The amount of PAGA penalties could be even higher if settlement  
25 administration costs fall below \$4,000. Additionally, Plaintiff’s counsel devoted significant  
26 resources to the task of litigating this case. For these reasons, the Court finds that an award of  
27 \$20,768.75 for attorney’s fees and \$8,053.27 for costs is reasonable within the meaning of

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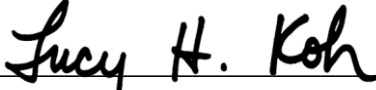
California Labor Code § 2699(g)(1). Therefore, the Court awards Plaintiff’s counsel a total of \$28,822.02 for attorney’s fees and costs.

**III. CONCLUSION**

For the foregoing reasons, the Court GRANTS Plaintiff’s motion for approval of the second amended settlement.

**IT IS SO ORDERED.**

Dated: August 28, 2019

  
\_\_\_\_\_  
LUCY H. KOH  
United States District Judge