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FILED
OCT - 2 2024
K. BIEKER CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
By ______ Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF CONTRA COSTA

JOSS HARRIS, as an aggrieved employee pursuant to the Private Attorneys General Act ("PAGA"), on behalf of the State of California and other aggrieved employees,

Plaintiff,

vs.

ISP2, INC., a California corporation; ISP2 SAN RAMON, INC., a California corporation; ISP2 BAKERSFIELD, INC., a California corporation; ISP2 BAKERSFIELD MARKETPLACE, INC., a California corporation; ISP2 BURBANK, INC., a California corporation; ISP2 BURLINGAME, INC.; ISP2 CHINO, INC., a California corporation; ISP2 DANVILLE INC., a California corporation; ISP2 DAVIS, INC., a California corporation; ISP2 DEL MAR, LLC, a California limited liability company; ISP2 DUBLIN, INC., a California corporation; ISP2 EMERYVILLE, INC., a California corporation; ISP2 FOUNTAIN VALLEY, INC., a California corporation; ISP2 FRESNO, INC., a California corporation; ISP2 FRESNO 2, INC., a California corporation; ISP2 HAYWARD, INC., a California corporation; ISP2 HILLSDALE, INC., a California corporation; ISP2 LONG BEACH, INC., a California corporation; ISP2 MANHATTAN BEACH, LLC, a California limited liability company; ISP2 MODESTO, INC., a California corporation; ISP2 MONTEREY, INC., a California corporation; ISP2 MOUNTAIN

Case No. MSC21-01157

Assigned to the Hon. Charles S. Treat

[~~PROPOSED~~] ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION FOR ATTORNEYS' FEES, COSTS, AND A CLASS REPRESENTATIVE ENHANCEMENT PAYMENT

Date: August 31, 2023
Time: 9:00 a.m.
Place: Department 12

Complaint Filed: June 14, 2021

VIEW, INC., a California corporation; ISP2 NEWPORT BEACH, INC., a California corporation; ISP2 NORCAL, LLC, a Delaware limited liability company; ISP2 NORTHRIDGE, INC., a California corporation; ISP2 OAKLAND, INC., a California corporation; ISP2 ROCKRIDGE, INC., a California corporation; ISP2 SACRAMENTO, INC., a California corporation; ISP2 SALINAS INC., a California corporation; ISP2 SAN DIEGO, INC., a California corporation; ISP2 SAN JOSE D/T INC., a California corporation; ISP2 SAN LUIS OBISPO, INC., a California corporation; ISP2 SANTA CLARA INC., a California corporation; ISP2 SANTA CRUZ, INC., a California corporation; ISP2 SANTANA ROW, INC., a California corporation; ISP2 SAP, INC., a California corporation; ISP2 SERRAMONTE, INC., a California corporation; ISP2 SF, INC., a California corporation; ISP2 SHATTUCK, INC., a California corporation; ISP2 SKYPORT, INC., a California corporation; ISP2 STOCKTON, INC., a California corporation; ISP2 STONESTOWN, INC., a California corporation; ISP2 SUNNYVALE, INC., a California corporation; ISP2 THE PLANT, INC., a California corporation; ISP2 THE WILLOWS, INC., a California corporation; ISP2 TURLOCK, INC., a California corporation; ISP2 TUSTIN, INC., a California corporation; ISP2 VACAVILLE, INC., a California corporation; ISP2 VALLEJO, INC., a California corporation; ISP2 WALNUT CREEK, INC., a California corporation; ISP2 WESTGATE, INC., a California corporation; and DOES 1 through 10, inclusive,

Defendants.

Plaintiff Joss Harris moves for final approval of his class action and PAGA settlement with defendant ISP2, Inc. and related corporate entities. He also moves for approval of his attorney's fees, litigation costs, administration costs, and representative payment. The motions are granted. The Court's tentative ruling on the motions is attached as Exhibit A.

This settlement has had a bit of a rocky progress. Preliminary approval of the settlement was granted in March 2023. Thereafter, however, the parties discovered that the numbers of class members and covered pay periods were substantially larger than had been previously estimated, triggering an escalator clause in the settlement agreement. On their own, and without notification to or approval of the Court, the parties decided to cut back the covered time period for the settlement and release. When they sought final approval of the settlement with that modification, however, the Court denied the motion. The parties went back to negotiation, and agreed to increase the total settlement amount substantially, while also decreasing the requested attorney-fee award from one-third of the total to 25%. They now seek final approval of the modified settlement, with the class period restored to what was preliminarily approved but the class size and total payment significantly increased.

After preliminary approval, the administrator mailed notices to 1,798 class members (reflecting the later-disapproved truncated class period). After the parties agreed to modify the settlement, notices were sent to an additional 592 class members. Overall, 189 notices were returned by the Postal Service, but follow-up resulted in new addresses and remailings to many of them. Only 71 notices were ultimately determined to be undeliverable.

No objections have been received, and only 3 class members have opted out.

A. Background and Settlement Terms

Defendant ISP2, and its subsidiaries also named as defendants, are in the business of operating a chain of restaurants called Ike's Love & Sandwiches throughout California (and elsewhere). Plaintiff was employed as a Crew Member at the San Ramon store between 2018 and 2020.

The original complaint was filed on June 14, 2021. The operative complaint is the second amended complaint, filed in connection with this settlement.

The settlement will create a gross settlement fund of $1,029,600. The class representative payment to the plaintiff will be $10,000. Attorney's fees will be $258,333 (25% of the settlement, and

the same dollar amount as in the original settlement). Litigation costs requested are $28,507, which will be discussed below. The settlement administrator's costs are $19,750. PAGA penalties will be $40,000, resulting in a payment of $30,000 to the LWDA. The net amount paid directly to the class members will be about $673,010, not including distribution of PAGA penalties. The fund is non-reversionary. There are 2,385 participating class members. Based on the estimated class size, the average net payment for each class member is approximately $282. The individual payments will vary considerably, however, because of the allocation formula prorating payments according to the number of weeks worked during the relevant time.

The entire settlement amount will be deposited with the settlement administrator within 10 days after the effective date of the settlement, or December 1, 2024, whichever is later.

The proposed settlement will certify a class of all current and former non-exempt employed at Defendants' California facilities between April 9, 2020 and the date of preliminary approval. There is no separate operative period for PAGA purposes.

The class members will not be required to file a claim. Funds will be apportioned to class members based on the number of workweeks worked during the class period.

Settlement checks not cashed within 180 days will be cancelled. The funds will be directed to Workplace as a *cy pres* beneficiary.

The settlement contains release language covering all claims and causes of action, alleged or which could have reasonably been alleged based on the allegations in the operative pleading, including a number of specified claims. Under recent appellate authority, the limitation to those claims with the "same factual predicate" as those alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ("A court cannot release claims that are outside the scope of the allegations of the complaint.") "Put another way, a release of claims that goes beyond the scope of the allegations in the operative complaint' is impermissible." (*Id.*, quoting *Marshall v. Northrop Grumman Corp.* (C.D. Cal.2020) 469 F.Supp.3d 942, 949.)

Formal discovery was undertaken, resulting in the production of substantial documents. The matter settled after arms-length negotiations, which included a session with an experienced mediator.

Counsel also has provided an analysis of the case, and how the settlement compares to the

potential value of the case, after allowing for various risks and contingencies. At the outset, defendant has stated that many of the potential class members have signed arbitration agreements and class action waivers, which if true, would likely preclude litigation and recovery on a class-wide basis, instead requiring inefficient and expensive individual presentation of claims. Moreover, agreements aside, several major components of plaintiff's substantive claims may be unsuitable for class treatment because they would present highly individualized factual evidence.

Plaintiff's substantive claims center largely on allegations of required off-the-clock work, and violations concerning meal and rest breaks. Defendant, however, has asserted that it has valid standard policies addressing these points. That could present serious problems of proof, requiring individualized hearings. It also presents issues as to whether the employer was aware of any violations that occurred. Possibly less problems of proof might arise from plaintiff's allegations of violations concerning split shifts or reporting-time violations. Plaintiff also asserts allegations as to uncompensated uniform cleaning and use of personal vehicles and cell phones. There is little reason to suspect that issues of compensable cleaning expense arose often, however; and plaintiff presents no scenario as to how a line fast-food worker would be likely to have to use a personal vehicle or cell phone for employer purposes.

The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code § 2699(e)(2) (PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory.")) Moreover, recent decisions may make it difficult for PAGA plaintiffs to recover statutory penalties, as opposed to actual missed wages. (See, e.g., *Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 937.

Counsel attest that notice of the proposed settlement was transmitted to the LWDA concurrently with the filing of the motion.

B. Legal Standards

The primary determination to be made is whether the proposed settlement is "fair, reasonable,

and adequate," under *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction ... to the proposed settlement." (See also *Amaro v. Anaheim Arena Mgmt.*, LLC, 69 Cal.App.5th 521.)

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. The Court of Appeal's decision in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees." (*Id.*, at 64-65.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "the court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that Neary does not always apply, because "where the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

C. Attorney Fees and Other Costs

Plaintiffs seek 25% of the total settlement amount as fees, relying on the "common fund" theory, or $258,333. (This is the same dollar amount as previously requested, but a lower percentage due to the intervening increase in the total settlement.)

Even a proper common fund-based fee award, however, should be reviewed through a lodestar

cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id.*, at 505.)

Accordingly, plaintiffs have provided information concerning the lodestar fee amount. They estimate the lodestar at $298,640, representing an implied "negative" (actually "less than one") multiplier of about 0.87. No adjustment from the 25% fee is necessary. The attorney's fees are reasonable and are approved.

The requested representative payment of $10,000 for the named plaintiff was deferred until this final approval motion. Criteria for evaluation of such requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-07. Plaintiff has provided a declaration in support of the request. Plaintiff points out that he executed a broader release than the class as a whole, but does not identify any particular claims of value that he may have. He also risks damage to his reputation and more difficulty in obtaining employment. The representative payment is approved.

Litigation costs are requested in the amount of $28,507, a total within the cap previously approved. As is usually true in these cases, the great bulk of the requested expenses are mediation fees and filing fees. Usually, however, the filing fees are substantially smaller than the mediation fees; here, they are over double – $18,107. The Court cannot recall ever seeing a request anywhere near that large for filing fees. Moreover, no detailed breakdown is provided, let alone any documentation of what filing-fee expenses were incurred. Counsel appeared at the Final Approval Hearing to provide an explanation and filed a supplemental declaration that explained why the requested filing fees are so greatly in excess of the usual; the explanation being that the costs of serving all ≈ 50 defendants with the initial and first amended complaints accounted for over 75% of the total costs for this category. The Court is satisfied with the explanation.

The settlement administrator's costs of $19,750 are reasonable and are approved.

D. Discussion and Conclusion

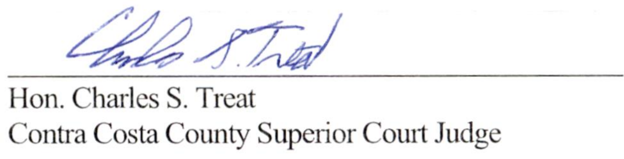
The moving papers sufficiently establish that the proposed settlement is fair, reasonable, and adequate to justify final approval. The allocation of PAGA penalties among the aggrieved employees (based on pay periods) is reasonable.

The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented, to be determined in consultation with the Department's clerk by phone. Plaintiffs' counsel are to submit a compliance statement one week before the compliance hearing date. Five percent of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court. Counsel are reminded that once all payments are completed, pursuant to Code of Civil Procedure § 384(b), the judgment must be amended to reflect the amount paid to the cy pres recipient.

Effective January 2, 2025, this case is reassigned to Department 39 for all purposes.

IT IS SO ORDERED.

Dated: SEP 2 6 2024



Hon. Charles S. Treat
Contra Costa County Superior Court Judge

EXHIBIT A

CASE NUMBER: MSC21-01157

CASE NAME: HARRIS VS ISP2, INC. ET AL

***HEARING ON MOTION IN RE: FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

& MTN FOR ATTYFEES/COSTS & CLASS REP ENH PAYMENT

TENTATIVE RULING:

Plaintiff Joss Harris moves for final approval of his class action and PAGA settlement with defendant ISP2, Inc. and related corporate entities. He also moves for approval of his attorney's fees, litigation costs, administration costs, and representative payment.

Counsel to appear (Zoom okay). The motions are largely in order and can be granted. However, as the Court will discuss below, there is one detail that requires better explanation and documentation, namely the exceptionally large reimbursement sought for "Court Fees, Courier Fees, Filings & Service of Process".

Assuming that the Court's questions on that point can be adequately answered (or that that part of the request is suitably revised), however, the motions will be granted.

This settlement has had a bit of a rocky progress. Preliminary approval of the settlement was granted in March 2023. Thereafter, however, the parties discovered that the numbers of class members and covered pay periods were substantially larger than had been previously estimated, triggering an escalator clause in the settlement agreement. On their own, and without notification to or approval of the Court, the parties decided to cut back the covered time period for the settlement and release. When they sought final approval of the settlement with that modification, however, the Court denied the motion. The parties went back to negotiation, and agreed to increase the total settlement amount substantially, while also decreasing the requested attorney-fee award from one-third of the total to 25%. They now seek final approval of the modified settlement, with the class period restored to what was preliminarily approved but the class size and total payment significantly increased.

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Counsel attest that notice of the proposed settlement was transmitted to the LWDA concurrently with the filing of the motion.

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review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

C. Attorney Fees and Other Costs

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The settlement administrator's costs of $19,750 are reasonable and are approved.

D. Discussion and Conclusion

The moving papers sufficiently establish that the proposed settlement is fair, reasonable, and adequate to justify final approval. The allocation of PAGA penalties among the aggrieved employees (based on pay periods) is reasonable.

Assuming granting of the motions at hearing, counsel are directed to prepare an order reflecting this entire

tentative ruling and the other findings in the previously submitted proposed order and a separate judgment.

The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented, to be determined in consultation with the Department's clerk by phone. Plaintiffs' counsel are to submit a compliance statement one week before the compliance hearing date. Five percent of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court. Counsel are reminded that once all payments are completed, pursuant to Code of Civil Procedure § 384(b), the judgment must be amended to reflect the amount paid to the cy pres recipient.

Effective January 2, 2025, this case is reassigned to Department 39 for all purposes.