SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Brian C. Walsh Presiding

JeeJee Vizconde, Courtroom Clerk
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To contest the ruling, call (408) 808-6856 before 4:00 P.M.
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LAW AND MOTION TENTATIVE RULINGS
DATE: FEBRUARY 1, 2019 TIME: 9 A.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
(SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	18CV322644	Chavez vs Hugo Boss Retail, Inc.	CLICK on LINE 1 for Ruling
LINE 2	18CV328915	Uzair vs Google, LLC	CLICK on LINE 2 for Ruling
LINE 3	16CV301473	Ruffy vs Island Hospitality Management, Inc., et al (Consolidated Action / LEAD CASE)	CLICK on LINE 3 for Ruling
LINE 4	18CV325480	County Sanitation District 2-3, et al vs City of San Jose, et al	The parties shall appear to address Defendants' Demurrer to the third cause of action.
LINE 5			
LINE 6			
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Calendar Line 1

Case Name: *Jesus Chavez v. Hugo Boss Retail, Inc., et al.*
Case No.: 18-CV-322644

This is a putative wage and hour class action on behalf of employees of defendant Hugo Boss Retail, Inc. Before the Court is plaintiff's motion for preliminary approval of a settlement.

I. Factual and Procedural Background

Plaintiff worked as a non-exempt employee at defendant's retail store in Gilroy from June to November of 2017. (First Amended Class Action Complaint ("FAC"), ¶ 8.) He alleges that he was paid at a rate of $9.00 per hour during his employment in 2017, while the applicable minimum wage was $10.50 per hour as of January 1st of that year. (*Id.* at ¶ 24.) In addition, plaintiff alleges that non-discretionary commission pay was not included in his regular rate of pay for purposes of calculating his overtime compensation. (*Ibid.*)

Based on these allegations, plaintiff brings class claims for (1) failure to pay minimum wages in violation of Labor Code sections 1194, 1197, and 1197.1; (2) failure to pay overtime wages in violation of Labor Code sections 510, 558, and 1194; (3) failure to pay rest period premiums in violation of Labor Code section 226.7; (4) failure to pay meal period premiums in violation of Labor Code sections 226.7 and 512; (5) failure to provide accurate itemized wage statements in violation of Labor Code section 226; (6) unfair competition in violation of Business & Professions Code section 17200, et seq.; and (7) violations of Labor Code section 2698, et seq. (the Private Attorneys General Act or "PAGA").

The parties have reached a settlement. Plaintiff now moves for an order preliminarily approving the settlement, provisionally certifying the settlement class, approving the form and method for providing notice to the class, and scheduling a final fairness hearing.

II. Legal Standards for Approving a Class Action/PAGA Settlement

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as 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 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.

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, internal citations and quotations omitted.)

The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting *Dunk v. Ford Motor Co*., *supra*, 48 Cal.App.4th at p. 1801, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk v. Ford Motor Co*., *supra*, 48 Cal.App.4th at p. 1802.) The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.)

Finally, Labor Code section 2699, subdivision (l) provides that "[t]he superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to" the Private Attorneys General Act ("PAGA"). Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.) "[T]here is no requirement that the Court certify a PAGA claim for representative treatment" as in a class action. (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *5.) "[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Id.* at *13.) The settlement must be reasonable in light of the potential verdict value (see *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict]); however, it may be substantially discounted given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds a trial (see *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8-9).

III. Settlement Process

According to a declaration by plaintiff's counsel, after this action was filed, the parties agreed to mediation and defendant produced class data that enabled plaintiff to conduct a full

damages analysis. The data included each putative class member's regular and overtime hours and wages, rates of pay, commissions earned, dates of employment, and meal and rest period premiums. Plaintiff estimated defendant's total potential liability in the case at $2,157,000, based on a class size of 598.

The parties participated in a mediation with Michael E. Dickstein on September 25, 2018. Although they did not reach a settlement that day, they continued negotiations with the mediator's assistance and reached a settlement on October 23, 2018 based on a mediator's proposal.

IV. Provisions of the Settlement

The non-reversionary gross settlement amount is $575,000. Attorney fees of up to $191,666.67 (one-third of the gross settlement), litigation costs not to exceed $25,000, and administration costs estimated at $10,000 will be paid from the gross settlement. $28,750 will be allocated to PAGA penalties, 75 percent of which will be paid to the California Labor and Workforce Development Agency. The named plaintiff will also seek an enhancement award of $7,500.

From the net settlement of approximately $320,085, participating class members will receive a minimum payment of $150, with payments otherwise calculated based on class members' qualifying work weeks. Class members will not be required to submit a claim to receive their payments. Settlement awards will be allocated 20 percent to wages and 80 percent to interest and penalties, and both the employee's and the employer's share of payroll taxes will be paid from the gross settlement. Funds associated with checks uncashed after 180 days will be escheat to the Department of Industrial Wages Unclaimed Wages Fund in the name of the class member. Based on the estimated 598 individuals in the putative class, the average payment to each class member will be $535.26.

Class members who do not opt out of the settlement will release all claims "arising out of the facts and allegations set forth in the Action, or that could have been alleged based on the facts set forth in the Plaintiff's First Amended Complaint," including specified wage and hour claims.

V. Fairness of the Settlement

Based on the class data provided by defendant, plaintiff estimates the potential liability in this action to be $334,000 in unpaid minimum wages, $253,000 for rest break violations, $182,000 for overtime wages, $42,000 for meal break violations, $246,000 for wage statement violations, and $1.1 million in waiting time penalties. The settlement thus represents about 26 percent of the potential value of the case.

Plaintiff submits that the settlement is fair and reasonable to the class based on the general risks of litigation and the particular circumstances of this case, including defendant's position that plaintiff and the rest of the putative class members are subject to a binding arbitration agreement with a class action waiver. The Court agrees with this assessment, particularly considering the risk of no class recovery should defendant invoke its arbitration

agreement. The Court also finds that the PAGA allocation provided by the settlement is genuine, meaningful, and reasonable.

The Court retains an independent right and responsibility to review the requested attorney fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) While 1/3 of the common fund for attorney fees is generally considered reasonable, counsel shall submit lodestar information prior to the final approval hearing in this matter so the Court can compare the lodestar information with the requested fees. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 504 [trial courts have discretion to double-check the reasonableness of a percentage fee through a lodestar calculation].)

VI. Proposed Settlement Class

Plaintiff requests that the following settlement class be provisionally certified:

> All non-exempt employees who were employed by Hugo Boss Retail, Inc. in the State of California at any time between January 31, 2014 to May 20, 2018. The Class excludes time periods prior to August 6, 2015 for any individuals who were members of the class in *Pam Rolita Bean v. Hugo Boss Retail, Inc.*

A. Legal Standard for Certifying a Class for Settlement Purposes

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …." As interpreted by the California Supreme Court, Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court (Rocher)* (2004) 34 Cal.4th 319, 326, 332.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. (*Ibid*.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court (Botney)* (1976) 18 Cal.3d 381, 385.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court (Cotton On USA, Inc.)* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93-94.) However, considerations designed to protect

absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

B. Ascertainable Class

"The trial court must determine whether the class is ascertainable by examining (1) the class definition, (2) the size of the class and (3) the means of identifying class members." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) "Class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.)

Here, the estimated 598 class members have already been identified based on defendant's records, and the class is clearly defined. The Court finds that the class is numerous, ascertainable, and appropriately defined.

C. Community of Interest

With respect to the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) The court must also give due weight to any evidence of a conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court (Heliotrope General, Inc.)* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. (*Lockheed Martin Corp. v. Superior Court, supra,* 29 Cal.4th at pp. 1104-1105.) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp.*, *supra,* 89 Cal.App.4th at p. 916.)

Here, common legal and factual issues predominate. Plaintiff's claims all arise from defendant's wage and hour practices applied to the similarly-situated class members.

As to the second factor,

> The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

(*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations, brackets, and quotation marks omitted.)

Like other members of the class, plaintiff was employed by defendant as a non-exempt employee and alleges that he was not paid the minimum wage and that his non-discretionary commission pay was not included in his regular rate of pay for purposes of calculating overtime. The anticipated defenses are not unique to plaintiff, and there is no indication that plaintiff's interests are otherwise in conflict with those of the class.

Finally, adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.) "Differences in individual class members' proof of damages [are] not fatal to class certification. Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid*., internal citations and quotation marks omitted.)

Plaintiff has the same interest in maintaining this action as any class member would have. Further, he has hired experienced counsel. Plaintiff has sufficiently demonstrated adequacy of representation.

D. Substantial Benefits of Class Certification

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.)* "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id*. at pp. 120-121, internal quotation marks omitted.)

Here, there are an estimated 598 members of the proposed class. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

VII. Notice

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement or object. Class members are instructed that they may appear at the final fairness hearing and make an oral objection even if they do not submit a written objection. The gross settlement amount and estimated deductions are provided, along with each class member's estimated payment. Class members are informed of their qualifying work weeks as reflected in defendant's records and instructed how to dispute this information. Class members are given 45 days to request exclusion from the class, dispute their workweek information, or submit a written objection. The notice is adequate and is approved.

Turning to the notice procedure, the parties have selected RG/2 Claims Administration, LLC as the settlement administrator. The administrator will mail the notice packet within 10 days of receiving the class data, after updating class members' addresses using the National Change of Address database. Any notice packets returned as undeliverable will be re-mailed to any forwarding address provided or located through skip tracing. These notice procedures are appropriate and are approved.

VIII. Conclusion and Order

Plaintiff's motion for preliminary approval is GRANTED. The final approval hearing shall take place on **May 10, 2019** at 9:00 a.m. in Dept. 1.

The following class is provisionally certified for settlement purposes:

> All non-exempt employees who were employed by Hugo Boss Retail, Inc. in the State of California at any time between January 31, 2014 to May 20, 2018. The Class excludes time periods prior to August 6, 2015 for any individuals who were members of the class in *Pam Rolita Bean v. Hugo Boss Retail, Inc.*

The Court will prepare the order.

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Calendar Line 2

Case Name: *Abdullah Uzair v. Google LLC*
Case No.: 18-CV-328915

This is a putative class action arising from the automatic renewal of subscriptions for digital content through defendant's Google Play service. Before the Court is defendant Google LLC's demurrer to each cause of action in the complaint.

I. Allegations of the Operative Complaint

Google develops and operates Google Play as the official software application or "App" store for the Android operating system, allowing consumers to browse and download Android Apps published by both Google and third-party developers. (Complaint, ¶¶ 20-22.) Through the Google Play Store, defendant offers digital products including songs, movies, television shows, and periodicals through paid subscriptions that are automatically renewed at the end of a definite term for a subsequent term or that continue until the consumer cancels ("In-App subscriptions"). (*Id.* at ¶ 23.)

To make purchases through Google Play, whether for Google's or third parties' applications, consumers use Google Play's payment system, formerly known as Google Wallets and currently called Google Payments. (Complaint, ¶ 24.) Even for third-party Apps, Google enrolls subscribers, processes payments, and delivers the In-App subscriptions—third-party developers never receive subscribers' payment information. (*Id.* at ¶¶ 24-25.) To subscribe, consumers must have a Google Account with a Google ID and password and are required to set up a Google Payments Account by providing their payment information. (*Id.* at ¶ 26.) During this process, consumers must state that they agree to the Google Play Terms of Service and the Google Payments Terms of Service ("Legal Agreements"), the current versions of which are attached to the complaint. (*Ibid.*) Consumers accept the Google Play Terms of Service when first using the Google Play Store App and when making a new purchase after the Terms have been updated. (*Id.* at ¶ 30.) Consumers do not agree to the Google Play Terms of Service prior to each and every purchase. (*Ibid.*) Rather, when Google Play offers consumers an In-App Subscription, text at the bottom of the screen states: "By tapping 'subscribe," you agree to the Terms of Service – Android (US)," with a hyperlink to the Google Payments Terms of Service. (*Ibid.*)

Plaintiff alleges that Google's "subscription flow," including an initial pop up screen summarizing the subscription offer and an expanded summary that may also be viewed by the user, does not disclose that subscriptions will automatically renew until the consumer affirmatively acts to cancel the subscription and does not disclose that any cancellation is not effective until the end of the current billing period, in violation of Business & Professions Code sections 17600-17604, which govern automatic renewal and continuous service offers to consumers in California (the "Automatic Renewal Law"). (Complaint, ¶¶ 34-40.) While these terms are disclosed in the Google Payments Terms of Service, they do not appear until consumers have scrolled through 29-30 screens of information within that document. (*Id.* at ¶ 41.) The terms consequently are not clear and conspicuous or in visual proximity to the subscription offer, in violation of the ARL. (*Ibid.*) The Legal Agreements also violate the ARL in that they do not disclose (1) the recurring charges that will be charged to the payment method information as part of the automatic renewal plan, (2) the length of the automatic

renewal term or that the service is continuous where the length of the term is not chosen by the consumer, or (3) that there is a minimum purchase obligation; further, the disclosures they do contain are not clear and conspicuous and/or in visual proximity to the offer. (*Id.* at ¶¶ 44-46.) In addition, defendant's "subscription flow" does not satisfy the ARL's requirement of an affirmative consent to the agreement containing the automatic renewal offer terms and, while it sends out confirmation emails, Google fails to provide an acknowledgement that includes the terms, cancellation policy, and information on how to cancel in a manner capable of being retained by the subscriber and that describes a timely, cost-effective and easy to use mechanism for cancellation. (*Id.* at ¶¶ 50-51.) Finally, Google failes to allow subscribers to cancel before payment as required by the statute. (*Ibid.*)

Plaintiff resides in California and purchased a family plan subscription to Google Play Music from defendant on March 16, 2016. (Complaint, ¶ 9.)

> Because Defendant failed to clearly and conspicuously disclose the automatic renewal offer terms in visual proximity to the request for Plaintiff's consent to the offer, Plaintiff was not informed prior to purchase that the subscription would renew automatically until cancelled or that any cancellation would not be effective until the next period. Had Defendant made these disclosures, Plaintiff would not have subscribed to Google Play Music at the time he did so.

(*Ibid.*) Since March 16, 2016, Google has continued to charge plaintiff $14.99 per month on a recurring basis for this Google Play Music subscription. (*Ibid.*)

Based on these allegations, plaintiff brings putative class claims for (1) ARL violations entitling the class to restition under section 17603 of the ARL (the "gift provision"); (2) Unfair Competition Law ("UCL") violations; (3) injunctive relief and restitution under Business & Professions Code section 17535 (the False Advertising Act or False Advertising Law or ("FAA" or "FAL"); (4) violation of the Consumer Legal Remedies Act ("CLRA"); (5) common count for money had and received; and (6) declaratory relief.

II. Legal Standard Governing Demurrers

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, "[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations and quotations omitted; see also Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. … Thus, … the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.)

In ruling on a demurrer, the allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247 Cal.App.4th 1, 6.) Nevertheless, while "[a] demurrer admits all facts properly pleaded, [it does] not [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.)

III. The ARL and Plaintiff's Request for Judicial Notice of Its Legislative History

As an initial matter, the unfair business practices underlying plaintiffs' claims in this action are Google's alleged violations of the Automatic Renewal Law, which provides in relevant part:

> (a) It shall be unlawful for any business making an automatic renewal or continuous service offer to a consumer in this state to do any of the following:
>
> (1) Fail to present the automatic renewal offer terms … in a clear and conspicuous manner before the subscription or purchasing agreement is fulfilled and in visual proximity … to the request for consent to the offer.
> (2) Charge the consumer's credit or debit card or the consumer's account with a third party for an automatic renewal … without first obtaining the consumer's affirmative consent to the agreement containing the automatic renewal offer terms ….
>
> (3) Fail to provide an acknowledgment that includes the automatic renewal … terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer.…

(Bus. & Prof. Code, § 17602.) The specific "terms" that must be provided are "(1) That the subscription or purchasing agreement will continue until the consumer cancels[;] (2) The description of the cancellation policy that applies to the offer[;] (3) The recurring charges that will be charged to the consumer's credit or debit card or payment account … [;] (4) The length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer[;] (5) The minimum purchase obligation, if any." (Bus. & Prof. Code, § 17601.)

The ARL also requires businesses to "provide a toll-free telephone number, electronic mail address, a postal address if the seller directly bills the consumer, or it shall provide another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgment specified in paragraph (3) of subdivision (a)." (Bus. & Prof. Code, § 17602, subd. (b).)

Plaintiff alleges that Google's practices violate subdivisions (a)(1)-(3) and (b) of the ARL. For purposes of the present demurrer, Google does not appear to contend that plaintiff's allegations fail to state a claim for violations of these provisions.

Plaintiff's request for judicial notice of legislative history materials associated with the ARL is GRANTED. (Evid. Code, § 452, subd. (c).)

IV. The First Cause of Action Under the ARL

Citing *Johnson v. Pluralsight, LLC* (9th Cir. 2018) 728 Fed. App'x. 674, *Lopez v. Stages of Beauty, LLC* (S.D. Cal. 2018) 307 F.Supp.3d 1058, and other authorities, Google urges that the ARL does not create a direct cause of action like the one asserted in plaintiff's first cause of action. Citing *Kissel v. Code 42 Software, Inc.* (C.D. Cal., Apr. 14, 2016, No.

SACV151936JLSKESX) 2016 WL 7647691, plaintiff argues that the ARL does create a direct cause of action. As observed by plaintiff, no published California authority addresses this issue.

A. Legislative Intent to Create a Cause of Action

"Adoption of a regulatory statute does not automatically create a private right to sue for damages resulting from violations of the statute. Such a private right of action exists only if the language of the statute or its legislative history clearly indicates the Legislature *intended* to create such a right to sue for damages." (*Vikco Ins. Services, Inc. v. Ohio Indem. Co.* (1999) 70 Cal.App.4th 55, 62, emphasis original.) "That intent need not necessarily be expressed explicitly, but if not it must be strongly implied." (*Farmers Ins. Exchange v. Superior Court (Ryan)* (2006) 137 Cal.App.4th 842, 850.)

General principles of statutory interpretation apply to this analysis. (See *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 133, citing Code Civ. Proc., § 1858.) As recently explained by the California Supreme Court,

> [a] statute may contain clear, understandable, unmistakable terms, which strongly and directly indicate that the Legislature intended to create a private cause of action. For instance, the statute may expressly state that a person has or is liable for a cause of action for a particular violation. Or, more commonly, a statute may refer to a remedy or means of enforcing its substantive provisions, i.e., by way of an action. If, however, a statute does not contain such obvious language, resort to its legislative history is next in order.

(*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 597, internal citations and quotations omitted.)

B. Analysis

Here, plaintiff contends that sections 17603 and 17604 of the ARL create a direct cause of action. Section 17604 states in relevant part that "[n]otwithstanding Section 17534, a violation of this article shall not be a crime. However, all available civil remedies that apply to a violation of this article may be employed." (Bus. & Prof. Code, § 17604, subd. (a).) The use of the language "all available" indicates that no new private right of action has been created; rather, a party may rely on civil remedies that already exist. For example, a party could bring an action under the UCL or FAL, as plaintiff does here in his second and third causes of action. (See *Johnson v. Pluralsight, LLC*, *supra,* 728 Fed. App'x. at p. 676 ["section 17604's reference to section 17535 evidences the legislature's intent to permit plaintiffs to pursue an injunction under section 17535 for violations of the ARL as opposed to creating a private cause of action under the ARL."].)

Plaintiff also relies on section 17603 of the ARL, which provides:

> In any case in which a business sends any goods, wares, merchandise, or products to a consumer, under a continuous service agreement or automatic renewal of a purchase, without first obtaining the consumer's affirmative consent as described in Section 17602, the goods, wares, merchandise, or

> products shall for all purposes be deemed an unconditional gift to the consumer, who may use or dispose of the same in any manner he or she sees fit without any obligation whatsoever on the consumer's part to the business, including, but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares, merchandise, or products to the business.

Unlike the examples given by the California Supreme Court in *Lu*, section 17603's use of the words "unconditional gift" is not clear and unmistakable indication that the Legislature intended to create a private right of action, such as a reference to a remedy or a means of enforcement. (See *Johnson v. Pluralsight, LLC*, *supra,* 728 Fed. App'x. at p. 676 ["Section 17604(a) neither states that a person may "bring an action" to obtain civil remedies nor contains language commonly understood in California to create a "right to bring an action," quoting *Lu*].)

As convincingly explained by *Lopez*, the legislative history also supports the conclusion that violations of the ARL were intended to give rise to claims under previously established remedies and not to a new, standalone claim:

> The Senate Judiciary Committee bill analysis states, in relevant part:
>
> ["]Senate Bill 340 would provide that a violation of its provisions would not be a crime, but all applicable civil remedies would be available.
>
> Under the [False Advertising Act], any person who violates any provision of the FAA is liable for a civil penalty not to exceed $2,500 for each violation that must be assessed and recovered in civil action by the Attorney General or by any district attorney, county counsel, or city attorney. Under the UCL, a private party may bring a civil action for injunctive relief and/or for restitution of profits that the defendant unfairly obtained from that party. However, the party must have suffered an injury in fact and lost money or property.["]
>
> … The analysis also provides that "all civil remedies that apply to a violation may be employed," and lists "existing law," including the following California Business & Professions Code sections: § 17200, *et seq.* (the UCL), § 17500, § 17534, § 17536, § 17204, § 17203, and § 17206. Thus, the committees' bill analyses specifically contemplate that consumers who suffered an injury by violations of the ARL can seek relief under other statutory provisions, including the UCL.

(*Lopez v. Stages of Beauty, LLC*, *supra,* 307 F.Supp.3d at pp. 1067-1068, citations omitted.)

Kissel is not to the contrary. Although it concluded that the ARL created a private right of action, it reasoned that the Legislature "intentionally placed the ARL within the same chapter as § 17535, and … declare[d] certain conduct related to automatic renewal or continuous service offers to be [among the conduct deemed] unlawful [under that chapter]." (*Kissel v. Code 42 Software, Inc.*, *supra,* 2016 WL 7647691, at *6.) "Accordingly, pursuant to § 17535, injunctive relief and restitution are civil remedies that apply to a violation of the

ARL." (*Ibid.*) Thus, *Kissel* merely held that a plaintiff may recover under pre-existing section 17535 for a violation of the ARL.[1]

As explained by both *Lopez* and *Johnson*,

> Plaintiff's argument "misse[s] a crucial distinction between the existence of a private right to *enforce* [the ARL] (such as under the UCL, [False Advertising Law], and/or § 17535), and the existence of an independent *cause of action* under [the ARL] itself." Section 17535 "explicitly authorizes a private right of action by 'any person' for violations of [Chapter 1 of California's Business and Professions Code, which includes the ARL]." However, by stating actions "*under this section* may be prosecuted by ... any person who has suffered injury in fact," the California Legislature clarified its intent "that such a cause of action be pursued under § 17535 itself" and not the ARL.

(*Lopez v. Stages of Beauty, LLC*, *supra,* 307 F.Supp.3d at p. 106, quoting *Johnson*.)

C. Conclusion

Because the ARL does not create a direct cause of action, Google's demurrer to the first cause of action will be sustained without leave to amend.

V. The Second and Third Causes of Action Under the UCL and FAL and the Sixth Cause of Action for Declaratory Relief

Google demurs to the second cause of action under the UCL on the grounds that plaintiff fails to allege standing, does not allege that he suffered an injury in fact or lost money or property as a result of business practice at issue, and does not allege that he relied on any misleading omission by Google. Google also demurs to the third cause of action under the FAL and the sixth cause of action for declaratory relief; however, it does not address these claims in its memorandum of points and authorities. In its notice of motion, Google appears to take the position that the third and sixth causes of action fail because the second cause of action does. Accordingly, the Court will analyze Google's demurrer to these three claims together.

Google's arguments are largely addressed to plaintiff's fraud theory supporting his UCL claim. However, as urged by plaintiff in opposition, the UCL claim is also based on the theory that under section 17603, products sold in violation of the ARL are deemed unconditional "gifts" to the consumer. In its moving papers, Google addresses the gift theory only in a footnote, urging that section 17603 does not apply here because Google Play Music is an "intangible service." Google expands on this argument in its reply papers, citing unpublished opinions by this Court (Hon. Kirwan) in *Mayron v. Google, Inc.* (Super. Ct. Santa Clara County, No. 2015-1-CV-275940). The Court declines to follow *Mayron* on this point for the reasons discussed below.

[1] Unlike *Lopez* and *Johnson*, which rejected this theory, *Kissel* does not address an argument that section 17603 of the ARL creates a direct cause of action.

A. Principles Governing Statutory Construction

As recently stated by the California Supreme Court,

> [w]hen we interpret a statute, our fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.

(*City of San Jose v. Superior Court (Smith)* (2017) 2 Cal.5th 608, 616-617, internal citation and quotation omitted.)

"[S]tatutory language, even if it appears to have a clear and plain meaning when considered in isolation, may nonetheless be rendered ambiguous when the language is read in light of the statute as a whole or in light of the overall legislative scheme." (*People v. Valencia* (2017) 3 Cal.5th 347, 360.) Courts must accordingly "consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." (*City of San Jose v. Superior Court, supra,* 2 Cal.5th at p. 617.)

Finally, courts must consider "the general rule that civil statutes for the protection of the public are … broadly construed in favor of that protective purpose." (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530 [interpreting the Song–Beverly Credit Card Act], internal citation and quotation omitted.) While the "mandate to construe a statute liberally in light of its underlying remedial purpose does not mean that courts can impose on the statute a construction not reasonably supported by the statutory language" (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 645), ambiguous language must be construed to promote the objectives of the statute (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 269).

B. Legislative History of the ARL Gift Provision

The declared intent of the Automatic Renewal Law is "to end the practice of ongoing charging of consumer credit or debit cards or third party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service." (Bus. & Prof. Code, § 17600.) To that end, businesses that make an automatic renewal or continuous service offer to consumers in California are subject to requirements imposed by section 17602 of the ARL regarding the presentation of the offer's terms, the charging of consumers' credit card or other third-party account without affirmative consent, and the provision of an acknowledgement reflecting specified information that is capable of being retained by the consumer.

The author of the bill that became the Automatic Renewal Law explained the need for the statute as follows:

> It has become increasingly common for consumers to complain about unwanted charges on their credit cards for products or services that the consumer did not explicitly request or know they were agreeing to. Consumers report they believed they were making a one-time purchase of a product, only to receive continued shipments of the product and charges on their credit card. These unforeseen charges are often the result of agreements enumerated in the "fine print" on an order or advertisement that the consumer responded to. The onus falls on the consumer to end these product shipments and stop the unwanted charges to their credit card.

(Sen. Com. on Judiciary, Analysis of Sen. Bill No. 340 (2009-2010 Reg. Sess.) as amended April 2, 2009.) The author cited a settlement between the Attorneys General of 23 states, including California, and Time Inc. regarding unwanted magazine subscriptions as an example of one "widespread instance of these violations." (*Ibid.*)

The language that ultimately became section 17603 was not included in the original bill introduced in the Senate on February 25, 2009. It was first introduced in a June 16, 2009 amendment in the Assembly, with materially the same language as the version that ultimately became law. Using somewhat different language, subsequent legislative history materials described the provision as providing that

> in any case in which a business sends any goods, wares, merchandise, or products to a consumer, under a continuous service or automatic renewal, without first obtaining the consumer's affirmative consent, in the manner required by this bill, then the goods, wares, merchandise, or products shall be deemed an unconditional gift to the consumer, and the business shall bear any shipping or other related costs.

(Assem. Com. on Judiciary, Analysis of Sen. Bill No. 340 (2009-2010 Reg. Sess.) as amended June 24, 2009.) Little further context is provided that would explain why this specific provision was added to the bill.

C. Analysis

In the Court's view, the language of section 17603 is ambiguous regarding whether that section applies to digital subscriptions like the ones offered by Google. As urged by Google, it is true that the section's references to "goods, wares, merchandise, or products" and specifically to shipping costs are suggestive of physical items that are shipped to consumers. The ARL is fewer than ten years old, and its authors must have been aware that providers of digital subscriptions could employ the same misleading practices as providers of tangible products; however, the Legislature did appear to be particularly focused on items being shipped to consumers, as evidenced by the repeated references to this practice and to the Time Inc. settlement in the legislative history. Further, while section 17600 refers to "ongoing shipments of a product or ongoing deliveries of service," section 17603 does not encompass services, suggesting that some practices subject to the requirements of the ARL are not covered by the "gift" provision.

While all of these circumstances suggest a focus on physical goods, they do not ultimately show that the Legislature intended to *exclude* digital subscriptions from the protections of section 17603. Notably, while the ALR contains at least two references to "shipping" or "shipments" of products, section 17603 uses the broader term "sends" to describe how products within its ambit reach consumers. The Legislature made this choice even though it used the term "shipping" later in section 17603 itself to describe one type of "cost" or "responsibility" that consumers do not bear when a product is deemed a gift. As discussed in plaintiff's opposition, the term "product" is commonly defined to include digital or intangible goods. Particularly where the Legislature must have been aware that digital subscriptions would be subject to other parts of the ARL, the Court concludes that it would have used more precise language to exclude them from the effects of section 17603 if it meant to.

This conclusion is consistent with a liberal reading of the Automatic Renewal Law to effectuate its purpose "to end the practice of ongoing charging of consumer credit or debit cards or third party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service." (Bus. & Prof. Code, § 17600.) There is no obvious reason why the Legislature would declare physical products sent in violation of the ARL "an unconditional gift to the consumer" while allowing businesses to impose obligations on consumers who receive digital subscriptions in violation of the law. Although the costs and logistics associated with sending a physical product back to a business do not exist for digital subscriptions, these are expressly only examples of the obligations that the statute addresses. Indeed, the statute explicitly and broadly encompasses "any obligation whatsoever" by the consumer. It seems clear that one such obligation is the recurring charge to a consumer's credit card itself—the main problem that the ARL is intended to address. Although Google contends that section 17603 is limited to physical goods, it does not contend that recurring credit card charges are beyond the scope of section 17603 where the subscriptions at issue involve physical goods, and it is unclear why the Legislature would choose to treat digital subscriptions differently in this regard. (See *Roz v. Nestle Waters North America, Inc.* (C.D. Cal., Jan. 11, 2017, No. 216CV04418SVWJEM) 2017 WL 132853, at *8 ["The clear meaning of [section 17603] is that when a business violates the requirements of [the ARL] when delivering a product to a consumer, that consumer has no obligation to pay the business for the product because it is deemed a gift."; holding section 17603 provides a basis for restitution]; *Lopez v. Stages of Beauty, LLC*, *supra,* 307 F.Supp.3d at p. 1070 ["[W]hen a product is delivered to a consumer in violation of the ARL, it is not considered a product that has been sold, but is considered a gift."].)

The Court accordingly concludes that section 17603 applies to digital subscriptions. Consistent with this conclusion, the Court of Appeal for the Ninth Circuit recently held in *Johnson* that a consumer who purchased a subscription to digital content stated a claim under the URL on the theory that the defendant "unlawfully charged him for a subscription that should have been treated as an unconditional gift pursuant to section 17603." (*Johnson v. Pluralsight, LLC*, *supra,* 728 Fed. App'x. at p. 677 [citing *Ladore v. Sony Comput. Entm't Am., LLC* (N.D. Cal. 2014) 75 F.Supp.3d 1065, 1073 for the proposition that "the downloadable version of something offered in physical form is a 'good' "].) Under the gift theory, plaintiff alleges both standing and economic loss, and need not allege reliance. (See *ibid.* [plaintiff alleged standing and economic loss under the UCL through the gift theory]; *Lopez v. Stages of*

Beauty, LLC, *supra,* 307 F.Supp.3d at p. 1070 [same].) Thus, he states a claim under the UCL based on this theory.

D. Conclusion

Because plaintiff states a claim under the UCL based on his "gift" theory, the Court need not address Google's arguments regarding his fraud theory in connection with this claim.[2] (See *PH II, Inc. v. Superior Court (Ibershof)* (1995) 33 Cal.App.4th 1680, 1682-1684 [a demurrer does not lie to a portion of a cause of action].) The demurrer to the second, third, and sixth causes of action will accordingly be overruled.

VI. The Fourth Cause of Action Under the CLRA

"The CLRA proscribes 27 specific acts or practices" in the sale or lease of goods or services to a consumer. (*Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 881, citing Civ. Code, § 1770, subd. (a)(1)–(27).) Among those practices is "[r]epresenting that a transaction confers or involves rights, remedies, or obligations that it does not have or involve, or that are prohibited by law" (Civ. Code, § 1770, subd. (a)(14)), the violation asserted by plaintiff here.

Google contends that plaintiff lacks standing to sue under the CLRA because he fails to allege that he "suffer[ed] any damage as a result of" Google's use "of a method, act, or practice declared to be unlawful by Section 1770." (Civ. Code, § 1780, subd. (a).) Relatedly, Google urges that plaintiff does not allege an affirmative misrepresentation as required to state a claim under subdivision (a)(14).

A. Actionable Conduct Under Subdivision (a)(14)

As an initial matter, the cases Google cites in support of the proposition that an affirmative misrepresentation is required to state a claim under subdivision (a)(14) do not so hold. (See *Rubenstein v. The Gap, Inc.*, *supra,* 14 Cal.App.5th at p. 881 [acknowledging that a CLRA claim may arise from a failure to disclose information, but finding the plaintiff did not allege any information was withheld that defendant had a duty to disclose]; *Davis v. Ford Motor Credit Co. LLC* (2009) 179 Cal.App.4th 581, 599 [plaintiff did not state a CLRA claim because "what Ford represented to Davis was correct, not a misrepresentation": "Ford was entitled … to allocate payments to the oldest outstanding installment and to assess a late fee on the late installment payments"].) The CLRA sounds in fraud (see *Nelson v. Pearson Ford Co*. (2010) 186 Cal.App.4th 983, 1023, disapproved on another ground by *Raceway Ford Cases* (2016) 2 Cal.5th 161), and given that concealment is a species of fraud that is often interchangeable with a claim for affirmative misrepresentation, courts have not required an affirmative misrepresentation to be alleged. (See *Outboard Marine Corp. v. Superior Court (Howarth)* (1975) 52 Cal.App.3d 30, 36-37 [exclusive remedy provision of the CLRA encompasses claims based on affirmative misrepresentations as well as parallel concealment claims]; *Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 835 ["a claim may be stated under the CLRA in terms constituting fraudulent omissions," where the

[2] In any event, the fraud theory also states a claim for the reasons discussed in connection with the fourth cause of action.

omission is "contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose," citing *Outboard Marine*].)

Whether characterized as a misrepresentation or as concealment of information that must be disclosed by statute, plaintiff alleges actionable conduct under the CLRA. According to the complaint, Google represented "that it had the right to charge Plaintiff's and Class Members' payment methods without first obtaining Plaintiff's and Class Members' affirmative consent to the agreement containing the automatic renewal offer terms" and otherwise complying with the ARL. (Complaint, ¶ 77.) Plaintiff alleges that Google does not have the legal right to charge for these subscriptions because it is not in compliance with the Automatic Renewal Law. This theory states a claim under subdivision (a)(14). (See *Nelson v. Pearson Ford Co., supra*, 186 Cal.App.4th at p. 1023 [finding CLRA violation based on illegal backdating of automobile finance contract; "Pearson Ford violated the CLRA because the second contract represented it had a legal right to collect finance charges effective October 2"].)

B. The CLRA's Damage Requirement

Finally, Google argues that plaintiff was not damaged by the practice at issue. "Our Supreme Court has interpreted the CLRA's 'any damage' requirement broadly, concluding that the 'phrase ... is not synonymous with "actual damages," which generally refers to pecuniary damages.' " (*Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, 724, quoting *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 640.) "Rather, the consumer must merely 'experience some kind of damage,' or 'some type of increased costs' as a result of the unlawful practice." (*Ibid.*)

A plaintiff who alleges standing under the UCL generally satisfies the CLRA's damage requirement as well. (*Hansen v. Newegg.com Americas, Inc.*, *supra,* 25 Cal.App.5th at p. 733, fn. 8 ["Because we conclude Hansen has adequately alleged 'economic injury' for purposes of UCL standing, we likewise conclude he has standing to pursue his CLRA claim."]; *Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916 ["the standing requirements of the CLRA are essentially identical to those of the UCL and FAL"].) As explained by the California Supreme Court in *Kwikset Corp. v. Superior Court (Benson)* (2011) 51 Cal.4th 310, 320 ("*Kwikset*"), this is generally not a difficult requirement to satisfy:

> There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary.

(*Id.* at p. 323.) Significantly, "ineligibility for *restitution* is not a basis for denying standing." (*Id.* at pp. 335-337, italics added.)

Commonly, UCL standing is established where false advertisements induced a consumer to buy a product he or she would not have purchased otherwise—regardless of whether the product had any actual defect. (See *Hinojos v. Kohl's Corp.* (9th Cir. 2013) 718

F.3d 1098, 1104-1107 ("*Hinojos*") and *Hansen v. Newegg.com Americas, Inc.*, *supra,* 25 Cal.App.5th at pp. 724-731 ("*Hansen*"), both discussing *Kwikset.*) Thus, in *Kwikset*, there was UCL standing where a product was mislabeled as "Made in the U.S.A.," and in *Hinojos* and *Hansen*, there was UCL standing where a product was mislabeled as being on sale. The plaintiff need not show that his or her reliance on the defendant's representation was "the sole or even the predominant or decisive factor" influencing his or her decision to purchase: "It is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing his decision." (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 326-327.)

Here, plaintiff alleges that "[h]ad Defendant complied with its disclosure obligations under § 17602, Plaintiff would not have entered into the subscription at the time he did so." (Complaint, ¶ 77.) This allegation establishes standing under the CLRA and the UCL. (See *Hansen, supra,* 25 Cal.App.5th at p.726 ["a consumer's allegation that he or she would not have purchased a product but for the defendant's misrepresentation is sufficient to establish economic injury"]; see also *In re Adobe Systems, Inc. Privacy Litigation* (N.D. Cal. 2014) 66 F.Supp.3d 1197, 1231 ["Plaintiffs allege that they would not have subscribed to Creative Cloud in the first instance had they known of Adobe's allegedly unsound security practices."].) This is true even assuming that plaintiff knew that his Google Play Music subscription would automatically renew in some fashion: plaintiff also specifically alleges that he was not informed that any cancellation would not be effective until the next pay period, and he would not have subscribed had Google made this disclosure as required by the ARL. (See Complaint, ¶ 9; see also Mot. at p. 16 [conceding that "[a]t most, [plaintiff] complains that he did not know about Google's policy not to provide refunds for prior payments when a user cancels"].) Plaintiff consequently alleges damage under the CLRA.

C. Conclusion

For the reasons discussed above, defendant's demurrer to the fourth cause of action must fail.

VII. The Fifth Cause of Action for Common Count

Finally, Google contends that the fifth cause of action is defective because plaintiff does not allege that the money he paid for Google Play Music was paid by mistake, extortion, oppression, or unfair advantage, since he received the service "that he evidently wanted and knew he was buying" and never sought a refund. (Mot. at pp. 18-19.) While brief and somewhat unclear, defendant's argument echoes its unsuccessful reasoning attacking plaintiff's other claims.

In opposition, plaintiff cites authorities tending to support the conclusion that a common count for money had and received is appropriate in the circumstances present here. (See, e.g., *J. C. Peacock, Inc. v. Hasko* (1961) 196 Cal.App.2d 353, 361 ["fraud may be proved under a complaint on the common count" and it is well-established "that an action for money had and received will lie … where an undue advantage was taken of plaintiffs' situation whereby money was exacted to which the defendant had no legal right"], internal citations and quotations omitted].) Google does not address these authorities in its reply, and merely argues that this claim must fail because plaintiff's gift theory fails to support his other claims. Because the gift theory is viable and appears to support a claim for common count, Google's demurrer to the fifth cause of action will be overruled.

VIII. Conclusion and Order

Google's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND as to the first cause of action and is otherwise OVERRULED.

The Court will prepare the order.

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Calendar Line 3

Case Name: *Charmie Ruffy v. Island Hospitality Management, Inc., et al.*
Case No.: 16-CV-301473 (lead case)

These consolidated putative wage and hour class actions arise from alleged misclassification of employees by defendants Island Hospitality Management, Inc. and Island Hospitality Management, LLC (collectively, "Island"). Before the Court is the parties' joint motion for preliminary approval of a settlement.

I. Factual and Procedural Background

As alleged in the operative complaint in the lead action (the First Amended Complaint or "FAC"), defendant Island Hospitality Management, Inc. provided hotel management services to hotels throughout California until December of 2014, when it converted to Island Hospitality Management, LLC. (FAC, ¶¶ 7-8.) Among the hotels to which defendants have provided services is the Residence Inn by Marriott in San Jose. (*Ibid.*)

Plaintiff Charmie Ruffy worked for defendants in San Jose as an Assistant General Manager from April of 2012 through September of 2015, and continued as a General Manager until she was terminated in May of 2016. (FAC, ¶ 16.) While she was classified as exempt during her tenure as an Assistant General Manager, she and other employees in this position actually performed non-exempt job duties and should have been classified accordingly. (*Id.* at ¶ 17.) In addition, defendants' wage statements issued to all of its employees did not reflect the correct legal name and address of the employer from January 1, 2015 until early 2017. (*Id.* at ¶ 79.)

On October 21, 2016, Ms. Ruffy filed the lead action, alleging misclassification of Assistant General Managers on behalf of a putative class of such workers, as well as individual claims for sex discrimination related to her termination. On April 24, 2017, she filed the operative FAC, asserting putative class claims for (1) failure to pay overtime, (2) meal period violations, (3) rest period violations, (4) failure to timely pay all wages due, (5) failure to properly itemize wage statements, and (6) unfair competition, plus individual claims for (7) sex discrimination and (8) wrongful termination in violation of public policy. The FAC alleges wage statement violations on behalf of both the original class and a second putative class of employees who received inaccurate wage statements.

Another former Assistant General Manager, Liliana Doonan, filed suit against Island Hospitality Management LLC in 2017. Ms. Doonan and Ms. Ruffy are represented by the same counsel, who declares that the 2017 *Doonan* action[3] was dismissed without prejudice in light of ongoing settlement negotiations, subject to a tolling agreement. Ms. Doonan essentially re-filed her complaint as *Doonan v. Island Hospitality Management, LLC* (Super. Ct. Santa Clara County, No. 18-CV-325187), the second action now before the Court. The pending *Doonan* action alleges that Island ultimately split the Assistant General Manager responsibilities between Operation Managers and Front Office Managers, who continue to perform the duties of Assistant General Managers and are also misclassified. (*Doonan*

[3] The 2017 action is entitled *Doonan v. Island Hospitality Management, LLC* (Super. Ct. Santa Clara County, No. 17-CV-320502).

Complaint, ¶ 14.) The operative complaint in *Doonan* asserts the same putative class claims as the *Ruffy* FAC, along with a seventh cause of action under the Private Attorneys General Act ("PAGA) and an eighth cause of action under the federal Fair Labor Standards Act ("FLSA").

According to counsel, from November of 2017 to March of 2018, defendants engaged in an individual settlement campaign, making direct offers to putative class members in groups. Materials provided to putative class members about the offers are attached to the declaration of Brian T. Ashe filed in support of the parties' motion. It appears that putative class members communicated with both defendants and plaintiffs' counsel about these offers. Ultimately, 105 of 121 misclassification class members and 1,048 of 1,519 wage statement class members accepted individual settlement offers.

In July of 2018, the parties reached a global settlement of the *Ruffy* and *Doonan* actions. In a stipulated order adopted by the Court (Hon. Stoelker), they agreed to consolidate the actions for purposes of settlement approval, with *Ruffy* serving as the lead action.

The parties now move for an order preliminarily approving the settlement, provisionally certifying the settlement class, approving the form and method for providing notice to the class, and scheduling a final fairness hearing. In addition, they seek the Court's approval of the individual settlement agreements executed by the majority of putative class members.

II. Legal Standards for Approving a Class Action/PAGA Settlement

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as 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 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.

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, internal citations and quotations omitted.)

The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned."

(*Ibid.*, quoting *Dunk v. Ford Motor Co*., *supra*, 48 Cal.App.4th at p. 1801, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245, citing *Dunk v. Ford Motor Co*., *supra*, 48 Cal.App.4th at p. 1802.) The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.)

Finally, Labor Code section 2699, subdivision (l) provides that "[t]he superior court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to" the Private Attorneys General Act ("PAGA"). Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.) "[T]here is no requirement that the Court certify a PAGA claim for representative treatment" as in a class action. (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *5.) "[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Id.* at *13.) The settlement must be reasonable in light of the potential verdict value (see *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict]); however, it may be substantially discounted given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds a trial (see *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8-9).

III. Settlement Process

According to a declaration by plaintiffs' counsel, counsel interviewed approximately 20 former employees after filing suit on behalf of Ms. Ruffy. Among those former employees was Ms. Doonan, who counsel determined could assert additional claims under PAGA and the FLSA and on behalf of Front Office Managers and Operations Managers. Counsel also propounded document requests resulting in the production of over 1,000 pages of documents, including defendants' handbook, job descriptions, randomized wage statements, sample schedules, putative class member data, and Ms. Ruffy's personnel file. Plaintiffs also obtained a list of current and former Assistant General Managers. Because the list did not include contact information, counsel engaged a private investigator to locate the employees and contacted twenty former employees to request interviews. As a result of these efforts, counsel obtained six witness statements that substantiated plaintiffs' claims.

Counsel "created complex spreadsheets to determine the range of damages and informally consulted with fellow lawyers experienced in wage and hour law" to determine the potential value of plaintiffs' claims. An initial mediation with Jeffrey A. Ross was held on August 30, 2017. After the first mediation failed, counsel focused on trial preparation, deposing two corporate witnesses over three days.

At this point, defendants began their individual settlement campaign, and plaintiffs' counsel fielded dozens of resulting phone calls from putative class members. Counsel established a web site providing putative class members with information about the litigation and offering to speak with them about their settlement offers. Ultimately, many employees accepted the individual settlement offers, but some did not, and plaintiffs obtained additional witness statements for use in the litigation.

Settlement negotiations continued with Mr. Ross's assistance, and the parties ultimately achieved a global settlement in July of 2018.

IV. Provisions of the Settlement

The gross settlement amount is $423,500, a sum which includes $168,000 in attorney fees, service awards of $5,500 to Ms. Ruffy and $3,000 to Ms. Doonan, and administration costs not to exceed $15,000. $6,667 of the gross settlement will be allocated to PAGA penalties, 75 percent of which will be paid to the California Labor and Workforce Development Agency.

The net settlement will be allocated $142,000 to the misclassification class and $80,000 to the wage statement class and distributed based on class members' weeks worked during the applicable class period. Notwithstanding this formula, the minimum payment to settlement class members shall be $25. For the misclassification class, the settlement payments will be characterized 50 percent as wages and 50 percent as penalties; for the wage statement class, the payments will be characterized 100 percent as penalties. The employees' share of payroll taxes will be paid from the net settlement. As the settlement agreement does not address the employer's share of payroll taxes, the Court presumes that Island will be responsible for any such taxes.

Class members are not required to submit a claim to receive their payments. Notably, however, should any putative class members choose to opt out of the class, the settlement provides that their portion of the net settlement will revert to defendants. Any unapproved amounts of attorney fees, service awards, or PAGA penalties will also revert to Island, along with any unclaimed funds.

Misclassification class members who do not opt out of the settlement will release all claims "that were alleged in the Action on behalf of the California Misclassification Class, whether known or unknown as well as similar claims that arise from the same factual predicate of the Action, whether known or unknown, that exist or existed at any time during the Class Period," including specified wage and hour claims and FLSA claims. Wage statement class members will release such claims as were alleged on behalf of that class, including specified wage and hour claims (but not FLSA claims).

V. Fairness of the Settlement

Particularly in light of several unusual and troubling features of the agreement before it, the Court lacks information necessary to evaluate whether the settlement is fair and reasonable to the remaining putative class members. Consequently, it will deny the parties' motion without prejudice. Still, the Court will provide its analysis of the proposed settlement, settlement class, and notice procedures to guide the parties should they renew their motion in the future.

A. Individual Settlement Agreements

As an initial matter, the Court will not review and approve individual settlement agreements between the defendants and absent putative class members—at least where there are no signs or allegations of unfairness or coercion.[4] (See *Hinds County, Miss. v. Wachovia Bank N.A.* (S.D.N.Y. 2011) 790 F.Supp.2d 125, 132 ["Prior to certification, court approval is not required to compromise the individual claims of potential class members."].) Still, the terms of the individual settlement agreements bear on the Court's evaluation of the global settlement's fairness to the remaining putative class members. The parties indicate that Island paid $566,600.76 in total compensation for the individual settlements, but do not explain how those funds were allocated among employees. Nor do they comprehensively describe their communications with the class pursuant to defendants' settlement campaign. They must do so in any future motion for preliminary approval so that the Court may consider all of the relevant circumstances to its fairness determination.

Relatedly, Ms. Ruffy has asserted individual claims for sex discrimination and wrongful termination in violation of public policy, but the parties do not specify whether these claims were resolved through a separate agreement or whether they will simply be released in exchange for Ms. Ruffy's service award. The parties must address this issue in any future motion and lodge any individual settlement by Ms. Ruffy for the Court's review.

B. The Value of the Case and the Structure of the Settlement

The Court appreciates counsel's efforts in achieving the settlement and their recommendation that it be approved. Still, the Court must not "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar v. Foot Locker Retail, Inc.*, *supra,* 168 Cal.App.4th at p. 130.) Here, plaintiffs have provided a general discussion of the strengths and weaknesses of the class claims, but have not shared their valuation of the case with the Court. Plaintiffs must disclose and explain their valuation in any future motion so that the Court may consider this critical information in assessing the fairness of the settlement.

[4] To be clear, the Court is empowered to intervene where a defendant engages in misleading or coercive *ex parte* communications with putative class members. (See *Marino v. CACafe, Inc.* (N.D. Cal., Apr. 28, 2017, No. 16-CV-6291 YGR) 2017 WL 1540717, at *3 [invalidating releases "obtained by deceptive omissions of material information"]; *Guifu Li v. A Perfect Day Franchise, Inc.* (N.D. Cal. 2010) 270 F.R.D. 509, 517 ["*ex parte* communications soliciting opt-outs, or even simply discouraging participation in a case, undermine" the court's control over the action and may require curative action by the court].)

This information is particularly crucial given the reversionary structure of the settlement proposed by the parties, which the Court is disinclined to approve. While this unusual structure may be permissible "as long as it d[oes] not render the settlement unfair, inadequate or unreasonable" (*Cundiff v. Verizon California, Inc.* (2008) 167 Cal.App.4th 718, 728), here, plaintiffs do not address the reasoning supporting the reversion. Defendants urge that participating class members will receive a "windfall" if nonparticipating class members' payments are redistributed to the class, but provide no support for this conclusion, particularly where they give no indication of the potential value of putative class members' claims. Defendants appear to suggest that settlement class members should not receive higher payments than employees who executed individual settlements. However, in the Court's opinion, class members should be compensated for the risk of no recovery that they faced in rejecting an individual settlement—while a campaign like defendants' may be permissible under some circumstances, the Court does not share Island's view that this approach should be encouraged. In a future motion, the parties must better explain the justification for the various reversions to defendants in this case, unless they opt to eliminate them to speed the approval of their settlement.

Finally, the combination of higher than usual attorney fee request and a "kicker" provision whereby any fees not approved by the Court will revert to Island is of serious concern to the Court. (See *In re Bluetooth Headset Products Liability Litigation* (9th Cir. 2011) 654 F.3d 935, 949 ["If the defendant is willing to pay a certain sum in attorneys' fees as part of the settlement package, but the full fee award would be unreasonable, there is no apparent reason the class should not benefit from the excess allotted for fees."].) This Court has never been presented with a settlement containing such a "kicker" provision and is unlikely to approve one absent highly unusual circumstances.

C. Release of FLSA Claims

Finally, in a future motion, the parties must address another significant and unusual feature of their settlement: its purported release of claims under the FLSA.

As explained in *Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067, the FLSA "govern[s] minimum wages and maximum hours." (At p. 1070.) Notably, the FLSA establishes an "opt-in" procedure for collective actions under its authority, which is essentially the opposite of the "opt-out" procedure typically employed in class actions. The "opt-in" procedure requires that aggrieved employees "give[] [their] consent in writing" to become a party to an FLSA action, which consent must be "filed in the court in which such action is brought." (29 U.S.C. § 216(b); *Haro v. City of Rosemead*, *supra,* 174 Cal.App.4th at p. 1071.) As held by *Haro*, "[a]n FLSA action has to be litigated according to rules that are specifically applicable to these actions" and may not be prosecuted as a class action. (*Haro v. City of Rosemead*, *supra,* 174 Cal.App.4th at p. 1077.)

While some unpublished federal decisions have approved "hybrid" class action and FLSA settlements, these settlements have not complied with the statutory requirement of written consents that are filed with the court. (See *Smothers v. Northstar Alarm Services, LLC* (E.D. Cal., Jan. 22, 2019, No. 217CV00548KJMKJN) 2019 WL 280294, at *10 ["Courts more elevated than this one have read the statutory language as requiring written consent filed with the court …."].) Further, as discussed in other federal cases, "hybrid" settlements raise a number of additional issues that are wholly unaddressed by the parties here.

First, plaintiff's motion for preliminary approval "does not explicitly request certification of an FLSA collective action, even though [the structure of the settlement] clearly contemplates the existence of a collective action …." (*Thompson v. Costco Wholesale Corporation* (S.D. Cal., Feb. 22, 2017, No. 14-CV-2778-CAB-WVG) 2017 WL 697895, at *7.) In the Court's view, this step is a prerequisite to approval of a hybrid settlement. Moreover, the settlement requires class members "to release FLSA claims to benefit from the settlement of the[ir] state law claims," while assigning no value to the FLSA claims. (*Id.* at *7-8.) The parties' failure to allow putative class members to participate in one but not the other form of action "counsels against the court's granting of preliminary approval." (*Maciel v. Bar 20 Dairy, LLC* (E.D. Cal., Oct. 23, 2018, No. 117CV00902DADSKO) 2018 WL 5291969, at *8, citing *Millan v. Cascade Water Services, Inc.* (E.D. Cal. 2015) 310 F.R.D. 593, 602.) Likewise, a "release of [an] FLSA claim in exchange for no consideration does not appear to be a fair and reasonable resolution of a bona fide dispute over FLSA provisions." (*Id.* at *6, internal citation and quotations omitted.)

Finally, courts considering settlements in hybrid FLSA and class actions "consistently require class notice forms to explain: (1) the hybrid nature of the action; and (2) the claims involved in the action; (3) the options that are available to [class] members in connection with the settlement, including how to participate or not participate in the … class action and the FLSA collective action aspects of the settlement; and (4) the consequences of opting-in to the FLSA collective action, opting-out of the … class action, or doing nothing." (*Id.* at *6, quoting *Thompson v. Costco Wholesale Corporation*, *supra,* 2017 WL 697895, at *8.) Here, the notice does not even reference the FLSA or disclose the FLSA release.

While the Court might conceivably approve an appropriately structured hybrid FLSA/class action settlement, here, significant changes to the settlement would be required for the Court to approve the FLSA release before it. Further, the Court is unlikely to approve the FLSA release in this settlement unless additional consideration is provided, given that plaintiffs do not appear to have included such a claim in their damages analysis. Accordingly, unless the parties agree to simply remove the FLSA release from their settlement (presumably accompanied by the dismissal of Ms. Doonan's FLSA claim), the Court is unlikely to grant preliminary approval.

VI. Proposed Settlement Class

Plaintiff requests that the following settlement classes be provisionally certified:

> The "California Misclassification Class" of "all current and former employees of either Defendant who work, or have worked, as exempt Assistant General Managers, Front Office Managers, or Operations Managers in California for either of the Defendants at any time during the Class Period, excluding the Individual Settlement Group.
>
> The "California Wage Statement Class" of "all current and former employees who work, or have worked, in California for either of the Defendants at any time during the Class Period, excluding the Individual Settlement Group.

A. Legal Standard for Certifying a Class for Settlement Purposes

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …." As interpreted by the California Supreme Court, Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court (Rocher)* (2004) 34 Cal.4th 319, 326, 332.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. (*Ibid*.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court (Botney)* (1976) 18 Cal.3d 381, 385.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court (Cotton On USA, Inc.)* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93-94.) However, considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

B. Ascertainable Class

"The trial court must determine whether the class is ascertainable by examining (1) the class definition, (2) the size of the class and (3) the means of identifying class members." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) "Class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 932.)

Here, the estimated 16 California Misclassification Class members and 471 California Wage Statement Class members have already been identified based on defendants' records, and the class is clearly defined. The Court finds that the class is numerous and ascertainable.

However, the proposed definition of the California Wage Statement Class is inconsistent with the definitions in the operative complaints, which limit the class to employees "who received inaccurate itemized wage statements from 2015 to the present." This limitation is consistent with plaintiffs' allegations that Island Hospitality Management, Inc. converted to Island Hospitality Management, LLC in December of 2014 and employees began receiving

incorrect wage statements in 2015. Any future motion for preliminary approval shall explain why this limitation on the class period for this class was removed.

C. Community of Interest

With respect to the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) The court must also give due weight to any evidence of a conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court (Heliotrope General, Inc.)* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. (*Lockheed Martin Corp. v. Superior Court, supra,* 29 Cal.4th at pp. 1104-1105.) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp.*, *supra,* 89 Cal.App.4th at p. 916.)

Here, common legal and factual issues predominate. Plaintiffs' claims all arise from defendants' wage and hour practices applied to the similarly-situated class members.

As to the second factor,

> The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

(*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations, brackets, and quotation marks omitted.)

Like other members of the classes, plaintiffs were employed by defendants in the relevant positions and allege that they were misclassified and received defective wage statements. The anticipated defenses are not unique to plaintiffs, and there is no indication that plaintiffs' interests are otherwise in conflict with those of the class.

Finally, adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.) "Differences in individual class members' proof of damages [are] not fatal to class certification. Only a conflict that goes to

the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid*., internal citations and quotation marks omitted.)

Plaintiffs appear to have the same interest in maintaining this action as any class member would have. However, the Court is not prepared to find adequacy of representation without further information. In addition to addressing the issues identified above, plaintiffs' counsel must submit billing summaries for the Court's review in connection with any future motion for preliminary approval.

D. Substantial Benefits of Class Certification

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.)* "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id*. at pp. 120-121, internal quotation marks omitted.)

Here, there are an estimated 16 and 471 members of the proposed classes. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

VII. Notice

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement or object. The gross settlement amount and estimated deductions are provided, along with each class member's estimated payment. Class members are informed of their qualifying work weeks as reflected in defendants' records and instructed how to dispute this information. Class members are given 60 days to request exclusion from the class, dispute their workweek information, or submit a written objection.

The notice is generally adequate, but must be modified to indicate that class members may appear at the final fairness hearing to make an oral objection without submitting a written objection. The notice must also be modified to highlight the estimates of class members'

eligible workweeks and settlement payments by displaying this information in bold within a box set off from the rest of the text on the first page of the notice. The verbatim definitions of "Released Wage Statement Claims" and "Released Misclassification Claims" must be provided. In addition, substantial modifications to the notice will be required if the parties seek approval of a modified hybrid FLSA/class action settlement, as discussed above.

Turning to the notice procedure, the parties have selected Simpluris, Inc. as the settlement administrator. The administrator will mail the notice packet within 20 days of receiving the class data, after updating class members' addresses using the National Change of Address database. Any notice packets returned as undeliverable will be re-mailed to any forwarding address provided or located through appropriate tracing methods. These notice procedures are appropriate.

VIII. Conclusion and Order

In light of the issues discussed above, the motion for preliminary approval is DENIED WITHOUT PREJUDICE.

The Court will prepare the order.

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