SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 613

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550(c)] **NEUTRON HOLDINGS WAGE AND HOUR CASES**	Case No. CJC-19-005044 JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 5044 REDACTED ORDER DENYING WITHOUT PREJUDICE PLAINTIFF REBECA TORRES'S MOTION FOR APPROVAL OF PAGA SETTLEMENT AND MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS AND SERVICE AWARD
This Order Relates to All Cases.	

INTRODUCTION

This matter came on regularly for hearing on February 2, 2021 in Department 613, the Honorable Andrew Y.S. Cheng, presiding. Gay Crosthwait Grunfeld, Seth Yohalem, and Jenny Yelin appeared for Plaintiff Yassin Olabi ("Olabi"). Dimitrios Korovilas appeared for Plaintiff Steven Tameny ("Tameny"). Alexander Wheeler appeared for Plaintiff Jon Osuna ("Osuna"). Joel B. Young appeared for Plaintiff Rebeca Torres ("Torres"). Joshua S. Lipshutz and Michael Holecek appeared for Defendant Neutron Holdings ("Defendant" or "Lime").

Having reviewed and considered the arguments, pleadings, and written submissions of all parties, the Court **DENIES** the motion **WITHOUT PREJUDICE**.

PROCEDURAL HISTORY

Torres filed her motion for approval of PAGA Settlement on August 17, 2020. On September 1, 2021, Plaintiffs Olabi, Osuna and Tameny (collectively "Objecting Plaintiffs") filed a motion to intervene in the Torres Action. On September 24, 2020, the Court issued a tentative ruling continuing Torres's motion for supplemental briefing due no later than October 23, 2020. The Court vacated the hearing on the motion to intervene pending supplemental briefing. Torres, the Objecting Plaintiffs and Lime timely filed supplemental briefing.

On November 6, 2020, the Court issued a second tentative ruling continuing Torres's motion for supplemental briefing due no later than December 4, 2020. Torres, the Objecting Plaintiffs and Lime filed timely filed supplemental briefing. On January 15, 2021, the Court set the motion for hearing on February 4, 2021. The Court then advanced the hearing to February 2, 2021.

DISCUSSION AND ANALYSIS

The Court denies the motion without prejudice because of (1) concerns regarding the circumstances surrounding the Torres Settlement negotiations, (2) inadequate investigation and discovery prior to the settlement, (3) inaccurate and incomplete maximum damages calculations, (4) the unjustified zero valuation of claims and (5) the unsupported 98.73-99.34% reduction of the total maximum theoretical recovery. The Court cannot find that the PAGA settlement is fair and adequate in view of the purpose and polices of the statute. The Court encourages the parties to continue to negotiate to see if they are able to present a new settlement agreement for approval.

I. Fairness

a. Reverse Auction

The Court is concerned about the circumstances surrounding the negotiation of the *Torres* Settlement. The Settlement is not the product of the group negotiation process all parties to the coordinated action initially agreed to and utilized.

"A reverse auction is said to occur when 'the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the [trial] court will approve a weak settlement that will preclude other claims against the defendant'.... It has an odor of mendacity

about it." (See *Negrete v. Allianz Life Ins. Co.* (9th Cir. 2008) 523 F.3d 1091, 1099 [citing *Reynolds v. Beneficial Nat'l Bank* (7th Cir. 2002) 288 F.3d 277, 282; Manual for Complex Litigation § 10.22; Cal. R. Court 3.541].) PAGA actions are a form of representative action; therefore, the concern may arise that a settlement is the product of a reverse action, collusion or overreaching by the parties. Settlement of representative actions "creates obvious dangers; the representative may have been a poor negotiator or may even be in cahoots with the defendant." (*Glidden v. Chromalloy American Corp.* (7th Cir. 1986) 808 F.2d 621, 627.) "It is therefore incumbent on a court in PAGA actions to closely scrutinize the circumstances underlying PAGA settlements, even absent direct evidence of collusive conduct, just as it would with respect to class actions." (Declaration of Gay Crosthwait Grunfeld in Support of Plaintiffs Olabi, Osuna, and Tameny's Response to the Court's November 6, 2020 Tentative Ruling Regarding the Torres Settlement, Ex. H [Labor Commissioner's Amicus Curiae Brief Pursuant to May 11, 2017 Order in *Price v. Uber Technologies, Inc.*, Los Angeles Superior Court Case No. BC554512 ("Price Brief")], 7.) "The exercise of vigilance is especially critical given that . . . a resolution of specifically-identified PAGA claims has preclusive impact on the State." (*Id.*)

When the parties first appeared in this coordination proceeding on December 11, 2019, the plaintiffs, including Torres, represented that they were working cooperatively. At the case management conference on January 16, 2020, the parties informed the Court of a scheduled joint mediation. The parties conducted that joint mediation on April 29, 2020, before the Honorable Bonnie Sabraw (ret.), with plaintiffs negotiating as a group. On July 10, 2020, the parties, including Torres, filed a joint statement with the Court indicating that a further joint mediation session had been scheduled for October 15, 2020, "to allow time for the parties' settlement discussions to be informed by Court rulings" on various discovery and merits issues. Contrary to Torres' representation that she would participate in that further joint mediation, on August 3, 2020, Lime filed a motion to stay the other cases indicating that it had reached a settlement with plaintiff Torres only. Lime and Torres represented that this settlement was the product of an offer made pursuant to Cal. Civ. Pro. Code § 998, an offer which the other three plaintiffs rejected. Lime and Torres did not disclose until September 18, 2020, after prodding from the other plaintiffs about the circumstances giving rise to the individual settlement, that the settlement in fact

resulted from separate negotiations, including a mediation conducted between Lime and Torres on July 23, 2020, before the Honorable Michael Latin (ret.), which was never previously disclosed to the other parties. Torres' conduct of negotiating individually while simultaneously representing to the Court and the other plaintiffs that she would negotiate jointly, as well as representing to the Court and other plaintiffs that the settlement was the product of a take-it-or-leave-it § 998 offer when in fact it was the product of separate side negotiation, evidences an "odor of mendacity," a lack of arms-length bargaining, and a likely reverse action.

b. Investigation and Discovery

Objecting Plaintiffs have raised concerns that insufficient discovery and investigation was completed by the parties prior to entering the Torres Settlement. At the time Torres filed her motion for settlement approval, she had admittedly conducted no formal discovery. Instead, since the Plaintiffs agreed to share discovery, Torres relied on the formal discovery propounded by the Objecting Plaintiffs. Since Torres filed the instant motion, Objecting Plaintiffs have conducted additional discovery, including taking the PMK deposition of Lime and three additional depositions of current and former Lime employees. In addition, the bulk of documents produced by Lime in these cases was not produced until November 4, 2020, after Torres filed her motion for settlement approval. Objecting Plaintiffs represent that the many of the assumptions underlying Torres's calculations and discounts are incorrect and suggest that the proposed settlement significantly undervalues the potential value of this case.

For example, Objecting Plaintiffs represent that this discovery revealed, among other things, that [redacted].[1] Objecting Plaintiffs assert Lime has yet to produce much of that data and it is the subject of their currently pending motion to compel. Further, in the Court's November 6, 2020 tentative ruling, the Court noted that "Torres did not calculate PAGA penalties under Labor Code § 226.8(a)(2) because Objecting Plaintiffs 'have not identified any evidence that Defendant made any deductions from compensation or charged any fees.'" (Nov. 6, 2020 Tentative Ruling, 3.) Objecting Plaintiffs assert it was later revealed at the PMK deposition that Lime in fact [redacted] for failure to comply

[1] This Order is conditionally sealed pending the Court's ruling on Lime's motion to seal set for hearing on March 19, 2021.

with Lime's battery, timing, and location requirements regarding the juicing process. Torres' valuation of her claims does not account for this because she did not have the necessary data.

The Court's obligation to "review" the settlement under Lab. Code § 2699(l)(2) requires the Court to analyze all available information, and the information yielded in the discovery taken after this settlement was reached indicates that the proposed settlement does not adequately reflect the potential value of this case to the State of California and the Juicers.

c. Maximum Penalties Calculations and Discounts

i. Maximum Penalties

The Court has repeatedly requested that Torres explain the basis for the $4.98 million proposed settlement, including her calculation of the maximum total penalties available. To date, Torres has not provided the Court with complete and accurate penalties calculations.

A. Theoretical Maximum Recovery

In any refiled motion, the Court will only consider the "theoretical maximum recovery" and not any reduced values based on an "assumed rate of violations". The assumed rate of violations results in double discounting (i.e. applying discounts once in *calculating* penalties based on an assumed rate of violations, and again in justifying the *settlement results obtained*). Thus, for each individual claim, the theoretical maximum recovery should be calculated based on a 100% violation rate. Then, the discounted value should reflect any assumed violation rate applied and the bases for the application of any assumed violation should be explained.

B. Unpaid Minimum Wage Penalties

Torres chose to calculate the maximum theoretical value of the Unpaid Minimum Wage claim based on Labor Code § 1197 (i.e., one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation) because it represents a "middle ground" on the penalty amounts associated with Labor Code § 558 (i.e., fifty dollars ($50) for the initial penalty and one hundred dollars ($100) for each subsequent penalty) in comparison to Labor Code § 1197.1 (i.e., one-hundred dollars ($100) for the initial penalty and two hundred fifty dollars ($250) for each subsequent penalty). (See Brief, 5.) This is

improper. The maximum theoretical recovery for the unpaid minimum wage claims should be based on Labor Code § 1197.1. Torres's explanation of why the "middle ground" figure was chosen is a justification for a discount, not a maximum damages calculation.

C. Unpaid Overtime and Failure to Provide Meal Break Penalties

Torres's decision not to value these penalties is problematic. Torres must evaluate these claims through the following lens: "it *may be* reasonable to settle a weak claim for *relatively little, while it is not reasonable to settle a strong claim for the same amount.*" (*O'Connor v. Uber Technologies, Inc.* (2016) 201 F.Supp.3d 1110, 1134-1135 [emphasis supplied].) For the reasons stated below, Torres's lack of valuation is unconvincing.

- Unpaid Overtime Penalties – Labor Code §§ 510, 558: Torres did not assign a value to overtime violations because "Juicers would face significant and likely insurmountable barriers to prevailing on overtime claims at trial". (Brief, 5.) Torres argues: (1) there would be significant issues in proving that a Juicer worked over eight (8) hours in day and (2) it would be difficult if not impossible to prove that all of the time Juicers spent collecting and charging scooters was compensable because Lime would argue (a) as soon as a Juicer has "plugged in" scooters to charge, the charging process was a passive activity (indeed, Juicers could sleep during that time) and that passive "charging" time was not compensable time and (b) when Juicers engaged in personal activities (such as personal phone calls, personal errands, and sleeping) was not compensable time. (Brief, 5-6.) These are reasons for discounting a claim, not valuing it at zero. Rather than provide a zero valuation, the parties must value the claim and *then* apply the relevant discounts.
- Failure to Provide Meal Break Claims – Labor Code §§ 226.7, 512: Torres contends there would be difficulty in establishing that Juicers worked at least five hours per day as most Juicers interviewed by Torres's counsel indicated that they worked less than three (3) hours per day, and all of them indicated that they could take a meal break at any point because Juicers had free rein to sign on and off the app whenever they wanted.

Therefore, Torres's position is that, for settlement purposes, no value should be assigned to the meal break claims. Again, these are reasons for discounting a claim, not valuing it at zero. Rather than provide a zero valuation, the parties must value the claim and *then* apply the relevant discounts.

ii. Discounts

In light of Torres's Second Supplemental Brief in Support of Motion for Approval of PAGA Settlement ("Brief"), Torres now values the theoretical maximum recovery as between $391,921,000[2] - $749,698,117.50[3]. Based on Torres's maximum recovery calculations, the $4.98 million settlement is approximately .66 – 1.27% of the maximum theoretical recovery of civil penalties. The Objecting Plaintiffs now estimate the maximum theoretical recovery to be [redacted]. (See Plaintiffs Olabi, Osuna, and Tameny's Response to the Court's November 6, 2020 Tentative Ruling Regarding the Torres Settlement ["Response"], 17 [estimating the maximum theoretical value of the Section 226.8(a)(2) alone to be "[redacted]"].) The risks at issue rest primarily on the merits of plaintiffs' labor code claims (particularly, misclassification) and the discretionary reduction of statutory penalties. The Court is cognizant that even if a verdict were rendered for the PAGA claims, a penalty of $749,698,117.50 would likely be reduced. (See *O'Connor, supra,* 201 F.Supp.3d at 1133; see also Cal. Lab. Code § 2699(e)(2).) While some discounting is appropriate, Torres failed to provide sufficient justification for the discounts she applied.

A. Overall

The parties failed to augment the factual and legal bases for the settlement discounts as requested in the Court's September 24, 2020 Tentative Ruling. Torres provided the Court with only half of the picture – the half favorable to Defendants. (See Plaintiff Rebeca Torres's Supplemental Brief in Support of Motion for Approval of PAGA Settlement (Filed Oct. 23, 2020) ["Oct. 23, 2020 Brief"], 18-22.) Even assuming Torres's calculations are accurate, the parties' failure to provide the complete picture counsels

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[2] 153,736,000 (Torres' Prior Calculation of the Theoretical Maximum Recovery) + 158,790,000 (lower end of Willful Misclassification Claim) + 79,395,000 (lower end of Charging Misclassified Workers a Fee Claim).

[3] 153,736,000 (Torres' Prior Calculation of the Theoretical Maximum Recovery) + 499,617.50 (assuming 2.5% violation rate for Unpaid Overtime Claims) + 396,975,000 (higher end of Willful Misclassification Claim) + 198,487,500 (higher end of Charging Misclassified Workers a Fee Claim).

against crediting a 98.73-99.34% reduction of the total maximum theoretical recovery.

B. Specific Issues

Though Torres declined to provide the Court with a complete picture of the discounts, nonetheless, the Objecting Plaintiffs provided the other half of the picture. Because willful misclassification is the most probative risk, the Court focuses on it below.

1. Willful Misclassification

As an initial matter, Torres and the Objecting Plaintiffs agree that Proposition 22 has no effect on Lime's liability in this case. Lime contends Proposition 22 applies to this case, is retroactive, repeals the "ABC" test and prevents plaintiffs from prevailing in these actions. However, the Court of Appeal declined requests to depublish or rehear *People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266 after the passage of Proposition 22. Furthermore, on January 14, 2021, well after Proposition 22 passed, the California Supreme Court issued its opinion in *Vasquez v. Jan-Pro Franchising Int'l, Inc.* (2021) 10 Cal.5th 944 holding that *Dynamex* applies retroactively. Finally, on January 26, 2021, in *James v. Uber Technologies, Inc.* (N.D. Cal. Jan. 26, 2021) Case No. 3:19-cv-06462-EMC, 2021 WL 254303, the District Court found that Proposition 22 does not apply retroactively. Since all plaintiffs agree that Proposition 22 is not a reason to discount the value of the case, absent further argument to the contrary from Lime, this Court likewise declines to do so.

Torres and Objecting Plaintiffs dispute whether Lime's failure to comply with *Dynamex* constitutes "willful" misclassification. In their response, Objecting Plaintiffs proffer evidence they argue supports "it is now clear that Lime made the decision to classify Juicers as independent contractors deliberately with open eyes, fully aware of the potential legal ramifications of doing so." (Response, 12.) Torres asserts that given the uncertainty following *Dynamex* but before the passage of Assembly Bill 5, "a court could easily conclude that Defendant's obligations under the law were genuinely unclear until the passage of Assembly Bill 5, and that failure to comply with *Dynamex* does not constitute "willful" misclassification." (Oct. 23, 2020 Brief, 20-21.) In assigning negligible value to multiple Labor Code penalties, Torres fails to consider the possibility that a court could find that Lime knew about the *Dynamex* decision and its applicability and that it was misclassifying Juicers under *Dynamex*.

Torres still has not cited a single case explicitly finding that post-*Dynamex*, an employer's obligations under the law remained unclear. After *Dynamex*, it was at least clear that the "ABC" test applied to wage order claims. (See *Dynamex Operations W. v. Sup. Ct.* (2018) 4 Cal.5th 903, 964.) In this respect, Torres's reliance on *Garcia v. Border Transp. Grp., LLC* (2018) 28 Cal.App.5th 558, 563-564 as modified on denial of reh'g (Nov. 13, 2018) is misguided. In *Garcia*, the question was whether *Dynamex* applied to *all* sections of the Labor Code. The court explicitly noted "[i]t is logical to apply the 'suffer or permit to work' standard (and the ABC test that explicates it) to wage order claims." (*Id.* at 571.) Objecting Plaintiffs offer evidence that after the Supreme Court issued its decision in *Dynamex* on April 30, 2018, [redacted]. (See Response, 12.) Torres offers no response to Objecting Plaintiffs' repeated assertion that uncertainty as to whether *Dynamex* applied to certain sections of the Labor Code cannot be used to justify Lime's decision to willfully misclassify Juicers as to deny them protections of the Wage Orders. Moreover, Torres does not cite any authority to support that any uncertainty post-*Dynamex* and pre-AB 5 forecloses finding willful misclassification for the non-wage order claims.

Any discounts in a refiled motion must account for the real risks for both parties. (See Response, 12-15 [setting forth both evidence and case law to support a finding that Lime's misclassification was willful].)

2. Other Discounts

The Court credits the discretionary reduction, stacking and manageability arguments justifying a discount in the settlement figure. But again, the parties overstate the risk. Specifically, the Court believes this risk is overstated based on Torres's (1) failure to address the strength of Plaintiffs' PAGA claim and/or the likelihood that Plaintiffs may succeed on the merits, and (2) assignment of "negligible value" to several of the underlying violations. (See Oct. 23, 2020 Brief, 25, 30, 32-33.)

d. Conclusion

Based on the present record, the Court cannot conclude that the Settlement is fair, adequate, and reasonable.

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I. MOTION FOR ATTORNEYS' FEES, COSTS AND INCENTIVE AWARDS

A. Attorneys' Fees and Costs

Because the Court denies the motion without prejudice, it will reserve its evaluation of attorneys' fees and costs (including the issue of the direction of fees and the appropriate multiplier).

CONCLUSION

The Court **DENIES** Torres's Motion **WITHOUT PREJUDICE**.

IT IS SO ORDERED.

Dated: February 18, 2021

ANDREW Y.S. CHENG
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, KEITH TOM, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On February 18, 2021, I electronically served the ATTACHED DOCUMENT(S) via File&ServeXpress on the recipients designated on the Transaction Receipt located on the File&ServeXpress website.

Dated: February 18, 2021

T. Michael Yuen, Clerk

By: _____
KEITH TOM, Deputy Clerk