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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

MICHAEL HARRINGTON, an individual, in
his representative capacity on behalf of the State
of California and fellow Aggrieved Employees,

Plaintiff,

v.

GENESIS PRIVATE SECURITY, INC., (fka
ATLAS PRIVATE SECURITY, INC.), a
California Corporation; ATLAS PRIVATE
SECURITY, INC., a California Corporation; and
DOES 1-50, Inclusive;

Defendants.

Case No. RG21105476

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION TO APPROVE PAGA
SETTLEMENT**

Hearing Date: September 15, 2023

Hearing Time: 9:00 A.M.

Judge: Hon. Grillo

Dept.: 21

Reservation ID: 154134417178

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Michael Harrington (“Plaintiff”) seeks approval of the PAGA Settlement Agreement
4 (“Agreement”)¹, which if approved, would provide valuable monetary relief for 904 “Aggrieved
5 Employees,” defined as all current and former non-exempt employees employed by Genesis Private
6 Security, Inc. (*fka* Atlas Private Security, Inc.) or Atlas Private Security, Inc. (“Defendants”) in
7 California during the period between May 10, 2020 to April 14, 2023 (“PAGA Period”). Agreement
8 at §§ I(B); I(P); III(A)(2). This is only a settlement of the PAGA claim for civil penalties and is not
9 a class settlement and does not release the individual wage claims, if any, of the affected employees
10 other than Plaintiff himself. Cal. Lab. Code § 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal.
11 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 182 (2019) (unpaid wages are not
12 recoverable under PAGA).

13 If approved, the Aggrieved Employees and the California Labor Workforce and Development
14 Agency (“LWDA”) will share in a Gross Settlement Amount of One Million Four Hundred Seventy-
15 Five Thousand Dollars and Zero Cents (\$1,475,000). Agreement at § I(I). After deducting any Court-
16 approved Attorneys’ Fees, Attorneys’ Expenses, and the Claims Administration Expenses, the Net
17 Settlement Amount shall be distributed, 75% to the LWDA and 25% to the Aggrieved Employees.
18 Agreement at § I(L).

19 An objective evaluation of the proposed Settlement confirms that the relief negotiated on
20 behalf of the Aggrieved Employees and the LWDA is fair and reasonable. The Settlement is a product
21 of informed, adversarial, and non-collusive and mediated negotiations between experienced counsel.
22 As discussed below, the proposed Settlement satisfies all criteria for PAGA settlement approval.
23 Accordingly, Plaintiff and Plaintiff’s Counsel respectfully request this Court grant approval of the
24 Agreement. JCL Dec., at ¶ 9.

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28 ¹ The Agreement is attached as Ex “1” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to the Agreement incorporate by this reference a citation to the JCL Dec., ¶ 3. Further, unless indicated otherwise, capitalized terms used herein have the same meaning as those defined by the Agreement.

II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Exhaustion of Administrative Remedies Under PAGA

On May 10, 2021, Plaintiff on behalf of himself and on behalf of other “Aggrieved Employees” served Defendants and the LWDA with a Notice of Violations (“PAGA Notice”) and draft complaint memorializing claims against Defendants for alleged violations of the California Labor Code, including causes of action for failure to pay minimum wages in violation of Labor Code sections 1194, 1197 and 1197.1; failure to pay overtime wages in violation of Labor Code sections 510; failure to provide required meal periods in violation of Labor Code sections 226.7 and 512; failure to provide required rest periods in violation of Labor Code sections 226.7 and 512; failure to provide accurate itemized wage statements in violation of Labor Code section 226; failure to reimburse employees for required expenses in violation of Labor Code section 2802; and failure to provide wages when due in violation of Labor Code sections 201, 202, and 203;(LWDA Case Number LWDA-CM-831782-21). JCL Dec., at ¶¶ 4, 10.

The 65-day “waiting period” on Plaintiff’s right to file a civil action under PAGA, *see* Cal. Lab. Code § 2699.3(a)(2)(A), lapsed without the LWDA notifying Plaintiff that they intended to investigate the claims in the PAGA Notice. To date, the LWDA still has not advised Plaintiff of any intent to take action with respect to the claims in the PAGA Notice. JCL Dec., at ¶ 11.

B. Plaintiff's Civil Action Against Defendant

On July 16, 2021, Plaintiff filed a class and representative action complaint against Defendants in the Superior Court for Alameda, Case Number RG21105476. The complaint alleged nine causes of action for (1) Unfair Competition in Violation of Cal. Bus. & Prof Code §§ 17200 et seq.; (2) Failure to Pay Minimum Wages in Violation of Cal. Labor Code §§ 1194, 1197 and 1197.1; (3) Failure to Pay Overtime Wages in Violation of Cal. Labor Code § 510; (4) Failure to Provide Required Meal Periods in Violation of Cal. Labor Code §§ 226.7 and 512; (5) Failure to Provide Required Rest Periods in Violation of Cal. Labor Code §§ 226.37 and 512; (6) Failure to Provide Accurate Itemized Wage Statements in Violation of Cal. Labor Code § 226; (7) Failure to Reimburse Employees for Required Expenses in Violation of Cal. Labor Code § 2802; (8) Failure to Provide Wages When Due in Violation of Cal. Lab. Code §§ 201-203; and (9) Violation of the Private Attorneys General Act at Cal. Lab.

1 Code §§2698, *et seq.* On December 27, 2021, based on the existence of an arbitration agreement,
2 Plaintiff dismissed the class action allegations and causes of action and filed a First Amended
3 Complaint alleging a single cause of action for Violation of the Private Attorney General Act. JCL
4 Dec., ¶ 12.

5 On February 14, 2022, the Parties attended a full-day mediation with experienced wage and
6 hour class and PAGA action mediator Lynn Frank, Esq. In advance of the mediation, Defendants
7 provided Plaintiff with sufficient information to properly evaluate Defendants’ liability exposure for
8 civil penalties to the Aggrieved Employees. Among the data and documents Defendants produced
9 included, but was not limited to, the total number Aggrieved Employees and pay periods, written wage
10 and hour policies, employee handbooks, and a sample of all time and payroll records for the Aggrieved
11 Employees. JCL Dec., ¶ 13.

12 At the conclusion of the mediation, and with the assistance of the mediator, the Parties reached
13 a settlement. The Parties subsequently executed a binding and enforceable Memorandum of
14 Understanding (“MOU”). After reaching an agreement in the principle, the Parties drafted and
15 negotiated a long-form Settlement which is the subject of the instant motion. The Settlement was
16 negotiated in light of all known facts and circumstances and the uncertainty associated with litigation
17 – including the risk of Plaintiff not being able to maintain representative claims and establishing
18 manageability, the difficulty of proving Plaintiff’s claims in a manageable trial, the merits of
19 Defendants’ potential defenses, and the significant delay and potential appellate issues inherent to
20 litigation – and was reached after extensive arm’s length negotiations, with the assistance of mediator.
21 JCL Dec., at ¶ 14.

22 The Settlement is intended to fully and finally resolve the Released PAGA Claims asserted by
23 Plaintiff on behalf of the Aggrieved Employees and State of California. This is only a settlement of
24 the PAGA claims for civil penalties and is not a class settlement and does not release the individual
25 claims, if any, of the Aggrieved Employees. This Settlement does not release any claim that is not a
26 PAGA claim.² Nor does this Settlement waive Defendants’ right to assert *res judicata* or other
27

28 ² As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th 175 at 196: “Nonparty employees are bound by the judgment in an action under the PAGA, but only with respect to recovery of civil penalties.”

1 available defense to any asserted claim or lawsuit. JCL Dec., at ¶ 15. PAGA claim.³ Nor does this
2 Settlement waive Defendants’ right to assert *res judicata* or other available defense to any asserted
3 claim or lawsuit. JCL Dec., at ¶ 15.

4 Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of the
5 Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant motion
6 for settlement approval as set forth in the accompanying proof of service. Additionally, Plaintiff will
7 submit to the LWDA a copy of the Court’s judgment and order approving the Settlement Agreement
8 within ten (10) days after entry of judgment or order. JCL Dec., at ¶¶ 5, 16.

9 **III. TERMS OF THE PAGA SETTLEMENT**

10 **A. The Gross Settlement Amount**

11 The PAGA Settlement is subject to Court approval consistent with Labor Code § 2699(1)(2).
12 The Settlement Agreement negotiated by the Parties provides for a “Gross Settlement Amount”
13 payment in the amount of One Million Four Hundred Seventy-Five Thousand Dollars and Zero Cents
14 (\$1,475,000.00) to resolve the Released PAGA claims. From the Gross Settlement Amount, there is
15 a deduction of Attorneys’ Fees in the amount of \$491,666.66 (which is one-third of the Gross
16 Settlement Amount), reimbursement of incurred Attorneys’ Expenses in an amount not to exceed
17 \$20,000.00, and payment of Claims Administration Expenses to the Settlement Administrator in an
18 amount not to exceed \$10,000.00. Agreement at §§ III(I)(7)-(8). After these deductions, the amount
19 remaining is the “Net Settlement Amount,” which is estimated to be \$953,333.34. Agreement at §
20 I(L).

21 Of the “Net Settlement Amount,” seventy-five percent (75%) shall be paid to the LWDA and
22 the remaining twenty-five percent (25%) shall be paid to the Aggrieved Employees as Individual
23 PAGA Payments. § I(L). This allocation is required by Labor Code § 2699 as explained by *ZB, N.A.*
24 *v. Superior Court*, 8 Cal.5th 175 (2019).

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28 ³ As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th 175 at 196: “Nonparty employees are bound by the judgment in an action under the PAGA, but only with respect to recovery of civil penalties.”

1 **B. Allocation of Individual PAGA Payments**

2 The Individual PAGA Payments to the Aggrieved Employees shall be based on the number of
3 PAGA Pay Periods each Aggrieved Employee worked during the PAGA Period as a percentage of the
4 total PAGA Pay Periods worked by all Aggrieved Employees during the PAGA Period. Agreement at
5 §§I(O); III(I)(1).

6 At the time of mediation, Defendants estimated that there were approximately 904 Aggrieved
7 Employees who worked approximately 22,000 Pay Periods during the PAGA Period based on
8 company records. Should the number of PAGA Pay Periods increase by more than 10% of what was
9 represented at the mediation (i.e., if the PAGA Pay Periods exceed 24,200), Defendants shall increase
10 the Gross Settlement Amount proportionally. Agreement at § III(A)(2).

11 **C. Funding and Distribution**

12 Provided that an order approving this Settlement is entered by the Court, Defendants shall pay
13 the Gross Settlement Amount as follows: (1) 50% of the Gross Settlement Amount shall be paid within
14 ten (10) calendar days of the Effective Date, and (2) the remaining 50% of the Gross Settlement
15 Amount shall be paid by the earlier of March 22, 2024 or fourteen (14) days after Defendants' receipt
16 of its 2021 tax refunds. Agreement at § III(I). The Effective Date is the date upon which the Court
17 enters the order approving the Settlement of the PAGA penalties as described in the Parties' Settlement
18 Agreement. Agreement at § I(F).

19 Within fifteen (15) calendar days of the date on which the Gross Settlement Amount is funded
20 in full by Defendants in accordance with the terms of the Settlement Agreement (the "Funding Date"),
21 the Settlement Administrator will transmit the LWDA Payment to the LWDA as one lump sum
22 payment. Agreement at § III(I)(6).

23 No later than fifteen (15) calendar days after the Funding Date, the Settlement Administrator
24 will mail the Individual PAGA Payments to the Aggrieved Employees by regular First-Class U.S.
25 Mail to the Aggrieved Employees' last known mailing address. § III(I)(4). Settlement checks issued
26 to Aggrieved Employees will expire one hundred eighty (180) days from the date they are issued by
27 the Settlement Administrator. Agreement at § III(I)(5). If the check remains uncashed by the
28 expiration of the 180-day period, the Settlement Administrator shall cause the aggregate sum

1 represented by those uncashed checks to be sent to the State of California’s Controller, to be held in
2 the name of each expired check payee. Agreement at § III(I)(5). The individual Aggrieved Employee
3 Payments are 100% penalties and interest and shall be reported using IRS Form 1099s. Agreement §
4 III(I)(2).

5 **D. Release of Claims**

6 Upon entry of final judgment and funding of the Gross Settlement Amount in full, all
7 Aggrieved Employees, Plaintiff, the LWDA and the State of California shall release the Released
8 PAGA Claims against Defendants and their subsidiaries, parents, affiliates, and their agents,
9 employees, successors, assigns, officers, officials, directors, attorneys, and representatives (“Released
10 Parties”). Agreement at §§ I(X); III(B). The Released PAGA Claims are all claims for civil penalties
11 arising under PAGA that were alleged or could reasonably have been alleged based on the facts in the
12 operative complaint and/or Plaintiff’s LWDA Notice, which occurred during the period between May
13 10, 2020 to April 14, 2023. Agreement at §§ I(P); I(W). This release includes claims for civil penalties
14 pursuant to Labor Code section 2699, et seq. for violations of Labor Code sections 201, 202, 203, 204,
15 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246, 510, 512, 558, 1174(d), 1174.5, 1194, 1197, 1197.1,
16 1198, 1199, 2802, and 2804 and applicable Industrial Welfare Commission Wage Orders. This release
17 does not include underlying wage and hour claims, claims for wrongful termination, discrimination,
18 unemployment insurance, disability, and workers’ compensation, and claims outside of the PAGA
19 Period. The Released PAGA Claims do not include any claims that cannot be released as a matter of
20 law.

21 **IV. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT**

22 Labor Code § 2699(l) requires that the Court “shall review and approve any settlement of any
23 civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the
24 agency at the same time that it is submitted to the court.” Further, the Court in *Moniz v. Adecco USA,*
25 *Inc.* (2021) 72 Cal.App.5th 56, 77 stated that “the trial court must review and approve a PAGA
26 settlement (§ 2699, subd.(l)(2)), and the Supreme Court has in dictum referred to this review as a
27 safeguard.” (Citing *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 88; internal
28 quotations omitted.) “The Supreme Court has also observed that trial court approval ensures that any

1 negotiated resolution is fair to those affected,” leading the Court in *Moniz* to determine that “adoption
2 of a standard of review for settlements that prevents fraud, collusion or unfairness, and protects the
3 interests of the public and the LWDA in the enforcement of state labor laws is warranted.” (*Moniz*,
4 *supra*, 72 Cal.App.5th at 77; citing *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549; *Dunk v.*
5 *Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801; internal citations omitted.) In other words,
6 “[i]n review and approval of a proposed settlement under section 2699, subd. (1)(2), a trial court thus
7 must scrutinize whether, in resolving the action, a PAGA plaintiff has adequately represented the
8 state’s interests, and hence the public interest.” (*Moniz, supra*, 72 Cal.App.5th at 88.) Consequently,
9 the Parties respectfully ask the Court to review and approve the Settlement of the PAGA claims and
10 the amount to be paid as part of the proposed Settlement.

11 **A. The Gross Settlement Amount is Fair and Reasonable**

12 The Gross Settlement Amount of \$1,475,000.00 is fair and reasonable and, therefore, should
13 be approved. JCL Dec., ¶ 17. Here, *without stacking* the PAGA penalties, Defendants’ *maximum*
14 liability exposure is estimated at approximately \$3,542,000 in PAGA penalties. If derivative penalties
15 are included (or “stacked”), Defendants’ maximum liability exposure is estimated at approximately
16 \$5,742,000. JCL Dec., ¶ 18. Plaintiff’s consultant estimated Defendants’ exposure as follows:

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Claim	Penalty Amount	Number of Pay Periods w/ Violation	Violation Rate	Total Penalties
<i>Meal Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	7,920	36% of PAGA Pay Periods	\$396,000
<i>Rest Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	7,920	36% of PAGA Pay Periods	\$396,000
<i>Unpaid Wages</i> Cal. Labor Code §§ 201, 202, 203, 204, 1194, 1197, 1997.1 1198 and 558	\$100	22,000	100% of PAGA Pay Periods	\$2,200,000
<i>Business Reimbursement Violations</i> Cal. Labor Code § 2802	\$100	5,500	25% of PAGA Pay Periods	\$550,000
<i>Wage Statement Violations</i> Cal. Labor Code § 226(a)	\$100	22,000	100% of PAGA Pay Periods	\$2,200,000

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1 **i. Estimated Penalties for Rest Period Violations**

2 Plaintiff alleged that Defendants unlawfully required all non-exempt security guards, including
3 Plaintiff, to remain at their post and on-call or on-duty during their 10-minute rest breaks. JCL Dec.,
4 ¶ 20. Specifically in the context of security guards, the California Supreme Court’s decision in
5 *Augustus v. ABM Security Services, Inc.*, held that “employers . . . must relinquish control over how
6 employees spend their time” during rest periods. 2 Cal. 5th 257, 259 (2016). Moreover, Lab. Code §
7 226.7(c) provides that “if an employer fails to provide an employee a meal or rest or recovery period
8 in accordance with a state law, including ... an ... order of the Industrial Welfare Commission, the
9 employer shall pay the employee one additional hour of pay at the employee’s regular rate of
10 compensation for each workday that the meal or rest or recovery period is not provided.”

11 Here, Defendants maintained a written on-duty meal period policy that stated that there are
12 some positions/sites that prevent an employee from being relieved for a meal break. Plaintiff alleged
13 that off-duty rest periods could not be provided under the same circumstances that required on-duty
14 meal periods. Plaintiff was also unable to find any evidence of an attempt by Defendants to apply to
15 the Department of Industrial Relations for an exemption from the provision of the Industrial Welfare
16 Commission requiring off-duty breaks. Defendants argued that its written policies encouraged rest
17 breaks and moreover, that it adopted new policies related to rest and meal breaks in 2021, about one
18 year into the PAGA Period. Defendants also argued that Plaintiff’s rest break claim would have
19 mainly relied on the testimony of Aggrieved Employees, making it a riskier claim. JCL Dec., ¶ 21.
20 Establishing liability likely would have entailed competing testimony stating either rest breaks were
21 taken, or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan.
22 17, 2013) 2013 WL 210223, at *11 (“Because of the competing testimony before the Court, plaintiff’s
23 evidence that defendant may have an illegal, written rest break policy is insufficient for this Court to
24 find that common issues predominate.”); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov.
25 13, 2012) 2012 WL 5503550, at *8 (“Indeed, Plaintiff’s own evidence confirms that the written policy
26 does not generate uniform practices.”). JCL Dec., ¶ 22.

27 Taking into account the new policies implemented in 2021, Plaintiff estimates that his claim
28 for rest period violations was potentially worth approximately \$396,000. This was calculated by

1 multiplying 36% of the number of total pay periods by a violation rate of \$50. The 36% violation rate
2 reflects Defendants’ argument that it implemented revised, compliant meal and rest break policies
3 approximately one year into the 33-month PAGA Period. JCL Dec., ¶ 23. The \$50 penalty rate was
4 used for a number of reasons in this instance. First, Defendants argued that increased civil penalties
5 for subsequent violations do not apply unless the plaintiff can present evidence that the Labor
6 Commission or a court notified the employer that it was in violation of the Labor Code. *Amaral v.*
7 *Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209 [“Until the employer has been notified that it
8 is violating a Labor Code provision ... the employer cannot be presumed to be aware that its continuing
9 underpayment of employees is a ‘violation’ subject to penalties.”].) Separately, Defendants also
10 argued that courts have considerable discretion to reduce the penalty awards under PAGA. *See, e.g.*
11 *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (reducing the maximum PAGA penalty
12 amount by 90%, at \$5 per pay period). Accordingly, it is unlikely that Plaintiff would recover full
13 penalty amounts even if they prevailed in establishing the underlying Labor Code violations. Pursuant
14 to California Labor Code section 558(a)(1), an employer is subject to a penalty of \$50 for violations
15 of a Labor Code section regulating hours and days of work, including meal period and rest period
16 violations. Thus, because section 558(a)(1) specifically provides for a civil penalty, Plaintiff used a
17 \$50 penalty per violation for the meal and rest break claims. JCL Dec., ¶ 24.

18 **ii. Estimated Penalties for Meal Period Violations**

19 Plaintiff also alleges that Defendants unlawfully required blanket on-duty meal break waivers
20 in advance from non-exempt security guards, regardless of the working conditions at particular sites.
21 An on-duty meal period is not a waiver of an off-duty meal period, but rather “a type of meal period
22 that can be lawfully provided only in those circumstances in which the three conditions set forth in
23 [the regulation] are satisfied.” *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 959 (9th Cir. 2013)
24 (quoting DLSE Opinion Letter 2009.06.09 at 8). The standard is laid out in *Lubin v. Wackenhut*
25 *Corporation*, 5 Cal.App.5th 926, 947 (2016), which established that the type of work, the availability
26 of other employees to provide relief to an employee during a meal period, the potential consequences
27 to the employer if the employee is relieved of all duty, the ability of the employer to anticipate and
28 mitigate these consequences such as by scheduling the work in a manner that would allow the

1 employee to take an off-duty meal break, and whether the work product or process will be destroyed
2 or damaged by relieving the employee of all duty are all factors considered to determine whether an
3 on-duty meal period is required. As noted above, Defendants argued that it adopted new, compliant
4 policies related to rest and meal breaks in 2021, about one year into the PAGA Period. JCL Dec., ¶
5 25.

6 Plaintiff's expert estimated the damages for this claim at \$396,000. JCL Dec. ¶ 26. This
7 number was calculated by multiplying a 36% violation rate of the number of total pay periods by a
8 violation rate of \$50. The 36% violation rate and \$50 penalty rate were used for the same reasons as
9 stated above. JCL Dec., ¶ 26.

10 **iii. Estimated Penalties for Unpaid Minimum Wages**

11 Plaintiff alleged unpaid minimum wages based on two separate theories: First, Plaintiff alleged
12 that Defendants required employees to undergo mandatory COVID screenings including a temperature
13 check and completing a questionnaire before being allowed to clock in for their shifts. Accordingly,
14 employees were not compensated for this time, even though this time was spent at Defendants'
15 direction and under Defendants' control. Such practice runs afoul of California law requiring
16 employees to be compensated for all time spent under an employer's control. JCL Dec., ¶ 27.

17 Second, Plaintiff alleged that Defendants failed to properly record and maintain records of the
18 actual hours worked by their employees. Specifically, the records provided by Defendant show a
19 rounded total of either eight or ten hours worked per employee per day. Plaintiff alleged that
20 Defendants not only rounded time, but failed to maintain any records of the actual time worked by
21 employees. Accordingly, Plaintiff contended that Defendants "rounding" practice is neither fair nor
22 neutral because Plaintiff and Aggrieved Employees forfeited compensation for all hours worked,
23 resulting in a direct benefit to Defendant. Defendants argued that the Aggrieved Employees were
24 tasked with including the accurate number of hours worked on their own timesheets, thus Defendants
25 did not employ a rounding system, and to the extent time was in fact rounded, this was done so by the
26 employees themselves. JCL Dec., ¶ 28.

27 Plaintiff's expert estimated that Defendants' total exposure for this claim was approximately
28 \$2,200,000 in penalties. This was calculated by assuming that each of the 22,000 pay periods worked

1 in total during the PAGA Period by the Aggrieved Employees included at least one instance in which
2 the Aggrieved Employee was not paid minimum wage. JCL Dec., ¶ 29.

3 **iv. Estimated Liability for Defendants' Violation of Labor Code §2802**

4 Plaintiff alleged that Defendants required Plaintiff and the Aggrieved Employees to maintain
5 uniforms that are neat, clean, and wrinkle free. In order to do so, Plaintiff and the Aggrieved
6 Employees were required to incur additional expenses to maintain the uniforms for which they were
7 not reimbursed or compensated. Defendants denied any liability for this claim. Defendants argued that
8 on the rare occasions where employees did incur business expenses, these expenses were fully
9 reimbursed. JCL Dec., ¶ 30.

10 Plaintiff's expert estimated that Defendants' total exposure for this claim was approximately
11 \$550,000 in penalties. This was calculated by multiplying 25% by the total number of pay periods by
12 a violation rate of \$100 per pay period. Plaintiff used a 25% violation rate for this claim to reflect its
13 belief that Aggrieved Employees incurred expenses to clean and maintain their uniforms
14 approximately once per month. JCL Dec., ¶ 31.

15 **v. Estimated Derivative Penalties for Wage Statement Violations**

16 Plaintiff alleged that Defendants failed to provide accurate itemized wage statements that
17 include all items required by Labor Code § 226(a)(1-9). As a result of the failure to pay employees for
18 all time worked, and failure to pay for all premiums owed, the wage statements issued by Defendants
19 do not indicate the correct number of hours worked, the amount of gross wages earned, or net wages
20 earned during each pay period. Plaintiff's expert estimated that Defendant could be liable for
21 \$2,200,000 in *derivative* PAGA penalties as a result of these violations. JCL Dec., ¶ 32.

22 **vi. The Gross Settlement Compares Favorably to The Likely Recover**

23 In light of the above, the Gross Settlement Amount is approximately 41.6% of Defendants'
24 potential unstacked PAGA exposure, and 25.6% of Defendants' potential stacked PAGA exposure.
25 The Gross Settlement Amount compares favorably to the likely recovery of PAGA penalties through
26 continued litigation. JCL Dec., ¶ 18.

27 Defendants' maximum exposure to PAGA penalties is not a realistic outcome of the litigation
28 because it fails to account for the risks of continued litigation including, but not limited to, Defendants'

1 defenses. Here, Defendants argued that it can only be assessed civil penalties for actual violations of
2 the Labor Code. *See* Lab. Code § 2699(f)(2). In other words, to recover any civil penalties, Plaintiff
3 would be required to prove the underlying Labor Code violations. (*Cardenas v. McLane Foodservice,*
4 *Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) [“Given the statutory language [of PAGA],
5 a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a
6 violation of the Labor Code by the defendant.”].) To do this, Plaintiff would need to prove each
7 Aggrieved Employee was subject to the alleged Labor Code violation. JCL Decl., ¶ 33. Thus,
8 Defendants contended that Plaintiff would be required to “prove Labor Code violations with respect
9 to each and every individual on whose behalf plaintiff seeks to recover civil penalties under PAGA.”
10 *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2, 2009). When
11 “determining whether the employer committed Labor Code violations with respect to each employee”
12 is impractical, the PAGA action can be dismissed. *Wesson v. Staples the Off. Superstore*, 2021 WL
13 4099059, *11 (Cal. Ct. App. Sept. 9, 2021). JCL Decl., ¶ 34.

14 Second, Defendants contended that PAGA actions with numerous employees, many locations,
15 and different types of employees are not manageable and may be dismissed on that basis. *See, Wesson*
16 *v. Staples the Office Superstore*, (2021) 68 Cal.App.5th 746 (holding that courts can dismiss PAGA
17 claims if significant variation exists among aggrieved employees, who have unique factual situations)
18 *see also, Ortiz v. CVS Caremark Corp.* (N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 36833 (dismissing
19 PAGA claim as unmanageable because “a multitude of individualized assessments would be
20 necessary”); *Lifty v. Merrill Lynch & Co.* (C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 160448 (striking
21 PAGA claim as unmanageable because “individualized issues predominate in this action” and a
22 “multitude of individualized assessments would be necessary”); *Amiri v. Cox Communs. Cal., LLC*
23 (C.D. Cal.) 272 F.Supp.3d 1187, 1194 (striking PAGA claim as unmanageable). JCL Decl., ¶ 35.
24 Here, with nearly 1,000 Aggrieved Employees working at different locations and in different types of
25 jobs, Defendants asserted that Plaintiff’s theories were unmanageable. *Cf. Estrada v. Royalty Carpet*
26 *Mills, Inc.*, (Cal.App. 4th Dist. March 30, 2022) (disagreeing with *Wesson* and creating a split among
27 the Courts of Appeal on whether manageability is a prerequisite to bringing a PAGA claim). JCL Dec.,
28 ¶ 36.

1 Third, a ballot initiative to eliminate PAGA has qualified for the 2024 ballot.
2 See [https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-](https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-2024-ballot/)
3 [2024-ballot/](https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-2024-ballot/). If this initiative passes, it will effectively repeal PAGA by taking away the ability to
4 pursue civil penalties via a representative action. Plaintiff views this initiative as a significant
5 additional risk due to the potential limitation on their ability to recover penalties against Defendants
6 should litigation continue. JCL Dec., ¶ 37.

7 Finally, the maximum penalty figure does not consider that Courts have complete discretion
8 to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on
9 the facts and circumstances of the particular case, to do otherwise would result in an award that is
10 unjust, arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code § 2699(e)(2)). JCL Dec., ¶ 38. In
11 fact, Courts routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g.*
12 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (reducing PAGA penalties to \$5 per
13 pay period; “Although the trial court may have disagreed with Starbucks regarding the issue of
14 liability, it clearly took the circumstances proffered by Starbucks into consideration when it imposed
15 the penalty ... only \$5 per initial violation”); *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal App 5th
16 778, 788 (2018), review granted on other grounds (noting that the trial court “exercised its discretion
17 to reduce the [PAGA] penalties to 13 percent of the full amount [requested, because] [o]n average,
18 plaintiffs were deprived of 13 percent of the 30-minute meal period”); *Fleming v. Covidien, Inc.*, 2011
19 WL 7563047, *4 (C.D. Cal. 2011) (exercising discretion to reduce the maximum amount of PAGA
20 civil penalties for plaintiffs’ section 226 claims from \$2,800,000 to \$500,000 because the employees
21 suffered no injuries as a result of the erroneous wage statements and made no complaints about the
22 errors or omissions in the wage statements, thus reducing the maximum penalty by 82%); *see also*,
23 *Gola v. University of San Francisco*, San Francisco Superior Court Case No. CGC-18-5655018,
24 Proposed Statement of Decision, dated July 21, 2020, Judge Curtis A. Karnow of San Francisco
25 Complex (concluding after a full-blown bench trial that a penalty of 15% of the maximum PAGA
26 penalties was the appropriate penalty). The gross amount obtained by Plaintiff’s Counsel is reasonable
27 in light Defendants’ arguments. Further, the adverse decision in *Wesson* poses very significant, and
28 even fatal, risk to Plaintiff’s case. JCL Dec., ¶ 39

Given Defendants' defenses to the claimed Labor Code violations at issue, and the risks and costs of continued litigation, Plaintiff and Plaintiff's Counsel believe that the Gross Settlement Amount is fair and reasonable. This settlement was negotiated by experienced counsel at arm's length. JCL Dec., ¶ 40. The LWDA has been provided notice of this motion and the PAGA settlement, and the decision of LWDA to accept the PAGA settlement and not oppose the motion should be given considerable weight. Moreover, the LWDA is a sophisticated government entity that can assert and protect its own rights. JCL Dec., ¶ 41.

B. The Remaining Settlement Terms Are Fair and Reasonable

Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code § 2699(1) does not require that a court approve any other elements of the proposed settlement. Because there are no class allegations for which Plaintiff seeks approval, the approval provisions applicable to class settlements under Cal. Code Civil Proc. § 382 do not apply. Accordingly, the Court only needs to approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as explained herein, the settlement terms for attorneys' fees and costs are reasonable.

i. The Attorneys' Fees and Expenses are Fair and Reasonable

Plaintiff's Counsel seeks approval of Attorneys' Fees in the amount of \$491,666.66 (one-third of the Gross Settlement Amount) and Attorneys' Expenses not to exceed \$20,000.00⁴ for reimbursement of actually incurred litigation expenses. PAGA does not have any requirements for reviewing attorneys' fees, and Plaintiff's position is that the payment of attorneys' fees and costs in this Settlement is a matter of contract for a contingent representation. Nevertheless, should this Court review the requested attorneys' fees, the requested fees and costs are reasonable for experienced wage and hour counsel. JCL Dec., ¶ 42.

V. THE ATTORNEYS' FEES AND EXPENSES ARE FAIR AND REASONABLE

A. The Requested Attorneys' Fee is Fair and Reasonable

The requested Attorneys' Fee of \$491,666.66 and reimbursement of Attorneys' Expenses of up to \$20,000.00 is fair, reasonable, and justified by the result achieved. JCL Dec., ¶42. Plaintiff's

⁴ As detailed *infra*, at the time of filing this motion, Plaintiff's Counsel incurred \$12,510.70 litigating this matter. Plaintiff will provide the Court with a final amount of litigation costs at the time of hearing on this motion.

1 Counsel negotiated a recovery of \$1,475,000.00, and this result justifies the requested fees equal to
2 one third of this recovery. This percentage is the standard contingent recovery percentage of one-
3 third, and this percentage is what was expressly approved by the Supreme Court in *Laffitte v. Robert*
4 *Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016). At the time this case was brought, the result was far from
5 certain. Defendants' defenses to the merits of the case created difficulties with proof and complex
6 legal issues for Plaintiff's Counsel to overcome. Here, as noted above in section IV(A), several
7 defenses asserted by Defendants present serious threats to the claims of Plaintiff and the Aggrieved
8 Employees. While Plaintiff believes that these defenses could be overcome, Defendants maintain that
9 these defenses have merit and therefore present a serious risk to recovery. The Settlement was possible
10 because, in Plaintiff's Counsel's eyes, Plaintiff's Counsel was able to persuade Defendants that there
11 was an appreciable risk that Plaintiff would prevail on the factual and legal issues underlying liability
12 and overcome difficulties in proof as to monetary relief. JCL Dec., ¶ 43.

13 Further, the fee award is justified by the work performed. Generally, the Ninth Circuit and
14 California Courts award multipliers between 2 to 4 times the lodestar to reward counsel for accepting
15 the contingent risks of the litigation or obtaining good results. See, e.g., *Laffitte*, 1 Cal. 5th at 506
16 (approving one-third fee award with multiplier between 2.03 and 2.13); *Pellegrino v. Robert Half*
17 *Intern., Inc.*, 182 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0 are often applied
18 and affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001)
19 (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa Capital Corp.*, 8
20 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.52 multiplier of
21 lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-third
22 of fund, which was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-
23 LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented a
24 multiplier of 2.76 as falling within the "majority" range for risk multipliers).

25 As detailed in Plaintiff's Counsel's time and billing records submitted herewith, Plaintiff's
26 Counsel's current combined lodestar is \$302,570.67. JCL Dec., ¶¶33-38; Declaration of Shani Zakay
27 ("Zakay Dec.") at ¶¶ 4-6. Thus, Plaintiff's Counsel's fee request is equal to Plaintiff's Counsel's
28 lodestar with a negligible multiplier of 1.6 – well below the 2.13 multiplier approved in *Laffitte* – and

1 well within the recognized multiplier range between 2 and 4. See also *Taylor v. FedEx Freight, Inc.*,
2 2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016) (following *Laffitte*, approved 30% fee award with
3 cross-check lodestar multiplier of 2.26); *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, 2017 U.S.
4 Dist. LEXIS 27249 (E.D. Cal. 2017) (following *Laffitte*, approved 33% fee award with cross-check
5 lodestar multiplier of 1.7).

6 **B. Plaintiff's Counsel Are Entitled to Reimbursement of Actual and Reasonably**
7 **Incurred Litigation Costs.**

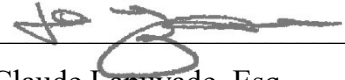
8 Attorneys who create a common fund for the benefit of a class are entitled to payment from
9 the fund of reasonable litigation expenses and costs. Common fund fee and expense awards include
10 counsel's incurred expenses because those who benefit from their effort should share in the cost. See
11 *Rider v. City of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992). The appropriate analysis in
12 deciding if costs are compensable is whether the costs are of the type typically billed by attorneys to
13 paying clients in the marketplace. See *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); see also
14 *Hartless*, 273 F.R.D. at 645-46 (common fund class action settlement where court awarded litigation
15 costs for consultants, online legal research, copying, postage, long distance charges, travel expenses,
16 filing fees, mediation fees and investigation fees). Prior to incurring costs for the filing of this motion,
17 Plaintiff's Counsel collectively expended \$12,510.70 prosecuting this action (JCL Law Firm, APC -
18 \$6,982.42 and Zakay Law Group, APLC - \$5,528.28). JCL Decl. ¶¶ 7, 39; Zakay Dec., ¶¶ 7-8.
19 Plaintiff's Counsel's out-of-pocket expenses are the types of expenses normally charged to paying
20 clients including the following: filing fees; copying; postage; factual and legal research charges;
21 mediation fees; and expert costs, which were all incurred during, and were necessary for the
22 successful prosecution of, the litigation and, therefore, should be reimbursed. JCL Dec. ¶¶ 6, 40.

23 **V. CONCLUSION**

24 Based on the foregoing, Plaintiff respectfully requests this Court approve the PAGA Settlement
25 as set forth in the Settlement Agreement and enter the proposed order and judgment submitted
26 herewith.

27 Dated: August 22, 2023

JCL LAW FIRM, APC

28 By: 
Jean-Claude Lapuyade, Esq.