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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

JACOB GRIFFIN, on behalf of the State of
California, as a private attorney general,

Plaintiff,

vs.

COURTESY CHEVROLET CENTER, a
California Corporation; and DOES 1 through 10,
inclusive,

Defendants.

Case No. 37-2022-00005485-CU-OE-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO APPROVE PAGA
SETTLEMENT AND JUDGMENT**

Date: July 7, 2023

Time: 10:30 a.m.

Dept.: C-64

Judge: Hon. Loren G. Freestone

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jacob Griffin (“Plaintiff”) reached a settlement of the California Labor Code Private
4 Attorneys General Act of 2004, Cal. Labor Code §2699, *et seq.* (“PAGA”) claim asserted in this action
5 against Defendant Courtesy Chevrolet Center (“Defendant”) (collectively, the “Parties”). In
6 accordance with California Labor Code § 2699(l), Plaintiff now asks this Court to review and approve
7 the settlement of Plaintiff’s PAGA claims¹. The PAGA settlement is fair, reasonable, and adequate
8 as to the Aggrieved Employees and satisfies all statutory criteria for approval. This is only a settlement
9 of the PAGA claims for civil penalties and is not a class settlement and does not release the individual
10 wage claims, if any, of the affected employees other than Plaintiff himself. Cal. Labor Code §
11 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*,
12 8 Cal. 5th 175, 182 (2019) (unpaid wages are not recoverable under PAGA).

13 The PAGA Settlement is set forth in the accompanying Joint Stipulation of Settlement of
14 PAGA Action and Release of PAGA Claims (“Settlement Agreement”). A true and correct copy of
15 the Settlement Agreement which sets forth the terms for the settlement of the PAGA claims is attached
16 as Exhibit #1 to the Declaration of Shani O. Zakay (“Zakay Dec.”), filed herewith. Capitalized terms
17 shall have the same meaning as defined in the Settlement Agreement. The LWDA received notice of
18 this settlement and this motion as set forth in the Zakay Dec. A proposed order confirming review
19 and approval of the PAGA Settlement is submitted herewith.

20 **II. RELEVANT FACTS**

21 Plaintiff was employed by Defendant as a non-exempt employee in California during the
22 PAGA Period of December 7, 2020 to April 1, 2023. On December 7, 2021, Plaintiff, on behalf of
23 himself and on behalf of other “Aggrieved Employees” submitted a notice and draft complaint to the
24 LWDA memorializing claims against Defendant for alleged violations of the California Labor Code,
25 including claims for failure to pay all minimum, regular, and overtime wages in violation of Labor
26 Code sections 510, 1194, 1197, and 1197.1; failure to provide compliant meal periods or compensation
27

28 ¹ Section 2699(1)(2) provides as follows: “The superior court shall review and approve any settlement of any civil action pursuant to this part.”

1 in lieu thereof in violation of Labor Code sections 226.7, and 512; failure to provide compliant rest
2 periods or compensation in lieu thereof in violation of Labor Code sections 226.7 and 512; failure to
3 provide accurate itemized wage statements in violation of Labor Code section 226; claims for
4 violations of Labor Code sections 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.2, 226.3,
5 226.7, 246, 510, 512, 558, 1174(d), 1174.5, 1194, 1197, 1197.1, 1197.14, 1198, 1199, 2802, and 2804;
6 Violation of the applicable Industrial Welfare Commission Wage Order(s); and claims for civil
7 penalties and other relief pursuant to Labor Code section 2699, and the sections preceding and
8 following section 2699. (LWDA Case No. 856431-21.)

9 On February 14, 2022, Plaintiff filed a complaint against Defendant in the Superior Court of
10 San Diego, Case No. 37-2022-00005485-CU-OE-CTL, alleging a single cause of action for violations
11 of PAGA based on the above Labor Code and Wage Order violations. (Zakay Dec. at ¶ 4.)

12 Plaintiff and Defendant agreed to mediate the action with Hon. Brian C. Walsh, (Ret.), an
13 experienced jurist and mediator of wage and hour actions. Prior to the mediation, the Parties engaged
14 in significant informal discovery in order to investigate Plaintiff's claims and to evaluate Defendant's
15 potential liability exposure. As a result, Plaintiff obtained thousands of pages of documents, including
16 but not limited to, Defendant's written wage and hour policies and time and payroll data for the
17 Aggrieved Employees. Based on this extensive discovery, Plaintiff was able to perform damages
18 calculations and assess his claims relevant to Defendant's defenses. (Zakay Dec. at ¶ 5.)

19 Thereafter, on March 15, 2023, the Parties engaged in a full-day mediation with Judge Walsh.
20 At the conclusion of the full-day mediation, the Parties reached a settlement which is memorialized
21 by the Settlement Agreement. The settlement was negotiated in light of all known facts and
22 circumstances and the uncertainty associated with litigation – including the risk of Plaintiff not being
23 able to maintain representative claims and establishing manageability, the difficulty of proving
24 Plaintiff's claims in a manageable trial, the merits of Defendant's potential defenses, and the
25 significant delay and potential appellate issues inherent to litigation – and was reached after extensive
26 arm's length negotiations, with the assistance of Judge Walsh. (Zakay Dec. at ¶ 6.)

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

28 The PAGA Settlement is subject to Court approval consistent with Labor Code § 2699(1)(2).

(Settlement Agreement at III(C).) The Settlement Agreement negotiated by the Parties provides for a “Gross Settlement Amount” payment in the amount of \$230,000.00 to resolve the PAGA claims (hereinafter referred to as the “PAGA Settlement”). From this PAGA Settlement of \$230,000.00, there is a deduction of a Plaintiff’s Counsel Award for attorneys’ fees in the amount of \$76,666.67 (which is one-third of the PAGA Settlement), plus costs and expenses not to exceed \$15,000.00, and payment of Settlement Administration Costs estimated in the amount of \$5,000.00. (Settlement Agreement at III(I)(8)-(9).) After these deductions, the amount remaining – \$133,333.33 – is the “Net Settlement Amount.” (Settlement Agreement at I(K).) (Zakay Dec. at ¶ 7.)

Of the Net Settlement Amount, seventy-five percent (75%) will be paid to the LWDA, and the remaining twenty-five percent (25%) will be paid to the Aggrieved Employees. (Settlement Agreement at I(K).)² This 75/25 allocation is required by Labor Code § 2699 as explained by *ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019). (Zakay Dec. at ¶ 8.)

The individual PAGA payment for each Aggrieved Employee shall be based on the number of pay periods each Aggrieved Employee worked during the PAGA Period as a percentage of the total pay periods worked by all Aggrieved Employees during the PAGA Period. (Settlement Agreement at III(I)(1).) The PAGA Period is the time period December 7, 2020 to April 1, 2023. (Settlement Agreement at I(O).) (Zakay Dec. at ¶ 9.)

Defendant provided that there were 232 Aggrieved Employees who collectively worked 7,480 pay periods during the PAGA Period. (Settlement Agreement at III(A)(2).) (Zakay Dec. at ¶ 10.)

A. Release of Claims

Upon entry of the final judgment and funding of the Gross Settlement Amount in full, in exchange for the consideration set forth in the Agreement, the Plaintiff, the LWDA and the State of California shall release the Defendant from the PAGA Released Claims for the PAGA Period. “Released PAGA Claims” means all PAGA claims based on the factual or legal theories that were alleged in the operative First Amended Complaint and Plaintiff’s PAGA Notice and Amended PAGA Notice to the LWDA, or that reasonably could have been alleged based on the facts, legal theories,

² “Aggrieved Employees” means individuals employed by Defendant as non-exempt employees in California during the PAGA Period. (Settlement Agreement at I(B).)

1 Labor Code sections, and primary rights at issue in the First Amended Complaint or Plaintiff's PAGA
2 Notice and Amended PAGA notice, including PAGA Penalties for the: failure to pay minimum,
3 overtime, and sick pay wages; failure to provide complaint meal and rest periods and meal and rest
4 break premium payments; failure to provide accurate itemized wage statements; failure to pay at the
5 correct regular rate of pay; failure to pay for all time worked; failure to timely pay wages; failure to
6 reimburse for business expenses; making unlawful deductions from compensation, and any other
7 PAGA claims or PAGA penalties under the wage and hour laws pleaded in the Action which occurred
8 during the PAGA Period and expressly excluding all other claims, including claims for vested benefits,
9 wrongful termination, unemployment insurance, disability, social security, workers' compensation,
10 and PAGA claims outside of the PAGA Period. The release of claims for PAGA penalties shall bind
11 only the named Plaintiff, the Aggrieved Employees, and the State of California. (Settlement
12 Agreement at I(V).) (Zakay Dec. at ¶ 11.)

13 Defendant shall pay, via wire transfer or check, the Gross Settlement Amount to the Settlement
14 Administrator on or before the Funding Date. (Settlement Agreement at III(A)(3).) Defendant will
15 provide the Employee Data to the Settlement Administrator (Apex Class Actions) no later than five
16 (5) calendar days after the Effective Date. (Settlement Agreement at III(H).) The Settlement
17 Administrator will mail the individual Aggrieved Employee Payments by regular First-Class U.S. Mail
18 to the Aggrieved Employees' last known mailing address no later than five (5) calendar days after the
19 Funding Date. (Settlement Agreement at III(I)(4).) Any individual Aggrieved Employee Payments
20 returned to the Settlement Administrator as non-delivered on or before the check cashing expiration
21 deadline shall be re-mailed to any forwarding address provided. (Settlement Agreement at III(I)(5).)
22 If no forwarding address is provided, the Settlement Administrator shall promptly attempt to determine
23 a correct address by lawful use of skip-tracing, or other similar search, and shall then perform a re-
24 mailing. (*Id.*) Checks will remain valid and negotiable for one hundred eighty (180) days from the
25 date of their issuance. (Settlement Agreement at III(I)(6).) Aggrieved Employees who received a re-
26 mailed individual Aggrieved Employee payment shall have their check expiration deadline extended
27 fifteen (15) days from the original check expiration deadline. (Settlement Agreement at III(I)(5).) If
28 an Aggrieved Employee does not cash his or her settlement check within ninety (90) days, the

1 Settlement Administrator will send a letter to such persons, advising that the check will expire after
2 the 180th day, and invite that Aggrieved Employee to request reissuance in the event the check was
3 destroyed, lost, or misplaced. (Settlement Agreement at III(I)(6).) In the event Aggrieved Employee
4 payment checks have not been cashed within one hundred and eighty (180) days, all funds represented
5 by such uncashed checks, plus any interest accrued thereon, shall be transmitted to the State Controller
6 Fund in the name of the absent Aggrieved Employee. (Settlement Agreement at III(I)(6).) The
7 individual PAGA payments are 100% penalties and shall be reported using IRS tax form 1099.
8 (Settlement Agreement III(I)(2).) (Zakay Dec. at ¶ 12.)

9 Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of the
10 Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant motion
11 for settlement approval as set forth in the accompanying proof of service in compliance with Labor
12 Code section 2699(1). In addition, Plaintiff will submit to the LWDA a copy of the Court's judgment
13 and order approving the Settlement Agreement within ten (10) days after entry of judgment or order.
14 (Zakay Dec. at ¶ 13.)

15 **IV. THE PARTIES HAVE SETTLED THE PAGA CLAIMS**

16 The claim before this Court is a representative claim under the PAGA on behalf of the State of
17 California for civil penalties pursuant to the PAGA. The Parties have agreed to settle the PAGA claims
18 in their entirety after significant informal discovery, and an arm's length mediation. The settlement is
19 intended to fully and finally resolve the Released Claims asserted by Plaintiff on behalf of the State of
20 California. This is only a settlement of the PAGA claims for civil penalties and is not a class settlement
21 and does not release the individual claims, if any, of the Aggrieved Employees. This settlement does
22 not release any claim that is not a PAGA claim.³ Attorneys' fees equal to one-third of the PAGA
23 Settlement amount (\$76,666.67) and litigation expenses in an amount not to exceed \$15,000.00 will
24 also be paid to Plaintiff's Counsel as part of the settlement in accordance with California Labor Code
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28 ³ As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th 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 § 2699(g)(1) as set forth in the Settlement Agreement.⁴ Lastly, payment to the Settlement
2 Administrator estimated in the amount of \$5,000 to perform the administrative duties to distribute the
3 settlement money shall also be paid. (Zakay Dec. at ¶ 14.)

4 **V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE SETTLEMENT**
5 **OF THE PAGA CLAIMS**

6 Labor Code § 2699(l) requires that the Court “shall review and approve any settlement of any
7 civil [PAGA] action filed pursuant to this part. Further, the Court in *Moniz v. Adecco USA, Inc.* (2021)
8 72 Cal.App.5th 56, 77 stated that “the trial court must review and approve a PAGA settlement (§ 2699,
9 subd.(l)(2)), and the Supreme Court has in dictum referred to this review as a safeguard.” (Citing *Kim*
10 *v. Reins Int’l California, Inc.* (2020) 9 Cal.5th 73, 88; internal quotations omitted.) “The Supreme
11 Court has also observed that trial court approval ensures that any negotiated resolution is fair to those
12 affected,” leading the Court in *Moniz* to determine that “adoption of a standard of review for
13 settlements that prevents fraud, collusion or unfairness, and protects the interests of the public and the
14 LWDA in the enforcement of state labor laws is warranted.” (*Moniz, supra*, 72 Cal.App.5th at 77;
15 citing *Williams v. Super. Ct.* (2017) 3 Cal.5th 531, 549; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
16 1794, 1800–01; internal citations omitted.) In other words, “[i]n review and approval of a proposed
17 settlement under section 2699, subd. (l)(2), a trial court thus must scrutinize whether, in resolving the
18 action, a PAGA plaintiff has adequately represented the state’s interests, and hence the public interest.”
19 (*Moniz, supra*, 72 Cal.App.5th at 88.) The proposed settlement shall be submitted to the agency at the
20 same time that it is submitted to the court. Consequently, the Parties respectfully ask the Court to
21 review and approve the settlement of the PAGA claims and the PAGA Settlement amount to be paid
22 as part of the proposed settlement.

23 **A. The PAGA Settlement Amount to Be Paid Is Fair and Reasonable**

24 The Gross Settlement Amount of \$230,000.00 is fair and reasonable and, therefore, should be
25 approved. Zakay Dec., ¶ 15. Here, *without stacking* the PAGA penalties, Defendant’s *maximum*
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27 ⁴ As set forth in the accompanying Zakay Dec., Plaintiff’s Counsel incurred costs in the current
28 amount of \$9,118.35, which is less than the cost allocation in the Settlement Agreement. See Zakay
Dec. at ¶ 41.

liability exposure is estimated at approximately \$748,000 in PAGA penalties (7,480 pay periods multiplied by \$100 per pay period⁵). Zakay Dec., ¶ 16. Assuming the Court permitted Plaintiff to stack PAGA penalties, Plaintiff's third-party damages consultant estimated Defendant's maximum liability exposure at approximately \$1,822,200. Plaintiff's consultant estimated Defendant's exposure as follows:

Claim	Penalty Amount ⁶	Number of Pay Periods w/ Violation	Violation Rate	Total Penalties
<i>Rest Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	4,197	56.1% of PAGA Pay Periods	\$209,850
<i>Meal Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	4,197	56.1% of PAGA Pay Periods	\$209,850
<i>Wage Statement Violations</i> Cal. Labor Code §§ 226 and 226.2	\$100	7,480	100% of PAGA Pay Periods	\$748,000
<i>Unpaid Wages Violations</i> Cal. Labor Code §§ 201, 202, 203, 204, 1194, 1197, 1997.1, 1198 and 558	\$100	2,805	100% of PAGA Pay Periods	\$280,500
<i>Unreimbursed Business Expense Violations</i> <u>Cal. Labor Code § 2802</u>	\$100	3,740	100% of PAGA Pay Periods	\$374,000

Zakay Dec., ¶ 17.

i. Estimated Penalties for Rest Period Violations

Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically, Plaintiff alleged that because of their rigorous work schedules and written policy that rest periods could be waived, Plaintiff and PAGA Members were not able to take timely and duty-free rest periods. Zakay Dec., ¶ 18. Lab. Code § 226.7(c) provides that "if an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including ... an ... order of the Industrial

⁵ California Labor Code section 2699(f)(2) provides the default penalty for PAGA violations of \$100 for initial violations and \$200 for subsequent violations.

⁶ In *Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144, the court decided that "[u]ntil the employer has been notified that it is violating a Labor Code provision ... the employer cannot be presumed to be aware that its continuing underpayment of employees is a 'violation' subject to penalties." Therefore, Plaintiff used only penalties for initial violations.

1 Welfare Commission, the employer shall pay the employee one additional hour of pay at the
2 employee's regular rate of compensation for each workday that the meal or rest or recovery period is
3 not provided." Plaintiff's expert identified a 56.1% violation rate for meal periods based upon the
4 expert's review of time and payroll records. Plaintiff's expert analysis did not, however, consider
5 instances where meal periods were non-compliant because an employee voluntarily waived a
6 compliant break. Because rest periods are not recorded, Plaintiff's expert could not identify a violation
7 rate. Plaintiff therefore made the reasonable assumption that rest period violations were committed at
8 a rate similar to that of meal period violations. Zakay Dec., ¶ 19.

9 Defendant argued that its written policy regarding the waiver of rest breaks was not enforced
10 in practice and that Plaintiff's rest break claim would have mainly relied on the testimony of PAGA
11 Members, making it a riskier claim. Establishing liability likely would have entailed competing
12 testimony stating either rest breaks were taken, or rest breaks were voluntarily waived. *See, e.g.,*
13 *Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the
14 competing testimony before the Court, plaintiff's evidence that defendant may have an illegal, written
15 rest break policy is insufficient for this Court to find that common issues predominate."); *Villa v.*
16 *United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed,
17 Plaintiff's own evidence confirms that the written policy does not generate uniform practices."). Zakay
18 Dec., ¶ 20.

19 Based on an estimated 56.1% violation rate, Plaintiff contended that his claim for rest period
20 violations was potentially worth approximately \$209,850 dollars. This was calculated by multiplying
21 the number of total pay periods with a rest period violation by a violation rate of \$50 dollars. The \$50
22 penalty rate was used for a number of reasons in this instance. First, Defendant argued that increased
23 civil penalties for subsequent violations do not apply unless the Plaintiff can present evidence that the
24 Labor Commission or a court notified the employer that it was in violation of the Labor Code.
25 *Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144 citing *Amaral v. Cintas Corp. No. 2* (2008)
26 163 Cal.App.4th 1157, 1209 ["Until the employer has been notified that it is violating a Labor Code
27 provision ... the employer cannot be presumed to be aware that its continuing underpayment of
28 employees is a 'violation' subject to penalties."].) Separately, Defendant also argued that courts have

1 considerable discretion to reduce the penalty awards under PAGA. *See, e.g. Carrington v. Starbucks*
2 *Corp.* (2018) 30 Cal.App.5th 504 (reducing the maximum PAGA penalty amount by 90%, at \$5 per
3 pay period). Accordingly, it is unlikely that Plaintiff would recover full penalty amounts even if he
4 prevailed in establishing the underlying Labor Code violations. Pursuant to California Labor Code
5 section 558(a)(1), an employer is subject to a penalty of \$50 for violations of a Labor Code section
6 regulating hours and days of work, including meal period and rest period violations. Thus, because
7 section 558(a)(1) specifically provides for a civil penalty, Plaintiff used a \$50 penalty per violation for
8 the meal and rest break claims. Zakay Dec., ¶ 21.

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

10 Plaintiff also alleged that Defendant's time records reflected non-compliant meal periods, and
11 that Plaintiff and other PAGA Members were encouraged to work through their meal period.
12 Additionally, Plaintiff's expert found that 96.9% of shifts between 10 and 12 hours were without a
13 recorded second meal period. Conversely, Defendant asserted that it maintained facially compliant
14 meal period policies and practices throughout the PAGA Period. Thus, Defendant argued that there
15 was no potential liability for Plaintiff's alleged meal period violations. Plaintiff estimated the damages
16 for this claim at \$209,850. This number was calculated by multiplying the number of total pay periods
17 where there was a meal period violation by a violation rate of \$50 dollars. The \$50 penalty rate was
18 used for the same reasons as stated above. Zakay Dec., ¶ 22.

19 **iii. Estimated Penalties for Defendant's Inaccurate Wage Statements**

20 Plaintiff alleged derivative wage statement violations based on Defendant's failure to provide
21 meal and rest periods. Plaintiff's expert estimated that Defendant's exposure for this claim was
22 approximately \$748,000 in penalties. This was calculated by multiplying the total number of pay
23 periods by a violation rate of \$100 per pay period. Plaintiff assumed a 100% violation rate for
24 inaccurate wage statements upon the derivative wage statement penalties as a result of Defendant's
25 failure to provide meal and rest periods. Plaintiff's Counsel considered the arguable presence of
26 various penalties and weighed the potential recoveries against probable defenses. Specifically,
27 Defendant could also argue that that meal and rest period violations do not entitle employees like
28 Plaintiff and the PAGA Members to pursue the derivative itemized wage statement penalties. (*Naranjo*

1 *v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 927). Plaintiff could not give the penalty
2 claims great weight given that they depended on proving the underlying claims, which had their own
3 risks. Zakay Dec., ¶ 23.

4 **iv. Estimated Penalties for Unpaid Wages**

5 Plaintiff also alleged that Defendant failed to pay its employees for all hours worked.
6 Specifically, Plaintiff asserts that Defendant failed to pay employees for time spent undergoing
7 COVID-19 health screenings before being able to clock in for their shifts. Defendant vigorously
8 denied liability for this claim. Defendant argued, among other things, that all PAGA Members were
9 properly paid minimum and overtime compensation for all hours worked and that PAGA Members
10 were instructed not to work off-the-clock. Plaintiff's expert estimated that Defendant's exposure for
11 this claim was approximately \$280,500 in penalties. This number was calculated by multiplying the
12 number of pay periods with a violation by a violation rate of \$100 per pay period. Zakay Dec., ¶ 24.

13 **v. Estimated Penalties for Unreimbursed Business Expenses**

14 Plaintiff further alleged that Defendant required the Aggrieved Employees to regularly pay
15 out-of-pocket to launder their work uniforms and were required to use their personal cell phones in
16 furtherance of their job duties for Defendant. California law requires "[a]n employer shall indemnify
17 his or her employee for all necessary expenditures or losses incurred by the employee in direct
18 consequence of the discharge of his or her duties, or of his or her obedience to the directions of the
19 employer..." (See *Cal. Labor Code* § 2802(a).) Plaintiff's expert estimated Defendant's exposure for
20 this claim was approximately \$374,000 in penalties. Defendant denies it owes any unpaid
21 reimbursements to Class Members. Zakay Dec., ¶ 25.

22 **vi. The Gross Settlement Compares Favorably To The Likely Recovery**

23 In light of the above, the Gross Settlement Amount is approximately 12.6% of Defendant's
24 potential PAGA exposure. The Gross Settlement Amount compares favorably to the likely recovery
25 of PAGA penalties through continued litigation. Zakay Dec., ¶ 26.

26 Defendant's maximum exposure to PAGA penalties is not a realistic outcome of the litigation
27 because it fails to account for the risks of continued litigation including, but not limited to, Defendant's
28 defenses. See, *Zayerz v. Kiewit Infrastructure West*, 2018 U.S. Dist. LEXIS 14918, *14 (C.D. Cal.

1 January 18, 2018). For instance, Defendant contended that Plaintiff’s PAGA claims could be wiped
2 out in the light of the United States Supreme Court decision in *Viking River Cruises v. Moriana*, (2022)
3 142 S.Ct. 1906. Zakay Dec., ¶ 27.

4 In *Viking River*, the U.S. Supreme Court held that PAGA claims are preempted by the Federal
5 Arbitration Act, where, as here, arbitration agreements were signed by the employees. This posed a
6 very significant risk to Plaintiff’s case which was ultimately realized. See *Viking River Cruises v.*
7 *Moriana*, (2022) 142 S.Ct. 1906. Therefore, Plaintiff was mindful that their case could be potentially
8 wiped because of the U.S. Supreme Court’s adverse decision. Plaintiff’s claims are arguably worthless
9 in the post-*Viking River* world. Cf. *Adolph v. Uber Technologies* (California Supreme Court has agreed
10 to examine if SCOTUS relied on an incorrect understanding of California state law in *Viking River*.
11 Specifically, whether the representative side of the PAGA claim can, under state law, continue even
12 if the individual portion of the claim, if any exists, is compelled to arbitration). *Id.* Zakay Dec., ¶ 28.

13 Second, Defendant argued that it can only be assessed civil penalties for actual violations of
14 the Labor Code. See Lab. Code § 2699(f)(2). In other words, to recover any civil penalties, Plaintiff
15 would be required to prove the underlying Labor Code violations. (*Cardenas v. McLane Foodservice,*
16 *Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) [“Given the statutory language [of PAGA],
17 a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a
18 violation of the Labor Code by the defendant.”].) To do this, Plaintiff would need to prove each PAGA
19 Member was subject to the alleged Labor Code violation, which would be difficult to do, since
20 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in this
21 action. Zakay Dec., ¶ 29.

22 Thus, Defendant contended that Plaintiff would be required to “prove Labor Code violations
23 with respect to each and every individual on whose behalf Plaintiff seek to recover civil penalties
24 under PAGA.” *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2, 2009).
25 When “determining whether the employer committed Labor Code violations with respect to each
26 employee” is impractical, the PAGA action can be dismissed. *Wesson v. Staples the Off. Superstore*,
27 2021 WL 4099059, *11 (Cal. Ct. App. Sept. 9, 2021). Zakay Dec., ¶ 30.

28 Third, Defendant contended that PAGA actions with numerous employees, many departments,

1 and different types of employees are not manageable and may be dismissed on that basis. *See, Wesson*
2 *v. Staples the Office Superstore*, (2021) 68 Cal.App.5th 746 (holding that courts can dismiss PAGA
3 claims if significant variation exists among aggrieved employees, who have unique factual situations)
4 *see also, Ortiz v. CVS Caremark Corp.* (N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 36833 (dismissing
5 PAGA claim as unmanageable because “a multitude of individualized assessments would be
6 necessary”); *Lifty v. Merrill Lynch & Co.* (C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 160448 (striking
7 PAGA claim as unmanageable because “individualized issues predominate in this action” and a
8 “multitude of individualized assessments would be necessary”); *Amiri v. Cox Communs. Cal., LLC*
9 (C.D. Cal.) 272 F.Supp.3d 1187, 1194 (striking PAGA claim as unmanageable). Here, with over 1,000
10 PAGA Members working in different types of jobs, Defendant asserted that Plaintiff’s theories were
11 unmanageable. *Cf. Estrada v. Royalty Carpet Mills, Inc.*, (Cal.App. 4th Dist. March 30, 2022)
12 (disagreeing with *Wesson* and creating a split among the Courts of Appeal on whether manageability
13 is a prerequisite to bringing a PAGA claim). Zakay Dec., ¶ 31.

14 Fourth, a ballot initiative to eliminate PAGA has qualified for the 2024 ballot.
15 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/)
16 [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
17 pursue civil penalties via a representative action. Plaintiff views this initiative as a significant
18 additional risk due to the potential limitation on their ability to recover penalties against Defendant
19 should litigation continue. Zakay Dec., ¶ 32.

20 Finally, the maximum penalty figure does not consider that Courts have complete discretion
21 to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on
22 the facts and circumstances of the particular case, to do otherwise would result in an award that is
23 unjust, arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code § 2699(e)(2)). In fact, Courts
24 routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g. Carrington v.*
25 *Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (reducing PAGA penalties to \$5 per pay period;
26 “Although the trial court may have disagreed with Starbucks regarding the issue of liability, it clearly
27 took the circumstances proffered by Starbucks into consideration when it imposed the penalty ... only
28 \$5 per initial violation”); *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal App 5th 778, 788 (2018),

1 review granted on other grounds (noting that the trial court “exercised its discretion to reduce the
2 [PAGA] penalties to 13 percent of the full amount [requested, because] [o]n average, plaintiffs were
3 deprived of 13 percent of the 30-minute meal period”); *Fleming v. Covidien, Inc.*, 2011 WL 7563047,
4 *4 (C.D. Cal. 2011) (exercising discretion to reduce the maximum amount of PAGA civil penalties
5 for plaintiffs’ section 226 claims from \$2,800,000 to \$500,000 because the employees suffered no
6 injuries as a result of the erroneous wage statements and made no complaints about the errors or
7 omissions in the wage statements, thus reducing the maximum penalty by 82%); *see also, Gola v.*
8 *University of San Francisco*, San Francisco Superior Court Case No. CGC-18-5655018, Proposed
9 Statement of Decision, dated July 21, 2020, Judge Curtis A. Karnow of San Francisco Complex
10 (concluding after a full-blown bench trial that a penalty of 15% of the maximum PAGA penalties was
11 the appropriate penalty). Moreover, in *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018),
12 the Court of Appeal affirmed a judgment after trial which only provided for a PAGA penalty of \$5 per
13 pay period. Therefore, at trial, any PAGA penalties awarded in this case could be significantly less
14 than Plaintiff’s calculation, even had Plaintiff prevailed on the PAGA claim. Here, multiplying the
15 number of pay periods (approximately 7,480) by \$5 results in a total potential liability of \$37,400.
16 Therefore, even assuming Plaintiff would have prevailed on all of his claims in trial, the result obtained
17 by Plaintiff in the Settlement exceeds the amount Plaintiff would have recovered had the Court relied
18 on *Carrington* in awarding the PAGA penalties. The gross amount obtained by Plaintiff’s Counsel is
19 reasonable in light Defendant’s arguments. Further, the adverse decisions in *Viking River Cruises* and
20 *Wesson* pose very significant, and even fatal, risk to Plaintiff’s case. Zakay Dec., ¶ 33.

21 Defendant’s substantial compliance could also operate to prevent the imposition of PAGA
22 penalties. Zakay Dec., ¶ 34. A corollary of PAGA being an enforcement action is that “substantial
23 compliance with statutory directives will suffice if the purpose of the statute is thereby
24 satisfied.” *Downtown Palo Alto v. City Council*, 180 Cal.App.3d 384, 395 (1986) (emphasis
25 supplied); *see also Hernandez v. BCI Coca-Cola Bottling Co.*, 2012 WL 12272348, at *8 (C.D. Cal.
26 Apr. 12, 2012), *aff’d*, 554 F. App’x 661 (9th Cir. 2014) (granting defendant’s motion for summary
27 judgment based on defendant’s “substantial compliance” with Labor Code section 226). In this regard,
28 “[t]he paramount consideration is the objective of the statute.” *Id.* “Where there is compliance as to

1 all matters of substance[,] technical deviations are not to be given the stature of noncompliance.” *Cal-*
2 *Air Conditioning v. Auburn Union School Dist.*, 21 Cal.App.4th 655, 668 (1993) (emphasis supplied).
3 “Unless the intent of a statute can only be served by demanding strict compliance with its terms,
4 substantial compliance is the governing test.” *County of Tulare v. Campbell*, 50 Cal. App. 4th 847,
5 853 (1996) (emphasis supplied).

6 Given Defendant’s defenses to the claimed Labor Code violations at issue, and the risks and
7 costs of continued litigation, Plaintiff and Plaintiff’s Counsel believe that the Gross Settlement
8 Amount is fair and reasonable. This settlement was negotiated by experienced counsel at arm's length.
9 Zakay Dec., ¶ 35. The LWDA has been provided notice of this motion and the PAGA settlement, and
10 the decision of LWDA to accept the PAGA settlement and not oppose the motion should be given
11 considerable weight. Moreover, the LWDA is a sophisticated government entity that can assert and
12 protect its own rights. Zakay Dec., ¶ 36.

13 **B. The Remaining Settlement Terms Are Fair and Reasonable**

14 Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code §
15 2699(1) does not require that a court approve any other elements of the proposed settlement. Because
16 there are no class allegations for which Plaintiff seeks approval, the approval provisions applicable to
17 class settlements under Cal. Code Civil Proc. §382 do not apply. Accordingly, the Court only needs
18 to approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as explained
19 herein, the settlement terms for attorneys’ fees and costs are reasonable.

20 **VI. THE ATTORNEYS’ FEES AND COSTS ARE FAIR AND REASONABLE**

21 Plaintiff’s Counsel seeks approval of attorneys’ fees from the PAGA Settlement in the amount
22 of \$76,666.67, representing one-third of the \$230,000.00 PAGA Settlement amount. PAGA does not
23 have any requirements for reviewing attorneys’ fees, and Plaintiff’s position is that the payment of
24 attorneys’ fees and costs in this settlement is a matter of contract for a contingent representation.
25 Nevertheless, should this Court review the requested attorneys’ fees, it is clear that the requested fees
26 and costs are reasonable. Zakay Dec., ¶ 37.

27 First, the requested fees are justified by the result achieved. Plaintiff’s Counsel negotiated a
28 recovery of \$230,000.00, and this result justifies the requested fees equal to one third of this recovery.

1 This percentage is within the standard contingent recovery percentage of one-third, and this percentage
2 is what was expressly approved by the Supreme Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th
3 480, 504 (2016). At the time this case was brought, the result was far from certain. Defendant's
4 defenses to the merits of the case created difficulties with proof and complex legal issues for Counsel
5 to overcome. Here, a number of defenses asserted by Defendant present serious threats to the claims
6 of the Plaintiff and the Aggrieved Employees. These defenses are summarized hereinabove. If
7 successful, Defendant's defenses would eliminate *any recovery* to the Aggrieved Employees. While
8 Plaintiff believes that these defenses could be overcome, Defendant maintains these defenses have
9 merit, which therefore presents a serious risk to recovery. The PAGA Settlement was possible because
10 Counsel was able to persuade Defendant that there was an appreciable risk that Plaintiff would prevail
11 on the factual and legal issues underlying liability and overcome difficulties in proof as to monetary
12 relief. Zakay Dec., ¶ 38.

13 Second, the fee award is justified by the work performed. As detailed in the accompanying
14 Declaration of Shani O. Zakay at ¶ 39, and the Declaration of Jean-Claude Lapuyade at ¶ 4, the fee
15 award represents Plaintiff's Counsels' current combined lodestar of \$66,186.67 with a multiplier of
16 1.16, and with additional work to be performed such that the multiplier will ultimately be even lower.
17 Generally, the Ninth Circuit and California Courts award multipliers between 2 to 4 times the lodestar
18 to reward counsel for accepting the contingent risks of the litigation or obtaining good results. *See,*
19 *e.g., Laffitte*, 1 Cal. 5th at 506 (approving one-third fee award with multiplier between 2.03 and 2.13);
20 *Pellegrino v. Robert Half Int'l, Inc.*, 182 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0
21 to 4.0 are often applied and affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91
22 Cal.App.4th 224, 254 (2001) (noting that multipliers can range from 2 to 4 or higher); *Vandervort v.*
23 *Balboa Capital Corp.*, 8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which
24 was a 2.52 multiplier of lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D. Cal.
25 2014) (awarding one-third of fund, which was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales*
26 *Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award
27 that represented a multiplier of 2.76 as falling within the "majority" range for risk multipliers). Zakay
28 Dec., ¶ 39.

1 Third, consideration of the enhancement factors justifies the enhancement of the lodestar.
2 Courts multiply the lodestar by a factor to account for the risk of non-payment, delay in payment, the
3 quality of work, and the novelty and difficulty of the issues involved. See *Ketchum v. Moses*, 24
4 Cal.4th 1122, 1132 (2001). Failure to apply a risk multiplier in cases that meet these criteria is an
5 abuse of discretion. *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016). Zakay Dec., ¶ 40.

6 Finally, as to litigation expenses, Plaintiff's Counsel will be recovering litigation expenses in
7 the total amount of the \$9,118.35, which is less than the \$15,000 allocated in the Settlement
8 Agreement. These expenses are documented in the accompanying Zakay Dec. at ¶ 41, and JCL Dec.
9 at ¶ 3.

10 VII. CONCLUSION

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

14
15 Dated: June 12, 2023

ZAKAY LAW GROUP, APC

16
17 By:


Shani O. Zakay