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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

PAOLA VILLALVAZO, an individual, on
behalf of herself, and on behalf of all persons
similarly situated,

Plaintiffs,

vs.

SK MARKET, INC., a California corporation;
ADVANCE FOOD MARKET, INC., a
California corporation; JAY'S MARKET INC.,
a California corporation; and DOES 1 through
50, Inclusive;

Defendants.

Case No: 21STCV39911

Action Filed: October 29, 2021

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

Date: February 1, 2024

Time: 8:30 a.m.

Reservation ID: 123666307933

Dept.: 34

Judge: Michael P. Linfield

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1 **I.MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Paola Villalvazo (“Plaintiff”) seeks approval of the PAGA Settlement Agreement
4 (“Agreement”)¹, which if approved, would provide valuable monetary relief for approximately 363
5 “Aggrieved Employees,” defined as all current and former non-exempt employees who worked for
6 Defendant SK Market, Inc. (“Defendant”) and performed work in California (“Aggrieved
7 Employees”) between August 25, 2020, to September 15, 2023 (“PAGA Period”). Agreement at §§
8 1.20. This is only a settlement of the PAGA claim for civil penalties and is not a class settlement
9 and does not release the individual wage claims, if any, of the affected employees other than
10 Plaintiff herself. Cal. Lab. Code § 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348,
11 381 (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
14 Development Agency (“LWDA”) will share a payment for PAGA Payment of Forty-Four
15 Thousand, Nine Hundred Thirty-Three Dollars and Thirty-Three Cents (\$44,933.33). Agreement at
16 § 1.25. After deducting any Court-approved PAGA Counsel Fees Payment, PAGA Counsel
17 Expenses Payment, Service Award, and the Administration Expenses Payment, the PAGA Payment
18 shall be distributed, 75% to the LWDA (“LWDA PAGA Payment”) and 25% to the Aggrieved
19 Employees (“Individual PAGA Payments”). Agreement at §§ 1.23, 3.2.4.

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

26 ///

27 ¹ The Agreement is attached as Ex “1” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to
28 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.

1 **II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND**

2 **A. Plaintiff's Exhaustion of Administrative Remedies Under PAGA And Civil**
3 **Action Against Defendant**

4 On August 25, 2021, Plaintiff on behalf of herself and on behalf of other Aggrieved
5 Employees served Defendant and the LWDA with a Notice of Violations ("PAGA Notice") and
6 draft complaint memorializing claims against Defendant for alleged violations of the California
7 Labor Code, including causes of action for failure to provide compliant meal and rest periods; failure
8 to accurately compensate for missed meal and rest periods; failure to pay all minimum, regular, and
9 overtime wages; failure to reimburse for required business expenses; failure to provide accurate
10 itemized wage statements; and failure to timely pay wages due during, and upon termination of
11 employment. (LWDA Case No. LWDA-CM-842513-21). JCL Dec., at ¶ 10.

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

16 On October 29, 2021, Plaintiff filed a class and representative action complaint against
17 Defendant in the Superior Court for Los Angeles, Case Number 21STCV39911 ("Action"). The
18 Action alleged nine causes of action against Defendant for: (1) Unfair Competition in violation of
19 Cal. Bus. & Prof. Code §§ 17200, *et. seq.*; (2) Failure to Pay Overtime Wages in violation of Cal.
20 Lab. Code §§ 510, *et seq.*; (3) Failure to Pay Minimum Wages in violation of Cal. Lab. Code §§
21 1194, 1197, 1197.1; (4) Failure to Provide Required Meal Periods in violation of Cal. Lab. Code §§
22 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Required Rest Periods in
23 violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (6) Failure to
24 Provide Accurate Itemized Wage Statements in violation of Cal. Lab Code §226; (7) Failure to Pay
25 Wages When Due in violation of Cal. Lab. Code §§ 201, 202, and 203; (8) Failure to Reimburse for
26 Required Expenses in violation of Cal. Lab. Code § 2802; (9) Violations of PAGA. JCL Dec., ¶ 12.

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1 On March 15, 2022, Plaintiff dismissed the class action allegations from the Action without
2 prejudice and proceeded with a single cause of action for violation of the Private Attorneys General
3 Act at Cal. Lab. Code §§2698, *et seq.* JCL Dec., ¶ 13.

4 On May 22, 2023, the Parties participated in an all-day mediation presided over by Hon. Carl
5 West (Ret.), a retired jurist and experienced mediator of wage and hour representative actions. In
6 advance of the with the mediation, Defendant provided Plaintiff with sufficient information to
7 properly evaluate Defendant’s potential liability exposure. Among the data and documents
8 Defendant produced included, but was not limited to, the total number of Aggrieved Employees, pay
9 periods, employee handbooks, and over 577,000 unique cells of time and payroll data. JCL Dec., ¶
10 14.

11 The mediation did not result in a settlement. However, after several months of negotiation,
12 Judge West made a mediator’s proposal that was accepted by all Parties and memorialized in the
13 form of a Memorandum of Understanding (“MOU”). After reaching an agreement in the principle,
14 the Parties drafted and negotiated a long-form settlement which is the subject of the instant motion.
15 The Settlement was negotiated in light of all known facts and circumstances and the uncertainty
16 associated with litigation – including the risk of Plaintiff not being able to maintain representative
17 claims and establishing manageability, the difficulty of proving Plaintiff’s claims in a manageable
18 trial, the merits of Defendant’s potential defenses, and the significant delay and potential appellate
19 issues inherent to litigation – and was reached after extensive arm’s length negotiations, with the
20 assistance of Judge West. JCL Dec., at ¶ 15.

21 The Settlement is intended to fully and finally resolve the Released PAGA Claims asserted
22 by Plaintiff on behalf of herself, the Aggrieved Employees, and State of California. This is only a
23 Settlement of the PAGA claims for civil penalties and is not a class settlement and does not release
24 the individual claims, if any, of the Aggrieved Employees. This Settlement does not release any
25 claim that is not a PAGA claim.² Nor does this Settlement waive Defendant’s right to assert *res*
26 *judicata* or other available defense to any asserted claim or lawsuit. JCL Dec., at ¶ 16.

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.”

Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of the Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant motion for settlement approval as set forth in the accompanying proof of service. Additionally, Plaintiff will submit to the LWDA a copy of the Court's judgment and order approving the Settlement Agreement within ten (10) days after entry of judgment or order. JCL Dec., at ¶ 17.

III. TERMS OF THE PAGA SETTLEMENT

A. The Gross Settlement Amount

The PAGA settlement is subject to Court approval consistent with Labor Code § 2699(1)(2). The Settlement Agreement negotiated by the Parties provides for a Gross Settlement Amount payment in the amount of One Hundred Twenty-Five Thousand Dollars and Zero Cents (\$125,000.00) to resolve the PAGA claims. From the Gross Settlement Amount, there is a deduction of a PAGA Counsel Fees Payment in the amount of Forty-One Thousand, Six Hundred and Sixty-Six Dollars and Sixty-Seven Cents (\$41,666.67) (which is one-third of the Gross Settlement Amount), reimbursement of incurred litigation expenses in an amount not to exceed \$20,000.00 ("PAGA Counsel Litigation Expenses Payment"), and Administration Expenses Payment which will not exceed \$8,400.00. Agreement generally at § 3.2. After these deductions, the amount remaining is the "PAGA Payment", which is estimated to be \$44,933.33. JCL Dec., ¶ 18.

The Gross Settlement Amount will be used to satisfy the Individual PAGA Payments, the LWDA PAGA Payment, PAGA Counsel Fees Payment, PAGA Counsel Litigation Expenses Payment, and the Administrator's Expenses Payment, and Service Award. Agreement at § 1.11.

Of the PAGA Payment, seventy-five percent (75%) shall be paid to the LWDA ("LWDA PAGA Payment") and the remaining twenty-five percent (25%) shall be paid to the Aggrieved Employees ("Individual PAGA Payment"). Agreement at §§ 1.23, 3.2.4. This 75/25 allocation is required by Labor Code § 2699 as explained by *ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019).

B. Allocation of Individual PAGA Payments

The Individual PAGA Payments will be calculated by dividing the amount of the Aggrieved Employees' 25% share of PAGA Payment (\$11,233.33) by the total number of PAGA Pay Periods worked by all Aggrieved Employees during the PAGA Period and then multiplying the result by

1 each Aggrieved Employee's PAGA Pay Periods. Agreement at § 3.2.4. The PAGA Period is the
2 period between August 25, 2020 through September 15, 2023. Agreement at § 1.20.

3 At the time of the parties' settlement this action, Defendant estimated that there were
4 approximately 363 Aggrieved Employees who worked approximately 19,893 pay periods during the
5 PAGA Period based on company records. Agreement at § 4.1.³

6 **C. Funding and Distribution**

7 Provided that an order approving this Settlement is entered by the Court, Defendant shall
8 fund the Gross Settlement Amount in ten (10) monthly installment payments of \$12,500 each,
9 beginning within thirty (30) days after the entry of the court order approving the settlement.
10 Agreement at § 4.3. No later than fourteen (14) days after Defendant fully funds the Gross
11 Settlement Amount, the Administrator will mail the Individual PAGA Payments via First-Class U.S.
12 Mail to the Aggrieved Employees' last known mailing address, Individual PAGA Payments, the
13 LWDA PAGA Payment, the Administration Expenses Payment, the PAGA Counsel Expenses
14 Payment. Agreement at § 4.4. Settlement checks issued to Aggrieved Employees will expire one
15 hundred eighty (180) days from the date they are issued by the Administrator. Agreement at § 4.4.1.
16 If the check remains uncashed by the expiration of the 180-day period, the Administrator shall cause
17 the aggregate sum represented by those uncashed checks to be sent to the Community Law Project,
18 in accordance with C.C.P. § 384. Agreement at § 4.4.3. The Individual PAGA Payments are 100%
19 penalties and shall be reported using IRS Form 1099s. Agreement at § 3.2.4.2.

20 **D. Release of Claims**

21 Upon entry of Judgment and funding of the Gross Settlement Amount, the State of
22 California, the Aggrieved Employees, and Plaintiff shall release the Released Parties (as defined in
23 the Agreement) from the Released PAGA Claims which include all released PAGA claims alleged in
24 the operative complaint in the Action and Plaintiff's PAGA notice to the LWDA which occurred
25 during the PAGA Period, including but not limited to, claims under Labor Code sections 201, 201.3,
26

27 ³ The Agreement contains an escalator clause, providing that, should the number of Pay Periods increase by more than
28 10% of what was represented during the PAGA Period, the Gross Settlement Amount will increase proportionally for the
number of Pay Periods over 110% of 19,893. For example, if the total Pay Periods in the PAGA Period are 115% of
19,893, the Gross Settlement Amount shall increase by 5%. Agreement at § 8.

202, 203, 204, 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246, 510, 512,558, 1174(d), 1174.5, 1194, 1197, 1197.1, 1197.14, 1198, 1199, 2802, 2804 and 2698, et seq., California Code of Regulations, Title 8, Section 1 1070(14), the applicable Industrial Welfare Commission Wage Order(s), and any resulting claim for attorneys' fees and costs and expressly excluding all other claims, including claims for vested benefits, wrongful termination, unemployment insurance, disability, social security, workers' compensation, and PAGA claims outside of the PAGA Period. Agreement at § 1.26. The release of claims for PAGA penalties shall bind only the named Plaintiff, the Aggrieved Employees, and the State of California. Agreement at § 5.2.

IV. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT

Labor Code § 2699(l) requires that the Court “shall review and approve any settlement of any civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.” Further, the Court in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77 stated that “the trial court must review and approve a PAGA settlement (§ 2699, subd.(l)(2)), and the Supreme Court has in dictum referred to this review as a safeguard.” (Citing *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 88; internal quotations omitted.) “The Supreme Court has also observed that trial court approval ensures that any negotiated resolution is fair to those affected,” leading the Court in *Moniz* to determine that “adoption of a standard of review for settlements that prevents fraud, collusion or unfairness, and protects the interests of the public and the LWDA in the enforcement of state labor laws is warranted.” (*Moniz, supra*, 72 Cal.App.5th at 77; citing *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801; internal citations omitted.) In other words, “[i]n review and approval of a proposed settlement under section 2699, subd. (l)(2), a trial court thus must scrutinize whether, in resolving the action, a PAGA plaintiff has adequately represented the state’s interests, and hence the public interest.” (*Moniz, supra*, 72 Cal.App.5th at 88.) Consequently, the Parties respectfully ask the Court to review and approve the settlement of the PAGA claims and the PAGA Payment to be paid as part of the proposed Settlement.

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A. The Gross Settlement Amount is Fair and Reasonable

The Gross Settlement Amount of \$125,000.00 is fair and reasonable and, therefore, should be approved. JCL Dec., ¶ 19. Here, *without stacking* the PAGA penalties, Defendant's *maximum* liability exposure is estimated at approximately \$1,989,300 in PAGA penalties (19,893 pay periods multiplied by \$100 per pay period⁴). JCL Dec., ¶ 21. Assuming the Court permitted Plaintiff to stack PAGA penalties, Plaintiff's third-party damages consultant estimated Defendant's maximum liability exposure at approximately \$1,416,305. Plaintiff's consultant estimated Defendant's exposure as follows:

Claim	Penalty Amount ⁵	Number of Pay Periods w/ Violation	Violation Rate	Total Penalties
<i>Unpaid Wages Violations</i> Cal. Labor Code §§ 201, 202, 203, 204, 1194, 1197, 1997.1, 1198 and 558	\$50	1,983	10% of PAGA Pay Periods	\$99,150
<i>Meal Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	9,939	50% of PAGA Pay Periods	\$496,950
<i>Rest Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	9,939	50% of PAGA Pay Periods	\$496,950
<i>Failure to Reimburse for Mandatory Business Expenses</i> Cal. Labor Code § 2802	\$100	1,243	25% of PAGA Pay Periods	\$124,325
<i>Wage Statement Violations</i> Cal. Labor Code §§ 226 and 226.2	\$100	0	0% of PAGA Pay Periods	\$0

⁴ California Labor Code section 2699(f)(2) provides the default penalty for PAGA violations of \$100 for initial violations and \$200 for subsequent violations.

⁵ 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 2 3	<i>Suitable Seating Violations</i> California Labor Code Section 1198 and Wage Order 4-2001, Section 14	\$100	1,989	10% of PAGA Pay Periods	\$198,930
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4 JCL Dec., ¶ 20.

5 **i. Estimated Liability for Unpaid Wages**

6 One of Plaintiff's primary claims in the Action was that Defendant failed to pay for all hours
7 worked. Specifically, Plaintiff alleged that Defendant had in place a written policy that required
8 employees to undergo loss prevention checks while off-the-clock. Additionally, Aggrieved
9 Employees were, from time to time, required to perform store opening and closing duties before the
10 start and after the end of their shifts. Defendant vigorously denied liability for this claim. Defendant
11 argued, among other things, that all Aggrieved Employees were properly paid minimum and
12 overtime compensation for all hours worked and that Aggrieved Employees were instructed not to
13 work off-the-clock. Additionally, Defendant argued that the opening and closing procedures, and
14 security checks affected a small number of employees. JCL Dec., ¶ 21.

15 Consequently, Plaintiff heavily discounted this claim by 90% and estimated that Defendant's
16 exposure for this claim was approximately \$99,150 in penalties. This number was calculated by
17 multiplying the number of pay periods with a violation (1,983) by a violation rate of \$50 per pay
18 period. JCL Dec., ¶ 22.

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

20 Plaintiff also alleges that Defendant failed to provide compliant meal periods. Specifically,
21 Plaintiff's expert found that approximately 50% of the meal periods were recorded after the end of
22 the fifth (5th) hour of work. Accordingly, Plaintiff alleges that she and other Aggrieved Employees
23 are owed meal period premiums for meal period violations that occurred during the PAGA Period.
24 JCL Dec., ¶ 23.

25 Conversely, Defendant argued that it had a legally compliant written meal period policy and
26 had in place written meal period waivers applicable to Aggrieved Employees. Further, Defendant
27 argued that Aggrieved Employees were instructed to take timely meal periods before the end of their
28

1 fifth (5th) hour of work. In light of Defendant's defenses and meal period waivers, Plaintiff
2 estimated that Defendant's exposure for this claim was approximately \$496,950. JCL Dec., ¶ 24.

3 **iii. Estimated Penalties for Rest Period Violations**

4 Plaintiff also alleged that Defendant failed to provide compliant rest periods. Specifically,
5 Plaintiff alleged that because of their rigorous work schedules, Plaintiff and Aggrieved Employees
6 were not able to take timely and duty-free rest periods. Further, Defendant did not pay a single
7 rest period premium during the PAGA Period. Because rest periods are not recorded, Plaintiff's
8 expert could not identify a violation rate. Plaintiff therefore made the reasonable assumption that
9 rest period violations were committed at a rate similar to that of meal period violations. JCL Dec.,
10 ¶ 25.

11 Based on an estimated violation rate which resulted in 9,939 of PAGA Pay Periods
12 containing a violation, Plaintiff contended that her claim for rest period violations was potentially
13 worth approximately \$496,950. This was calculated by multiplying the number of total pay periods
14 with a rest period violation (9,939) by a violation rate of \$50 dollars. The \$50 penalty rate was
15 used for a number of reasons in this instance. First, Defendant argued that increased civil penalties
16 for subsequent violations do not apply unless the Plaintiff can present evidence that the Labor
17 Commission or a court notified the employer that it was in violation of the Labor Code. *Bernstein*
18 *v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144 citing *Amaral v. Cintas Corp. No. 2* (2008) 163
19 Cal.App.4th 1157, 1209 ["Until the employer has been notified that it is violating a Labor Code
20 provision ... the employer cannot be presumed to be aware that its continuing underpayment of
21 employees is a 'violation' subject to penalties."].) Separately, Defendant also argued that courts
22 have considerable discretion to reduce the penalty awards under PAGA. *See, e.g. Carrington v.*
23 *Starbucks Corp.* (2018) 30 Cal.App.5th 504 (reducing the maximum PAGA penalty amount by
24 90%, at \$5 per pay period). Accordingly, it is unlikely that Plaintiff would recover full penalty
25 amounts even if she prevailed in establishing the underlying Labor Code violations. Pursuant to
26 California Labor Code section 558(a)(1), an employer is subject to a penalty of \$50 for violations
27 of a Labor Code section regulating hours and days of work, including meal period and rest period
28

1 violations. Thus, because section 558(a)(1) specifically provides for a civil penalty, Plaintiff used a
2 \$50 penalty per violation for the meal and rest break claims. JCL Dec., ¶ 26.

3 Defendant argued that it had a legally compliant written rest period policy. Defendant also
4 argued that Plaintiff's rest break claim would have mainly relied on the testimony of Aggrieved
5 Employees, making it a riskier claim. Establishing liability likely would have entailed competing
6 testimony stating either rest breaks were taken, or rest breaks were voluntarily waived. See, e.g.,
7 *Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the
8 competing testimony before the Court, plaintiff's evidence that defendant may have an illegal,
9 written rest break policy is insufficient for this Court to find that common issues predominate.");
10 *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8
11 ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform
12 practices"). JCL Dec., ¶ 27.

13 **iv. Estimated Liability for Unreimbursed Business Expenses**

14 Plaintiff alleged that Defendant required Plaintiff and other Aggrieved Employees to use
15 their personal cellular phones to communicate with Defendant's supervisors and other coworkers.
16 However, Defendant did not reimburse Plaintiff and other Aggrieved Employees for the costs
17 incurred in using their own personal cellular phone. California employers who require employees to
18 incur personal business expenses for work purposes must reimburse the employee for the cost
19 incurred. (See *Cal. Labor Code* § 2802(a), providing that "an employer shall indemnify his or her
20 employee for all necessary expenditures or losses incurred by the employee in direct consequence
21 of the discharge of his or her duties, or of his or her obedience to the directions of the
22 employer..."). JCL Dec., ¶ 28.

23 Defendant argued that this claim was limited only to managers who used their cell phones to
24 provide other Aggrieved Employees with scheduling information, and each department in its stores
25 had a landline telephone. Thus, Plaintiff heavily discounted this claim and estimated that
26 Defendant's exposure for this claim was approximately \$124,325 in penalties. This was calculated
27 by multiplying the total number of pay periods by a violation rate of \$100 per pay period. JCL Dec.,
28 ¶ 29.

1 **v. Estimated Penalties for Defendant’s Suitable Seating Violations**

2 Plaintiff also alleges that Defendant failed to provide suitable seating to Aggrieved
3 Employees throughout the PAGA Period. Specifically, Plaintiff argued that Defendant could easily
4 fit a chair or a stool behind the counter where the cash registers are located. Even if other tasks
5 require walking or standing, the majority of employees’ time is spent behind the counter handling
6 purchases. Job duties, including, among other things, greeting customers, answering telephone calls,
7 ringing up customer purchases, interacting with customers, and providing pricing and product
8 information to customers can all be done in a seated position while not interfering with the integrity
9 of the duties. JCL Dec., ¶ 30.

10 Defendant argued that the nature of many of its employees’ work required them to stand and
11 providing seating was not feasible. Defendant also argued that seating was provided in those
12 departments where employees could perform their job duties while seated. Further, Defendant
13 argued that this claim should be limited to a small number of cashiers, and contended that providing
14 seating to cashiers was not feasible. Plaintiff’s expert estimated that Defendant’s exposure for this
15 claim was approximately \$198,930 penalties. This was calculated by multiplying the total number of
16 pay periods by a violation rate of \$100 per pay period. JCL Dec., ¶ 31.

17 **vi. Estimated Penalties for Defendant’s Inaccurate Wage Statements**

18 Plaintiff also alleged that Defendant failed to furnish its employees with accurate itemized
19 wage statements. Specifically, Plaintiff alleges that as a result of Defendant’s failure to provide meal
20 and rest periods as required by the California Labor Code, Plaintiff and other Aggrieved Employees
21 are entitled to derivative wage statement penalties. PAGA Counsel considered the arguable presence
22 of various penalties and weighed the potential recoveries against probable defenses. Specifically,
23 Defendant could also argue – and did argue – that that meal and rest period violations do not entitle
24 employees like Plaintiff and the Aggrieved Employees to pursue the derivative itemized wage
25 statement penalties. (*Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 927).
26 Plaintiff could not give the penalty claims great weight given that they depended on proving the
27 underlying claims, which had their own risks. Accordingly, Plaintiff did not give any value to this
28 claim as it was heavily based upon derivative wage statement violations. JCL Dec., ¶ 32.

1 **B. The Gross Settlement Compares Favorably To The Likely Recovery**

2 In light of the above, the Gross Settlement Amount is approximately 8.83% of Defendant's
3 potential PAGA exposure. The Gross Settlement Amount compares favorably to the likely recovery
4 of PAGA penalties through continued litigation. Notably, during the litigation, Defendant raised the
5 possibility that it would be unable to satisfy a PAGA-wide settlement due to its financial condition.
6 Based on Defendant's representations, Judge West proposed an installment plan to allow Defendants
7 time to work toward accumulating the settlement funds. Accordingly, the Gross Settlement Amount
8 accounts for the risk that Defendant would be unable to satisfy a larger settlement than the one
9 contemplated here. JCL Dec., ¶ 33.

10 Defendant's maximum exposure to PAGA penalties is not a realistic outcome of the
11 litigation because it fails to account for the risks of continued litigation including, but not limited to,
12 Defendant's defenses. *See, Zayerz v. Kiewit Infrastructure West*, 2018 U.S. Dist. LEXIS 14918, *14
13 (C.D. Cal. January 18, 2018). For instance, Defendant contended that Plaintiff's PAGA claims
14 could be and likely would be wiped out in the light of the United States Supreme Court decision in
15 *Viking River Cruises v. Moriana*, (2022) 142 S.Ct. 1906. JCL Dec., ¶ 34.

16 In *Viking River*, the U.S. Supreme Court held that PAGA claims are preempted by the
17 Federal Arbitration Act, where, as here, arbitration agreements were signed by the employees. This
18 posed a very significant risk to Plaintiff's case, which was ultimately realized. *See Viking River*
19 *Cruises v. Moriana*, (2022) 142 S.Ct. 1906. Therefore, Plaintiff was mindful that this case could be
20 potentially wiped because of the U.S. Supreme Court's adverse decision. Plaintiff's claims are
21 arguably worthless in the post-*Viking River* world. JCL Dec., ¶ 35.

22 Second, Defendant argued that it can only be assessed civil penalties for actual violations of
23 the Labor Code. *See* Lab. Code § 2699(f)(2). In other words, to recover any civil penalties, Plaintiff
24 would be required to prove the underlying Labor Code violations. (*Cardenas v. McLane*
25 *Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ["Given the statutory
26 language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not
27 proven suffered a violation of the Labor Code by the defendant."].) To do this, Plaintiff would need
28 to prove each Aggrieved Employee was subject to the alleged Labor Code violation, which would

1 be difficult to do, since Defendant deny any liability or wrongdoing of any kind associated with the
2 claims alleged in this action. JCL Dec., ¶ 36.

3 Thus, Defendant contended that Plaintiff would be required to “prove Labor Code violations
4 with respect to each and every individual on whose behalf Plaintiff seek to recover civil penalties
5 under PAGA.” *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2,
6 2009). When “determining whether the employer committed Labor Code violations with respect to
7 each employee” is impractical, the PAGA action can be dismissed. *Wesson v. Staples the Off.*
8 *Superstore*, 2021 WL 4099059, *11 (Cal. Ct. App. Sept. 9, 2021). JCL Dec., ¶ 37.

9 Third, a ballot initiative to eliminate PAGA has qualified for the 2024 ballot.
10 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/)
11 [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
12 pursue civil penalties via a representative action. Plaintiff views this initiative as a significant
13 additional risk due to the potential limitation on their ability to recover penalties against Defendant
14 should litigation continue. JCL Dec., ¶ 38.

15 Finally, the maximum penalty figure does not consider that Courts have complete discretion
16 to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on
17 the facts and circumstances of the particular case, to do otherwise would result in an award that is
18 unjust, arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code § 2699(e)(2)). In fact, Courts
19 routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g. Carrington v.*
20 *Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (reducing PAGA penalties to \$5 per pay period;
21 “Although the trial court may have disagreed with Starbucks regarding the issue of liability, it
22 clearly took the circumstances proffered by Starbucks into consideration when it imposed the
23 penalty ... only \$5 per initial violation”); *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal App 5th 778,
24 788 (2018), review granted on other grounds (noting that the trial court “exercised its discretion to
25 reduce the [PAGA] penalties to 13 percent of the full amount [requested, because] [o]n average,
26 plaintiffs were deprived of 13 percent of the 30-minute meal period”); *Fleming v. Covidien, Inc.*,
27 2011 WL 7563047, *4 (C.D. Cal. 2011) (exercising discretion to reduce the maximum amount of
28 PAGA civil penalties for plaintiffs’ section 226 claims from \$2,800,000 to \$500,000 because the

1 employees suffered no injuries as a result of the erroneous wage statements and made no complaints
2 about the errors or omissions in the wage statements, thus reducing the maximum penalty by 82%);
3 *see also, Gola v. University of San Francisco*, San Francisco Superior Court Case No. CGC-18-
4 5655018, Proposed Statement of Decision, dated July 21, 2020, Judge Curtis A. Karnow of San
5 Francisco Complex (concluding after a full-blown bench trial that a penalty of 15% of the maximum
6 PAGA penalties was the appropriate penalty). The gross amount obtained by PAGA Counsel is
7 reasonable in light of Defendant’s arguments. Further, the adverse decisions in *Viking River Cruises*
8 and *Wesson* pose very significant, and even fatal, risk to Plaintiff’s case. JCL Dec., ¶ 39.

9 Defendant’s substantial compliance could also operate to prevent the imposition of PAGA
10 penalties. JCL Dec., ¶ 40. A corollary of PAGA being an enforcement action is that “substantial
11 compliance with statutory directives will suffice if the purpose of the statute is thereby
12 satisfied.” *Downtown Palo Alto v. City Council*, 180 Cal.App.3d 384, 395 (1986) (emphasis
13 supplied); *see also Hernandez v. BCI Coca-Cola Bottling Co.*, 2012 WL 12272348, at *8 (C.D. Cal.
14 Apr. 12, 2012), *aff’d*, 554 F. App’x 661 (9th Cir. 2014) (granting defendant’s motion for summary
15 judgment based on defendant’s “substantial compliance” with Labor Code section 226). In this
16 regard, “[t]he paramount consideration is the objective of the statute.” *Id.* “Where there is
17 compliance as to all matters of substance[,] technical deviations are not to be given the stature of
18 noncompliance.” *Cal-Air Conditioning v. Auburn Union School Dist.*, 21 Cal.App.4th 655, 668
19 (1993) (emphasis supplied). “Unless the intent of a statute can only be served by demanding strict
20 compliance with its terms, substantial compliance is the governing test.” *County of Tulare v.*
21 *Campbell*, 50 Cal. App. 4th 847, 853 (1996) (emphasis supplied).

22 Given Defendant’s defenses to the claimed Labor Code violations at issue, the risks and costs
23 of continued litigation, and Defendant’s financial condition, Plaintiff and PAGA Counsel believe
24 that the Gross Settlement Amount is fair and reasonable. This settlement was negotiated by
25 experienced counsel at arm’s length. JCL Dec., ¶ 41. The LWDA has been provided with notice of
26 this motion and the PAGA settlement, and the decision of LWDA to accept the PAGA settlement
27 and not oppose the motion should be given considerable weight. Moreover, the LWDA is a
28 sophisticated government entity that can assert and protect its own rights. JCL Dec., ¶¶ 5, 42.

1 **C. The Remaining Settlement Terms Are Fair and Reasonable**

2 Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code §
3 2699(1) does not require that a court approve any other elements of the proposed settlement.
4 Because there are no class allegations for which Plaintiff seeks approval, the approval provisions
5 applicable to class settlements under Cal. Code Civil Proc. § 382 do not apply. Accordingly, the
6 Court only needs to approve the settlement of the civil penalties sought in the PAGA claim.
7 Nevertheless, as explained herein, the settlement terms for attorneys' fees and costs are reasonable.
8 JCL Dec., ¶ 43.

9 **V. THE PAGA COUNSEL FEES AND EXPENSES PAYMENT ARE FAIR AND**
10 **REASONABLE**

11 PAGA Counsel seeks approval of the PAGA Counsel Fees Payment in the amount of
12 \$41,666.67 (one-third of the Gross Settlement Amount) and PAGA Counsel Litigation Expenses
13 Payment not to exceed \$20,000⁶ for reimbursement of actually incurred litigation expenses. PAGA
14 does not have any requirements for reviewing attorneys' fees, and Plaintiff's position is that the
15 payment of attorneys' fees and costs in this Settlement is a matter of contract for a contingent
16 representation. Nevertheless, should this Court review the requested attorneys' fees, the requested
17 fees and costs are reasonable for experience wage and hour counsel. JCL Dec., ¶ 44.

18 **A. The Requested Attorneys' Fee is Fair and Reasonable**

19 The requested PAGA Counsel Fees Payment of \$41,666.67 and reimbursement of PAGA
20 Counsel Litigation Expenses Payment of up to \$20,000 is fair, reasonable, and justified by the result
21 achieved. Agreement at § 3.2.2; JCL Dec., ¶ 45. PAGA Counsel negotiated a recovery of \$125,000,
22 and this result justifies the requested fees equal to one third of this recovery. This percentage is
23 within the standard contingent recovery percentage of one-third, and this percentage is what was
24 expressly approved by the Supreme Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504,
25 (2016). At the time this case was brought, the result was far from certain. Defendant's defenses to
26 the merits of the case created difficulties with proof and complex legal issues for PAGA Counsel to
27

28 ⁶ As detailed *infra*, at the time of filing this motion, Plaintiff's Counsel incurred \$13,153.83 litigating this matter. Plaintiff will provide the Court with a final amount of litigation costs at the time of hearing on this motion.

1 overcome. Here, several defenses asserted by Defendant present serious threats to the claims of
2 Plaintiff and the Aggrieved Employees. Defendant asserted that its employment practices complied
3 with all applicable labor laws. If successful, Defendant's factual and legal defenses would eliminate
4 *any recovery* to the Aggrieved Employees. While Plaintiff believes that these defenses could be
5 overcome, Defendant maintains that these defenses have merit and therefore present a serious risk to
6 recovery. The Settlement was possible because, in PAGA Counsels' eyes, PAGA Counsel was able
7 to persuade Defendant that there was an appreciable risk that Plaintiff would prevail on the factual
8 and legal issues underlying liability and overcome difficulties in proof as to monetary relief. JCL
9 Dec., ¶ 46.

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

22 As detailed in PAGA Counsels' time and billing records submitted herewith, PAGA
23 Counsels' current combined loadstar is \$53,595.00. JCL Dec., ¶¶ 6, 53-56; Declaration of Shani
24 Zakay ("Zakay Dec.") at ¶¶ 3-5. Thus, PAGA Counsels' fee request is equal to PAGA Counsel's
25 loadstar with a negligible multiplier of .77 – well below the 2.13 multiplier approved in *Laffitte* –
26 and well within the recognized multiplier range between 2 and 4. See also *Taylor v. FedEx Freight,*
27 *Inc.*, 2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016) (following *Laffitte*, approved 30% fee award
28 with cross-check lodestar multiplier of 2.26); *Emmons v. Quest Diagnostics Clinical Labs., Inc.*,

2017 U.S. Dist. LEXIS 27249 (E.D. Cal. 2017) (following *Laffitte*, approved 33% fee award with cross-check lodestar multiplier of 1.7).

B. PAGA Counsel is Entitled to Reimbursement of Actual and Reasonably Incurred Litigation Costs.

Attorneys who create a common fund for the benefit of a class are entitled to payment from the fund of reasonable litigation expenses and costs. Common fund fee and expense awards include counsel's incurred expenses because those who benefit from their effort should share in the cost. *See Rider v. City of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992). The appropriate analysis in deciding if costs are compensable is whether the costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *see also Hartless*, 273 F.R.D. at 645-46 (common fund class action settlement where court awarded litigation costs for consultants, online legal research, copying, postage, long distance charges, travel expenses, filing fees, mediation fees and investigation fees). Prior to incurring costs for filing this motion, PAGA Counsel collectively expended \$13,153.83 prosecuting this action (JCL Law Firm, APC - \$6,889.11, Zakay Law Group, APLC - \$6,264.72). JCL Dec. ¶¶ 7, 57; Zakay Dec., ¶¶ 6-7; PAGA Counsel's out-of-pocket expenses are the types of expenses normally charged to paying clients including the following: filing fees; copying; postage; factual and legal research charges; mediation fees; and expert costs which were all incurred during, and were necessary for the successful prosecution of, the litigation and, therefore, should be reimbursed. JCL Dec. ¶¶ 7, 58.

VI. PLAINTIFF'S SERVICE AWARD IS FAIR AND REASONABLE

Incentive payments are intended to "compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (emphasis added). Courts routinely approve service awards to compensate named plaintiffs for the services they provide and the risks they incur during the litigation. *Bell v. Farmers Ins. Exch.*, 115 Cal.App.4th 715, 726 (2004) (upholding "service payments" to plaintiffs for their efforts in bringing class case). The factors courts use in determining the amount of service awards include: (1) a comparison between the

1 service awards and the range of monetary recovery available to the class; (2) time and effort put into
2 the litigation; (3) whether the litigation will further the public policy underlying the statutory
3 scheme; and (4) risks of retaliation. *Clark v. American Residential Services, LLC*, 175 Cal. App. 4th
4 785, 804-805 (2009).

5 The Settlement provides for a Service Award of \$10,000 for Plaintiff. The Service Award
6 payment is fair and reasonable compensation for the Plaintiff's efforts bringing the action, assisting
7 PAGA Counsel with the litigation and settlement, regularly conferring with PAGA Counsel on the
8 status of her case and the strategies for prosecuting the claims and agreeing to provide Defendant a
9 broad general release of all claims arising out of her employment. Plaintiff willingly came forward
10 to protect and advance the rights of the Aggrieved Employees on important legal disputes affecting
11 California employees. By way of example, Plaintiff assumed the serious risk of liability for
12 Defendant's costs and potentially fees if the case was unsuccessful. Nevertheless, Plaintiff
13 knowingly and voluntarily undertook the risk to vindicate the rights of the Aggrieved Employees.
14 JCL Dec., ¶ 59.

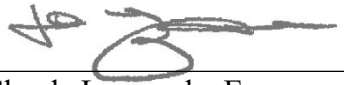
15 Plaintiff's efforts in bringing the lawsuit conferred a monetary benefit to 363 Aggrieved
16 Employees. Accordingly, Plaintiff and PAGA Counsel respectfully request the Court approve the
17 Service Award in accordance with the Settlement Agreement. Plaintiff and PAGA Counsel also
18 respectfully request approval of the requested Service Award in the amount of \$10,000.00 to
19 Plaintiff. JCL Dec., ¶ 60.

20 VII. CONCLUSION

21 Based on the foregoing, Plaintiff respectfully request this Court approve the PAGA
22 Settlement as set forth in the Settlement Agreement and enter the proposed order and judgment
23 submitted herewith.

24
25 Dated: January 8, 2023

JCL LAW FIRM, APC

26
27 By: 
28 Jean-Claude Lapuyade, Esq.