

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Traci Pollinger (“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 Defendants Hoehn Motors, Inc. Hoehn Buick GMC Cadillac Inc., Hoehn JRL, Inc. Hoehn of
6 Temecula, Inc. and The Hoehn Company, Inc. (“Defendant”) (collectively, the “Parties”). In
7 accordance with California Labor Code § 2699(l), Plaintiff now asks this Court to review and approve
8 the settlement of Plaintiff’s PAGA claims.¹ The PAGA Settlement is fair, reasonable, and adequate
9 as to the PAGA Members and satisfies all statutory criteria for approval. This is only a settlement of
10 the PAGA claims for civil penalties and is not a class settlement and does not release the individual
11 wage claims, if any, of the affected employees other than Plaintiff herself. Cal. Labor Code §
12 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*,
13 8 Cal. 5th 175, 182 (2019) (unpaid wages are not recoverable under PAGA).

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

21 **II. RELEVANT FACTS**

22 Plaintiff provided services to Defendant and Defendant’s customers as a non-exempt employee
23 in California between 2004 and April of 2020. On November 10, 2020, Plaintiff, on behalf of herself
24 and on behalf of other “Aggrieved Employees,” submitted a notice and draft complaint to the LWDA
25 memorializing claims against Defendant for alleged violations of the California Labor Code, including
26 claims for failure to provide compliant meal periods or compensation in lieu thereof in violation of
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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 Labor Code sections 226.7, and 512; failure to provide compliant rest periods or compensation in lieu
2 thereof in violation of Labor Code sections 226.7, and 512; failure to allow employees to take duty-
3 free, off-the-premises rest periods; failure to pay all minimum, regular, and overtime wages; failure to
4 maintain true and accurate records in violation of Labor Code sections 1174 and 1174.5; failure to pay
5 all reporting time wages; failure to provide accurate itemized wage statements in violation of Labor
6 Code sections 226, 226.2, 1174, and 1175; failure to reimburse employees for required business
7 expenses in violation of Labor Code section 2802; failure to timely pay wages due during, and upon
8 termination of employment; claims for violations of Labor Code sections 201, 202, 203, 204, 210,
9 218.5, 226, 226.3, 226.7, 510, 512, 558, 1174(d), 1194, 1197, 1197.1, 1198, 1199, and 2802; and
10 claims for civil penalties and other relief pursuant to Labor Code section 2699, and the sections
11 preceding and following section 2699. (LWDA Case No. 818935-21). On January 27, 2021, Plaintiff
12 filed a complaint against Defendant in the Superior Court of San Diego County, Case No. 37-2021-
13 0003888-CU-OE-CTL, alleging eight causes of action for violations of the California Labor Code and
14 a ninth cause of action for violations of PAGA. (Zakay Dec. at ¶ 4.) On May 5, 2020, Plaintiff filed
15 its first amended complaint alleging a single cause of action for violations of PAGA, based on the
16 above Labor Code violations.

17 A. Mediation

18 Plaintiff and Defendant agreed to mediate the action with Hon. Carl J. West (Ret.), an
19 experienced wage and hour PAGA action mediator. Prior to the mediation, in order to evaluate the
20 potential value of the claims, the Parties engaged in significant efforts to obtain evidence regarding
21 the claims asserted, including all of Defendant's relevant wage and hour policies, the exchange of
22 detailed statistical data regarding assignments performed by Plaintiff and the Aggrieved Employees,
23 the production of hundreds of pages of documents, including a large sample of payroll records and
24 time records, and the exchange of detailed briefing and analysis in connection with the mediation.
25 Based on this extensive discovery, Plaintiff was able to perform damages calculations and assess her
26 claims relevant to Defendant's defenses. (Zakay Dec. at ¶ 5.)

27 Thereafter, on January 24, 2022, the Parties engaged in a full-day mediation with Judge West.
28 At the conclusion of the full-day mediation, the Parties reached an agreement for settlement based on

1 Judge West’s proposal, which led to the signing of a Stipulation of Settlement of PAGA Action and
2 Release of PAGA Claims memorializing the settlement. The settlement was negotiated in light of all
3 known facts and circumstances and the uncertainty associated with litigation – including the risk of
4 Plaintiff not being able to maintain representative claims and establishing manageability, the difficulty
5 of proving Plaintiff’s claims in a manageable trial, the merits of Defendant’s potential defenses, and
6 the significant delay and potential appellate issues inherent to litigation – and was reached after
7 extensive arm’s length negotiations, with the assistance of Judge West. (Zakay Dec. at ¶ 6.)

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

9 The PAGA settlement is subject to Court approval consistent with Labor Code § 2699(1)(2)
10 (Settlement Agreement at III(J)). The Settlement Agreement negotiated by the Parties provides for a
11 “Gross Settlement Amount” payment in the amount of \$170,000 to resolve the PAGA Claims
12 (hereinafter referred to as the “PAGA Settlement”). From this PAGA Settlement of \$170,000, there
13 is a deduction of attorneys’ fees in the amount of \$56,667 (which is one-third of the PAGA
14 Settlement), reimbursement of incurred costs in an amount not to exceed \$20,000, and Settlement
15 Administration Costs, which will not exceed \$7,700. (Settlement Agreement at III(I)(7)-(8)).² After
16 these deductions, the amount remaining is the “Net Settlement Amount”, which is estimated to be
17 \$85,633.00. (Zakay Dec. at ¶ 7.)

18 Of the Net Settlement Amount, seventy-five percent (75%) will be paid to the LWDA, and the
19 remaining twenty-five percent (25%) will be paid to the Aggrieved Employees. (Settlement
20 Agreement at (I)(J)).³ This 75/25 allocation is required by Labor Code § 2699 as explained by *ZB*,
21 *N.A. v. Superior Court*, 8 Cal.5th 175 (2019). (Zakay Dec. at ¶ 8.)

22 The Individual PAGA Payment for each Aggrieved Employee shall be based on the number of
23 pay periods each Aggrieved Employee worked during the PAGA Period as a percentage of the total
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25 ² In the event the Court approves less than One-Third of the PAGA Settlement Amount in Attorneys’
26 Fees or less than \$20,000 in Attorneys’ Expenses to Plaintiff’s Counsel, the unawarded difference will
27 be added to the PAGA Payment and not to Plaintiff’s Counsel or Defendant (Settlement Agreement
28 at III(J)(7)).

³ “Aggrieved Employees” means all individuals who worked for Defendant HOEHN MOTORS, INC.
as non-exempt employees in California during the PAGA Period. (Settlement Agreement at (I)(B)).
The PAGA Period is November 10, 2019, through March 24, 2022.

1 pay periods worked by all Aggrieved Employees during the PAGA Period. (Settlement Agreement at
2 III(I)(1)). The PAGA Period is the time period from November 10, 2019, through March 24, 2022.
3 (Settlement Agreement at I(M)). (Zakay Dec. at ¶ 9.)

4 Defendant provided a declaration regarding how there were 423 Aggrieved Employees who
5 worked 11,099 pay periods during the PAGA Period. (Settlement Agreement at III(A)(2)). (Zakay
6 Dec. at ¶ 10.)

7 A. Release of Claims

8 Upon entry of Judgment and funding in full of the Settlement by Defendant, the Released
9 Parties shall be entitled to a release from the State of California and Plaintiff as to the following claims:

10 “Released PAGA Claims” shall mean the claims alleged in the Action arising during
11 the PAGA Period for civil penalties under PAGA that were asserted or could have been
12 asserted based on the facts alleged in the operative Complaint, including claims that
13 Defendant is liable for PAGA penalties for failure to pay minimum wages, failure to
14 pay overtime wages, failure to provide meal periods, failure to provide rest periods,
15 failure to pay an additional hour of premium pay for alleged meal period or rest period
16 violations at employees’ regular rates of compensation, failure to provide accurate
17 wage statements, failure to maintain accurate records, failure to pay all wages owed
18 during and at the end of employment, failure to provide the amount of sick leave
19 available, or paid time off leave provided in lieu of sick leave and failure to accurately
20 include such information on itemized wage statements, where the foregoing claims
21 arise under Labor Code § 2698, *et seq.*, for the alleged violations of the California
22 Labor Code, including but not limited to sections 201, 202, 203, 204, 210, 218.5, 218.6,
23 226, 226.3, 226.7, 246, 510, 512, 558, 1102.5, 1174, 1174.5, 1194, 1194.2, 1197,
24 1197.1, 1198, 1199, and 2804, and all applicable Wage Orders.

19 (Settlement Agreement at III(B)). (Zakay Dec. at ¶ 11.)

20 The Gross Settlement Amount shall be due by Defendant to the Settlement Administrator via
21 wire transfer or check on or before the Funding Date. (Settlement Agreement at III(A)(3)). Defendant
22 will provide the necessary information about the Aggrieved Employees to the Settlement
23 Administrator (ILYM Group) within ten (20) calendar days of the approval of the Effective Date.
24 (Settlement Agreement at III(H)). The Settlement Administrator will mail the Individual Aggrieved
25 Employee Payments by regular First-Class U.S. Mail to the Aggrieved Employees’ last known mailing
26 address no later than fifteen (15) calendar days after the Funding Date. (Settlement Agreement at
27 III(I)(4)). Checks will remain valid and negotiable for one hundred eighty (180) days. (Settlement
28 Agreement at III(J)(5)). If an Aggrieved Employee does not cash his or her settlement check within

1 ninety (90) days, the Settlement Administrator will send a letter to such persons, advising that the
2 check will expire after the 180th day, and invite that Aggrieved Employee to request reissuance in the
3 event the check was destroyed, lost, or misplaced. (*Id.*) In the event Aggrieved Employee Payment
4 checks have not been cashed within one hundred and eighty (180) days, the Settlement Administrator
5 shall cause the aggregate sum represented by those uncashed checks to be sent to the Controller of the
6 State of California to be held pursuant to the Unclaimed Property Law, California Civil Code § 1500
7 *et seq.*, in the names and corresponding amounts associated with each Aggrieved Employee whose
8 check(s) are cancelled. (*Id.*) The Individual PAGA Payments are 100% penalties and shall be reported
9 using IRS tax form 1099. (Settlement Agreement III(I)(2)). (Zakay Dec. at ¶ 12.)

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

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

17 The claim before this Court is a representative claim under the PAGA on behalf of the State of
18 California for civil penalties pursuant to the PAGA. The parties have agreed to settle the PAGA claims
19 in their entirety after significant informal discovery, and an arm's length mediation. The settlement
20 is intended to fully and finally resolve the PAGA Released Claims asserted by Plaintiff on behalf of
21 the State of California. This is only a settlement of the PAGA claims for civil penalties and is not a
22 class settlement and does not release the individual claims, if any, of the Aggrieved Employees. This
23 settlement does not release any claim that is not a PAGA claim.⁴ Attorneys' fees equal to one-third of
24 the PAGA Settlement amount (\$56,667) and litigation expenses in an amount not to exceed \$20,000
25 will also be paid to Plaintiff's Counsel as part of the settlement in accordance with California Labor
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28 ⁴ 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 Code § 2699(g)(1) as set forth in the Settlement Agreement.⁵ Lastly, payment to the Settlement
2 Administrator in an amount not to exceed \$7,700 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 Payment to be paid as part of
22 the proposed settlement.

23 **A. The PAGA Settlement Amount To Be Paid Is Fair And Reasonable**

24 Plaintiff and her counsel believe that the PAGA Settlement amount is fair and reasonable and
25 therefore “shall” be reviewed and approved. The Labor and Workforce Development Agency has
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27 ⁵ As set forth in the accompanying Zakay Dec., Plaintiff’s Counsel incurred costs in the current
28 amount of \$11,794.62 which is less than the cost allocation in the Settlement Agreement. See Zakay
Dec. at ¶29.

1 released data on PAGA settlement amounts. Here, the PAGA Settlement Amount of \$170,000 is
2 significant. (Zakay Dec. at ¶ 15.)

3 California Labor Code Section 2699(e)(1) permits a Court to award a lesser amount than the
4 maximum civil penalty if, based on the facts and circumstances, to do otherwise would result in an
5 award that is “unjust, arbitrary and oppressive or confiscatory.” Before and during the mediation,
6 Defendant argued, among other things, that it was unlikely that any Judge would award more than the
7 actual amounts owed on the claims, let alone the full \$100 or \$200 per violation. In *Carrington v.*
8 *Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal affirmed a judgment after trial
9 which only provided for a PAGA penalty of \$5 per pay period. Therefore, at trial, any PAGA penalties
10 awarded in this case could be significantly less than Plaintiff’s calculation, even had Plaintiff prevailed
11 on the PAGA claim. Here, multiplying the number of violations identified, assumed, and extrapolated
12 by Plaintiff (26,446 violations) by \$5 results in a total potential liability of **\$132,230**. Further,
13 multiplying the number of pay periods (11,099) by \$5 results in a total potential liability of **\$55,495**.
14 Therefore, even assuming Plaintiff would have prevailed on all of her claims at trial, the result obtained
15 by Plaintiff in the Settlement exceeds the amount Plaintiff would have recovered had the Court relied
16 on *Carrington* in awarding the PAGA penalties. (Zakay Dec. at ¶ 16.)

17 Under the PAGA, courts have considerable discretion to reduce the penalty award. In *Fleming*
18 *v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties
19 from \$2,800,000 to \$500,000, a reduction of 82.2%, as the court found maximum penalties “unjust”
20 because the employees had suffered no injuries. Some trial courts have actually awarded no civil
21 penalties, even when Labor Code violations are established. See *Makabi v. Gedalia*, 2016 Cal. App.
22 Unpub. 1489, *5–7 (2nd Dist. Ct. of App. Mar. 6, 2016) (no PAGA penalties were awarded by the
23 Los Angeles County Superior Court) (unpublished decision); *In re Taco Bell Wage & Hour Actions*,
24 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

25 Plaintiff’s claims and corresponding PAGA penalties can be broken down as follows:

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Labor Code Section	Number of employees	Statutory penalty	Number of pay periods / violations	Violation rate	Total Penalties
510, 1194, 1197, and, 1197.1, (unpaid/underpaid wages)	423 Aggrieved Employees	\$100	2,542	23% of total pay periods	\$254,200
226.2, 226.7 and 512 (rest break violations)	423 Aggrieved Employees	\$100	8,255	74.3% of total pay periods	\$825,500
226.7 (unpaid meal break violations)	423 Aggrieved Employees	\$100	4,550	41% of total pay periods	\$455,000
226 (wage statement violations)	423 Aggrieved Employees	\$100	11,099	100% of total pay periods	\$1,109,900

(Zakay Dec. at ¶ 17.)

Thus, at the time of mediation, Plaintiff's Counsel estimated Defendant's exposure at \$2,644,600.00. Consequently, the Gross Settlement Amount of \$170,000 is 6.4% of Defendant's maximum liability exposure – before any reduction.

In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) (“Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant.”). Here, Plaintiff would need to prove that each Aggrieved Employee suffered a violation for each period the employee worked in relation to meal or rest period violations, failure to pay minimum or overtime wages, failure to provide accurate itemized wage statements, failure to pay wages when due, and/or failure to maintain required records. (Zakay Dec. at ¶ 18.)

Defendant maintains that Plaintiff and the Aggrieved Employees were properly compensated, and that it did not violate the Labor Code. Most importantly and relevant to this case, Defendant argued that the Supreme Court decision in *Brinker v. Super. Ct.*, 53 Cal.4th 1004 (2012), weakened, if not eliminated, Plaintiff's claims, on liability, value, and discretion with respect to the PAGA penalties, as to the meal and rest period claims. A major component of the penalties alleged to have been owed

1 by Defendant are attributed to non-compliant meal and rest breaks. Before and during the mediation,
2 Defendant aggressively argued that Defendant's policies and culture afforded the Aggrieved
3 Employees an opportunity to take timely meal and rest breaks, and that employees like Plaintiff *chose*
4 not to take compliant breaks. Specifically, Defendant's written policies encouraged Aggrieved
5 Employees to take meal periods and rest breaks according to schedules compliant with the California
6 Labor Code. The policy further *required* employees who felt they were not provided an opportunity
7 to take a meal or a rest break to notify a supervisor prior to missing, or being late for, their breaks.
8 Defendant argued, therefore, that under the *Brinker* decision it has no liability for the missed breaks
9 whatsoever. Defendant argued that it adopted and strictly enforced lawful policies and afforded
10 Plaintiff and the Aggrieved Employees adequate time to take compliant meal periods and rest breaks.
11 Because Plaintiff's claims were largely based on the missed meal and rest breaks, and because
12 Defendant's policies were indeed compliant, this presented a very real concern for Plaintiff. If
13 successful, this defense could eliminate or substantially reduce any recovery under PAGA. While
14 Plaintiff believes that this defense, and others, could be overcome, Defendant maintains these defenses
15 have merit, which therefore presents a serious risk to recovery of penalties. (Zakay Dec. at ¶ 19.)

16 Accordingly, Defendant disputes and denies Plaintiff's allegations and claims asserted in the
17 operative complaint which are resolved by the Settlement Agreement. Defendant asserted additional
18 defenses to the PAGA claim, not only as to liability but also as to the amount of the penalties.
19 Defendant could argue that no penalties prior to the PAGA notification should be awarded because
20 the violations were not intentional, and at least one court has so ruled. These defenses present a risk
21 to the PAGA claim and the potential that some or all of the PAGA penalties sought may not be
22 awarded. (Zakay Dec. at ¶ 20.)

23 Given Defendant's potential defenses to the violations at issue and the risks and costs of
24 continued litigation, Plaintiff and her attorneys believe that the PAGA Settlement is fair and
25 reasonable. Plaintiff's Counsel have significant experience litigating wage and hour claims including
26 claims for PAGA penalties, and the PAGA Settlement here is similar to or greater than similar
27 settlements that courts have approved. The PAGA Settlement, along with the other terms of the
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1 proposed settlement, were negotiated by experienced counsel at arm's length with the assistance of an
2 experienced and reputable mediator, Hon. Carl J. West (Ret.). (Zakay Dec. at ¶ 21.)

3 As set forth in the accompanying proof of service, the LWDA has been provided notice of this
4 motion and the PAGA settlement. The decision of the LWDA to accept the PAGA Settlement and
5 not oppose the motion should be given considerable weight. This is not a situation where the Court
6 needs to be concerned about the rights of absent employees as in a class settlement, as this PAGA-
7 only settlement does not release the individual claims of absent employees, and the LWDA is a
8 sophisticated government entity that is more than able to look out for its own rights. (Zakay Dec. at ¶
9 22.)

10 Based on our investigation, analysis and discounts for risk factors, Plaintiff adequately
11 represented the interests of both the State and the public in resolving this action and reaching the
12 proposed PAGA settlement. (Zakay Dec. at ¶ 23.)

13 Notably, in the pending *Viking River Cruises, Inc. v. Moriana* case, the Supreme Court will
14 examine whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement
15 providing that an employee cannot raise representative claims, including under PAGA. Given the
16 Supreme Court's pending decision, there is a strong possibility that this action could be dismissed
17 altogether if the Supreme Court finds that Plaintiff could waive her right to bring a PAGA action. The
18 proposed PAGA settlement allows Plaintiff to resolve the claims on her behalf, on behalf of the
19 Aggrieved Employees, and on behalf of the State of California before *Viking River Cruises* is decided
20 and potentially rids them of the opportunity to receive a settlement at all. (Zakay Dec. at ¶ 24.)

21 Finally, Plaintiff's diligent and efficient litigation of this action resulted in the creation of an
22 ascertainable common fund of \$170,000 that will substantially benefit the State of California and the
23 Aggrieved Employees. PAGA Counsel's efforts also resulted in significant non-monetary relief for
24 the State of California and the Aggrieved Employees by catalyzing Defendant to change its meal break
25 policy and practices to pay premiums for meal break violations retroactively and on a forward-going
26 basis. Thus, PAGA Counsel obtained greater Labor Code compliance and a change to Defendant's
27 policies that accomplishes the primary objective of PAGA as set for by the Labor Commissioner in
28 *Price v. Uber Techs.*, Los Angeles Superior Court Case No. BC544512. (Zakay Dec. at ¶ 25.)

1 B. 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. Because
4 there are no class allegations for which Plaintiff seeks approval, the approval provisions applicable to
5 class settlements under Cal. Code Civil Proc. §382 do not apply. Accordingly, the Court only needs
6 to approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as explained
7 herein, the settlement terms for attorneys' fees and costs are reasonable.

8 **VI. THE ATTORNEYS' FEES AND COSTS ARE FAIR AND REASONABLE**

9 Plaintiff's Counsel seeks approval of attorneys' fees from the PAGA settlement in the amount
10 of \$56,667 representing one-third of the \$170,000 PAGA Settlement amount. PAGA does not have
11 any requirements for reviewing attorneys' fees, and Plaintiff's position is that the payment of
12 attorneys' fees and costs in this settlement is a matter of contract for a contingent representation.
13 Nevertheless, should this Court review the requested attorneys' fees, it is clear that the requested fees
14 and costs are reasonable.

15 First, the requested fees are justified by the result achieved. Plaintiff's Counsel negotiated a
16 recovery of \$170,000, and this result justifies the requested fees equal to one third of this recovery.
17 This percentage is within the standard contingent recovery percentage of one-third, and this percentage
18 is what was expressly approved by the Supreme Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th
19 480, 504 (2016). At the time this case was brought, the result was far from certain. Defendant's
20 defenses to the merits of the case created difficulties with proof and complex legal issues for Counsel
21 to overcome. Here, a number of defenses asserted by Defendant present serious threats to the claims
22 of the Plaintiff and the Aggrieved Employees. Defendant asserted that their employment practices
23 complied with all applicable Labor laws. If successful, Defendant's defenses would eliminate *any*
24 *recovery* to the Aggrieved Employees. While Plaintiff believes that these defenses could be overcome,
25 Defendant maintains these defenses have merit which therefore presents a serious risk to recovery.
26 The Settlement was possible because Counsel was able to persuade Defendant that there was an
27 appreciable risk that Plaintiff would prevail on the factual and legal issues underlying liability and
28 overcome difficulties in proof as to monetary relief. (Zakay Dec. at ¶ 26.)

1 Second, the fee award is justified by the work performed. As detailed in the accompanying
2 Declarations of Shani O. Zakay at ¶26-32 and Nicholas De Blouw, the fee award represents Plaintiff's
3 Counsels' current combined lodestar of \$64,776.50 with a negative multiplier of 0.87 with additional
4 work to be performed such that the multiplier will ultimately be even lower. Generally, the Ninth
5 Circuit and California Courts award multipliers between 2 to 4 times the lodestar to reward counsel
6 for accepting the contingent risks of the litigation or obtaining good results. *See, e.g., Laffitte*, 1 Cal.
7 5th at 506 (approving one-third fee award with multiplier between 2.03 and 2.13); *Pellegrino v. Robert*
8 *Half Int'l, Inc.*, 182 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0 are often
9 applied and affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254
10 (2001) (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa Capital Corp.*,
11 8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.52 multiplier
12 of lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-
13 third of fund, which was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-
14 02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented
15 a multiplier of 2.76 as falling within the "majority" range for risk multipliers). (Zakay Dec. at ¶ 27.)

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

21 Finally, based on Plaintiff's Counsel's lodestar, Plaintiff's Counsel's requested fee award
22 reflects a request for a reasonable hourly rate of \$470.65. Specifically, dividing \$56,667 by the number
23 of hours spent by Plaintiff's Counsel on the case (120.1), results in an average hourly rate of \$470.65,
24 which is reasonable and should be awarded. (Zakay Dec. at ¶ 28.)

25 Finally, as to litigation expenses, Plaintiff's Counsel will be recovering litigation expenses in
26 the total amount of \$11,794.62 which is less than the \$20,000 allocation for costs in the Settlement
27 Agreement. These expenses are documented in the accompanying De Blouw Dec. and Zakay Dec. at
28 ¶ 29.

1 **VII. CONCLUSION**

2 Based on the foregoing, Plaintiff respectfully requests this Court approve the PAGA settlement
3 as set forth in the Settlement Agreement and enter the proposed order and judgment submitted
4 herewith.

5 Dated: May 12, 2022

ZAKAY LAW GROUP, APC

6
7 By:


Shani O. Zakay