

JCL LAW FIRM, APC

Jean-Claude Lapuyade (State Bar #248676)

Eduardo Garcia (State Bar #290572)

3990 Old Town Avenue, Suite C204

San Diego, CA 92110

Telephone: (619) 599-8292

Facsimile: (619) 599-8291

jlapyade@jcl-lawfirm.com

egarcia@jcl-lawfirm.com

ZAKAY LAW GROUP, APLC

Shani O. Zakay (State Bar #277924)

Jackland K. Hom (State Bar #327243)

3990 Old Town Avenue, Suite C204

San Diego, CA 92110

Telephone: (619) 255-9047

Facsimile: (858) 404-9203

shani@zakaylaw.com

jackland@zakaylaw.com

Attorneys for Plaintiff ELIAS KASER

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

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

Plaintiffs,

vs.

AVIATION CONSULTANTS, INC. a
California Corporation; ACI JET ORANGE
COUNTY, LLC, a Limited Liability Company;
ACI JET SLO COUNTY, LLC, a Limited
Liability Company; and DOES 1-50, Inclusive,

Defendants.

Case No: 30-2021-01191204-CU-OE-CXC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF PAGA
SETTLEMENT**

Hearing Date: September 16, 2021

Hearing Time: 2:00 p.m.

Honorable Judge Peter J. Wilson
Department CX102

Trial Date: Not Set

Action Filed: March 23, 2021

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RELEVANT FACTS.....	1
a.	Mediation.....	2
III.	TERMS OF THE PAGA SETTLEMENT.....	3
a.	Release of Claims by Non-Exempt Aggrieved Employees.....	4
IV.	THE PARTIES HAVE SETTLED THE PAGA CLAIMS.....	6
V.	THE PARTIES REQUEST REVIEW AND APPROVAL OF THE SETTLEMENT OF THE PAGA CLAIM.....	6
a.	The PAGA Settlement Amount To Be Paid is Fair and Reasonable.....	7
VI.	THE ATTORNEYS' FEES AND COSTS ARE FAIR AND REASONABLE.....	10
VII.	CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases:

Page:

<i>Boyd v. Bank of America</i> , 2014 WL 6473804, at *11 (C.D. Cal. 2014).....	11
<i>Brinker v. Superior Court</i> , 53 Cal.4th 1004 (2012).....	8
<i>Cardenas v. McLane Foodservice, Inc.</i> , 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011).....	8
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018).....	7
<i>Fleming v. Covidien</i> , 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011).....	7
<i>Hopkins v. Stryker Sales Corp.</i> , No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013).....	11
<i>Iskanian v. CLS Transportation</i> , 59 Cal. 4th 348, 381 (2014).....	1
<i>Ketchum v. Moses</i> , 24 Cal.4th 1122, 1132 (2001).....	11
<i>Laffitte v. Robert Half Int'l Inc.</i> , 1 Cal.5th 480, 504, 506 (2016).....	10
<i>Makabi v. Gedalia</i> , 2016 Cal. App. Unpub. 1489, *5-7 (2nd Dist. Ct. of App. Mar. 6, 2016)...	8
<i>N.A. v. Superior Court</i> , 8 Cal. 5th 175, 182, 196 (2019)	1,3-4
<i>Pellegrino v. Robert Half Intern., Inc.</i> , 182 Cal.App.4th 278 (2010).....	10
<i>Stetson v. Grissom</i> , 821 F.3d 1157, 1166 (9th Cir. 2016).....	11
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal.App.4th 224, 254 (2001).....	11

Statutes, Rules and Regulations:

California Labor Code § 1182.12-1198.....	4
California Labor Code § 1194.....	1,4
California Labor Code § 1197.....	1,4
California Labor Code § 1198.....	1
California Labor Code § 1997.1.....	1
California Labor Code § 1174.....	4
California Labor Code § 1174.5.....	4
California Labor Code § 510.....	1
California Labor Code § 512.....	1,2
California Labor Code § 513.....	4
California Labor Code § 558.....	4
California Code of Civil Procedure §382	10
California Labor Code § 201.....	2,4
California Labor Code § 201.1.....	4
California Labor Code § 202.....	2,4
California Labor Code §203	2,4
California Labor Code §204.	4
California Labor Code §210.	4
California Labor Code §218.5.	4
California Labor Code §218.6.	4
California Labor Code §226	2,4
California Labor Code §226.3	2,4
California Labor Code §226.7	1,4
California Labor Code §2699.....	1,4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

California Labor Code §2698.....1,2,4

Secondary Sources:

In re Taco Bell Wage & Hour Actions,
2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016).....8

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Elias Kaser (“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 Aviation Consultants, Inc. (“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 claim.¹ This is only a settlement of the PAGA claim for civil
8 penalties, and is not a class settlement and does not release the individual wage claims, if any, of the
9 affected employees other than Plaintiff himself. Cal. Labor Code § 2699(g)(1); *Iskanian v. CLS*
10 *Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 182 (2019)
11 (unpaid wages are not recoverable under PAGA).

12 The PAGA settlement is set forth in the accompanying Private Attorneys General Act (Labor
13 Code Section 2698 *et seq.*) Settlement Agreement and Limited Release (“Settlement Agreement”). A
14 true and correct copy of the Settlement Agreement which sets forth the terms for the settlement of the
15 PAGA claim is attached as Exhibit #1 to the Declaration of Shani O. Zakay, filed herewith.
16 Capitalized terms shall have the same meaning as defined in the Settlement Agreement. The LWDA
17 received notice of this Settlement and this motion as set forth in the accompanying proof of service.

18 A proposed order confirming review and approval of the PAGA settlement is submitted
19 herewith.

20 **II. RELEVANT FACTS**

21 On July 31, 2020, Plaintiff Elias Kaser on behalf of himself and on behalf of similarly situated
22 aggrieved employees submitted a notice and draft complaint to the LWDA memorializing claims
23 against Defendant for alleged violations of the California Labor Code, including causes of action for
24 failure to pay minimum wages in violation of Labor Code sections 1194, 1197, and 1197.1; failure to
25 pay overtime wages in violation of Labor Code section 510; failure to provide required meal periods
26 in violation of Labor Code sections 226.7 and 512; failure to provide required rest periods in violation
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 of Labor Code sections 226.7 and 512; failure to provide accurate itemized wage statements in
2 violation of Labor Code section 226; failure to provide wages when due in violation of Labor Code
3 sections 201, 202, and 203; violation of Labor Code section 1198 related to failure to provide adequate
4 seating; and violation of the California Labor Code Private Attorneys General Act of 2004 (Labor
5 Code section 2698, *et seq.*), LWDA Case No. 800909-20. On October 12, 2020, Plaintiff and
6 Defendant entered into a Statute of Limitations Tolling Agreement, which tolled Plaintiff's statute of
7 limitations on Plaintiff's individual, class and representative PAGA claims against Defendant from
8 October 5, 2020 to April 23, 2021. On March 17, 2021, Plaintiff submitted a second notice to the
9 LWDA memorializing additional wage and hour claims against Defendant for alleged violations of
10 the California Labor Code. On March 23, 2021, Plaintiff filed the instant Action, alleging a single
11 cause of action for violations of PAGA based on the above alleged Labor Code violations. (Decl.
12 Zakay at ¶4).

13 A. Mediation

14 Plaintiff and Defendant agreed to mediate the action with Steven Rottman, Esq., an
15 experienced and reputable wage and hour and PAGA actions mediator. Prior to the mediation, in order
16 to evaluate the potential value of the claims, the Parties engaged in significant efforts to obtain the
17 facts regarding the claims asserted, including all of Defendant's relevant wage and hour policies, the
18 exchange of detailed statistical data regarding shifts worked by Plaintiff and the Aggrieved
19 Employees, the production of hundreds of pages of documents, including a large sample of payroll
20 records and time records, and the exchange of detailed briefing and analysis in connection with the
21 mediation. (Decl. Zakay at ¶5.)

22 Thereafter, on March 23, 2021, the Parties engaged in a full-day mediation with Mediator
23 Steven Rottman. At the conclusion of the full-day mediation, the Parties reached a settlement based
24 on a mediator proposal, which led to the signing of a Memorandum of Understanding memorializing
25 the settlement.² The settlement was negotiated in light of all known facts and circumstances and the

26
27 ² As part of the settlement and in addition to the Gross Settlement Amount, Defendant has agreed to
28 separately settle Plaintiff's individual claims which is set forth in a separate Individual Settlement
Agreement. The Individual Settlement Agreement is confidential, but can be made available to the
Court for in-camera review upon request.

1 uncertainty associated with litigation – including the risk of Plaintiff not being able to maintain
2 representative claims, the difficulty of proving Plaintiff’s claims in a manageable trial, the merits of
3 Defendant’s potential defenses, Defendant’s financial hardship resulting from the effects of COVID-
4 19³, and the significant delay and potential appellate issues inherent to litigation – and was reached
5 after extensive arm’s length negotiations over several months, with the assistance of Mediator Steven
6 Rottman. (Decl. Zakay at ¶5.)

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

8 The PAGA settlement is subject to Court approval consistent with Labor Code § 2699(1)(2)
9 (Settlement Agreement at §5.02). The Settlement Agreement negotiated by the Parties provides for a
10 “Gross Settlement Amount” payment in the amount of \$238,000 to resolve the PAGA Claim
11 (hereinafter referred to as the “PAGA Settlement”). From this PAGA Settlement of \$238,000, there
12 is a deduction of attorneys’ fees in the amount of \$79,333 (which is one-third of the PAGA
13 Settlement), reimbursement of incurred costs in an amount not to exceed \$22,000, and Settlement
14 Administration Costs, which will not exceed \$3,495. (Settlement Agreement at § 5.01-5.04).⁴ After
15 these deductions, the amount remaining is the “PAGA Payment”, which is estimated to be \$133,172.

16 Of the PAGA Payment amount, seventy-five percent (75%) will be paid to the LWDA and the
17 remaining twenty-five percent (25%) will be paid to the Aggrieved Employees (Settlement Agreement
18 at 5.04).⁵ This 75/25 allocation is required by Labor Code § 2699 as explained by *ZB, N.A. v. Superior*
19

20 ³ Defendant is a service provider for the airline industry, which has been negatively impacted by the
21 COVID-19 pandemic.

22 ⁴ In the event the Court approves less than One-Third of the PAGA Settlement Amount in Attorneys’
23 Fees or less than \$22,000 in Attorneys’ Expenses to Plaintiff’s Counsel, the unawarded difference will
24 be added to the PAGA Payment and not to Plaintiff’s Counsel or Defendant (Settlement Agreement
25 at 5.02). In the event the Court approves less than \$3,495 to administer the settlement or if the actual
26 cost to administer the settlement is less than \$3,495, the difference will be added to the PAGA
27 Payment. (*Id.* at 5.03).

28 ⁵ “Aggrieved Employees” means all current and former hourly or non-exempt employees that worked
for Aviation Consultants, Inc. in the State of California at any time during the PAGA Period.
(Settlement Agreement at § 1.01(iii)). The PAGA Period is July 31, 2019 through the date the Court
grants approval of the PAGA Settlement and resolves any and all claims relating to the facts and claims
asserted in the Action or any other claims, under PAGA, based on the facts alleged in the LWDA letter
and the Complaint.

1 Court, 8 Cal.5th 175 (2019).

2 The Individual PAGA Payment for each Aggrieved Employee shall be based on the number of
3 biweekly payroll periods each Aggrieved Employee worked during the PAGA Period as a percentage
4 of the total pay periods worked by all Aggrieved Employees during the PAGA Period. (*Id.*) The
5 PAGA Period is the time period from July 31, 2019 through the date the Court grants approval of the
6 PAGA Settlement. (Settlement Agreement at § 1.01(xvii)).

7 During mediation, Defendant represented to Plaintiff's Counsel the number of pay periods and
8 Aggrieved Employees. Defendant represented that there are approximately 214 Aggrieved Employees
9 who worked approximately 6,000 pay periods during the PAGA Period. (Settlement Agreement at §
10 6.02).

11 A. Release of Claims by Non-Exempt Aggrieved Employees

12 Upon entry of Judgment and funding in full of the Settlement by Defendant, the Released
13 Parties shall be entitled to a release from the State of California and Plaintiff as to the following claims:
14 All claims, rights, demands, liabilities and causes of action for civil penalties under the PAGA that
15 arose during the PAGA Period, that were alleged in the Action, including but not limited to the
16 following claims: (a) failure to pay all minimum wages owed; (b) failure to pay all overtime and/or
17 double time wages owed; (c) failure to pay all overtime and/or double time at the correct rate(s) of pay
18 due to bonus payments, incentive compensation, or otherwise; (d) failure to provide compliant meal
19 periods, or premium pay for non-compliant meal periods; (e) failure to authorize and permit compliant
20 rest periods, or premium pay for non-compliant rest periods; (f) failure to provide accurate, itemized
21 wage statements; (g) failure to timely pay wages during employment and/or upon separation of
22 employment; (h) failure to provide adequate seating; (i) all claims for PAGA penalties that could have
23 been premised on the facts, claims, causes of action or legal theories described above; and (j) all other
24 claims under PAGA that could have been premised on the facts, claims, causes of action or legal
25 theories described above and in the complaint, including but not limited to California Labor Code
26 sections 201, 201.3, 202, 203, 204, 210, 226, 226.3, 226.7, 218.5, 218.6, 510, 513, 558, 1174, 1174.5,
27 1182.12-1198 *et seq.*, 1194, 1197, 2698, and 2699. ("Released Claims") (Settlement Agreement at
28 §1.01(xxiii)).

1 This PAGA Released Claims in the Settlement Agreement excludes all PAGA claims outside
2 the PAGA Period, all PAGA claims not alleged in the operative complaint or LWDA Notice, and all
3 non-PAGA claims. (*Id.*) The Settlement Agreement does not release any individual claims of any
4 individuals other than Plaintiff. (*Id.*)

5 The Gross Settlement Amount shall be due by Defendant to the Settlement Administrator
6 within 30 days of the Effective Date as defined by the Settlement Agreement. (Settlement Agreement
7 at 6.04(c)).

8 Notice will be provided to the Aggrieved Employees in the following manner: Defendant will
9 provide the necessary information about the Aggrieved Employees to the Settlement Administrator
10 (Simpluris) within ten (10) business days of the approval of the PAGA settlement by the Court.
11 (Settlement Agreement at §6.04(b)). Within twenty-one (21) days after receipt of the PAGA
12 Settlement Amount from Defendant, the Settlement Administrator will issue to each Aggrieved
13 Employee a check for their Individual PAGA Payment at their last known home address along with
14 notice which has been mutually approved by the parties. (Settlement Agreement at § 6.04). Checks
15 will remain negotiable for one hundred eighty (180) days. (*Id.* at § 6.04(b)). Any checks returned as
16 non-deliverable on or before the check cashing deadline will be sent promptly via regular First-Class
17 U.S. Mail to the forwarding address affixed thereto. (*Id.*) If no forwarding address is provided, the
18 Settlement Administrator will promptly attempt to determine the correct address using a skip-trace, or
19 other search using the name, address, Social Security number, phone number, credit reporting and
20 social media of the Aggrieved Employee involved and will then perform a re-mailing. (*Id.*) If the
21 check remains uncashed by the expiration of the 180-day period, the funds from such uncashed checks
22 will be paid by *cy pres* consistent with California Code of Civil Procedure § 384 to the Capital Pro
23 Bono, Inc. and the Workers' Rights Employment Law Clinic (50/50), subject to Court approval, and
24 the Aggrieved Employees shall remain bound by the Settlement. (*Id.*; Settlement Agreement at § 5.05).
25 Pursuant to California Code of Civil Procedure § 384.4, the attorneys who signed the Settlement
26 Agreement hereby notify the Court that they and their respective firms have no relationship with or
27 connection to the Cy Pres recipients that could create an appearance of impropriety. (*Id.*) The
28

1 Individual PAGA Payments are 100% penalties and shall be reported using IRS tax form 1099.
2 (Settlement Agreement § 6.04(b))

3 Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of the
4 Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant motion
5 for settlement approval as set forth in the accompanying proof of service in compliance with Labor
6 Code section 2699(1). In addition, Plaintiff shall submit to the LWDA a copy of the Court's judgment
7 and order approving the Settlement Agreement within ten (10) days after entry of judgment or order.

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

9 The claim before this Court is the representative claim under the PAGA on behalf of the State
10 of California for civil penalties pursuant to the PAGA. The parties have agreed to settle this PAGA
11 claim in its entirety after significant informal discovery, and an arm's length mediation. (Declaration
12 of Shani O. Zakay, at ¶5.) The settlement is intended to fully and finally resolve the PAGA Released
13 Claims asserted by Plaintiff on behalf of the State of California. This is only a settlement of the PAGA
14 claims for civil penalties, and is not a class settlement and does not release the individual claims, if
15 any, of the Aggrieved Employees. This settlement does not release any claim that is not a PAGA
16 claim.⁶ Attorneys' fees equal to one-third of the PAGA Settlement amount (\$79,333) and litigation
17 expenses in an amount not to exceed \$22,000 will also be paid to Plaintiff's Counsel as part of the
18 settlement in accordance with California Labor Code § 2699(g)(1) as set forth in the Settlement
19 Agreement.⁷ Lastly, payment to the Settlement Administrator in an amount not to exceed \$3,495 to
20 perform the administrative duties to distribute the settlement money shall also be paid. (Declaration
21 of Shani O. Zakay, at ¶6.)

22 **V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE SETTLEMENT** 23 **OF THE PAGA CLAIM**

24
25

26 ⁶ As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th at 196: "Nonparty employees are bound
27 by the judgment in an action under the PAGA, but only with respect to recovery of civil penalties."

28 ⁷ As set forth in the accompanying Declaration of Shani O. Zakay, Plaintiff's Counsel incurred costs
in the current amount of \$11,909.09 which is less than the cost allocation in the Settlement
Agreement. See Declaration of Zakay at ¶ 20.

1 Labor Code § 2699(l) requires that the Court “shall review and approve any settlement of any
2 civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the
3 agency at the same time that it is submitted to the court.” Consequently, the parties respectfully ask
4 the Court to review and approve the settlement of the PAGA claims and the PAGA Payment to be
5 paid as part of the proposed settlement.

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

7 Plaintiff and his counsel believe that the PAGA Settlement amount is fair and reasonable and
8 therefore "shall" be reviewed and approved. The Labor and Workforce Development Agency has
9 released data on PAGA settlement amounts. After removing the outliers at the low and high end, the
10 average, total settlement amount of PAGA claims is approximately \$10,000. Here, the PAGA
11 Settlement Amount of \$238,000 is significantly more and constitutes almost \$40 per pay period.
12 (Declaration of Zakay, at ¶11.)

13 California Labor Code Section 2699(e)(1) permits a Court to award a lesser amount than the
14 maximum civil penalty if based on the facts and circumstances to do otherwise would result in an
15 award that is "unjust, arbitrary and oppressive or confiscatory." Before and during the mediation,
16 Defendant argued, among other things, that it was unlikely that any Judge would award more than the
17 actual amounts owed on the claims, let alone the full \$100 or \$200 per violation. In *Carrington v.*
18 *Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal affirmed a judgment after trial
19 which only provided for a PAGA penalty of \$5 per pay period. Therefore, at trial, any PAGA penalties
20 awarded in this case could be significantly less than Plaintiff's calculation, even had Plaintiff prevailed
21 on the PAGA claim. Here, multiplying the number of violations identified, assumed, and extrapolated
22 by Plaintiff's expert (24,948 violations) by \$5 results in a total potential liability of **\$124,740**. Further,
23 multiplying the number of pay periods (6,000) by \$5 results in a total potential liability of **\$30,000**.
24 Therefore, even assuming Plaintiff would have prevailed on all of his claims in trial, the result obtained
25 by Plaintiff in the Settlement exceeds the amount Plaintiff would have recovered had the Court relied
26 on *Carrington* in awarding the PAGA penalties.

27 Under the PAGA, courts have considerable discretion to reduce the penalty award. In *Fleming*
28 *v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA penalties

1 from \$2,800,000 to \$500,000, a reduction of 82.2%, as the court found maximum penalties "unjust"
2 because the employees had suffered no injuries. Some trial courts have actually awarded no civil
3 penalties, even when Labor Code violations are established. See *Makabi v. Gedalia*, 2016 Cal. App.
4 Unpub. 1489, *5-7 (2nd Dist. Ct. of App. Mar. 6, 2016) (no PAGA penalties were awarded by the Los
5 Angeles County Superior Court) (unpublished decision); *In re Taco Bell Wage & Hour Actions*, 2016
6 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

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

15 Defendant maintains that Plaintiff and the Aggrieved Employees were properly compensated,
16 and that it did not violate the Labor Code.

17 Most importantly and relevant to this case, Defendant argued that the Supreme Court decision
18 in *Brinker v. Superior Court*, 53 Cal.4th 1004 (2012), weakened, if not eliminated, Plaintiff's claims,
19 on liability, value, and discretion with respect to the PAGA penalties, as to the meal and rest period
20 claims. A major component of the penalties alleged to have been owed by Defendant are attributed to
21 non-compliant meal and rest breaks. Before and during the mediation, Defendant aggressively argued
22 that Defendant's policies and culture afforded the Aggrieved Employees an opportunity to take timely
23 meal and rest breaks, and that employees like Plaintiff *chose* not to take compliant breaks. Specifically,
24 Defendant's written policies encouraged Aggrieved Employees to take meal periods and rest breaks
25 according to schedules compliant with the California Labor Code. The policy further *required*
26 employees who felt they were not provided an opportunity to take a meal or a rest break to notify and
27 provide an explanation to their manager no later than the next day. Defendant argued, therefore, that
28 under the *Brinker* decision it has no liability for the missed breaks whatsoever. Defendant argued that

1 it adopted and strictly enforced lawful policies and afforded Plaintiff and the Aggrieved Employees
2 compliant meal and rest breaks. Because Plaintiff's claims were largely based on the missed meal and
3 rest breaks, and because Defendant's policies were, indeed, compliant, this presented a very real
4 concern for Plaintiff. If successful, this defense could eliminate or substantially reduce any recovery
5 under PAGA. While Plaintiff believes that this defense, and others, could be overcome, Defendant
6 maintains these defenses have merit and therefore present a serious risk to recovery of penalties. (Decl.
7 Zakay at ¶15).

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

15 Given Defendant's potential defenses to the violations at issue, the risks and costs of continued
16 litigation, Plaintiff and his attorneys believe that the PAGA Settlement is fair and reasonable.
17 Plaintiff's Counsel have significant experience litigating wage and hour claims including claims for
18 PAGA penalties, and the PAGA Settlement here is similar to or greater than similar settlements that
19 courts have approved. The PAGA Settlement, along with the other terms of the proposed settlement,
20 were negotiated by experienced counsel at arm's length with the assistance of an experienced and
21 reputable mediator, Steven Rottman. (Declaration of Zakay, at ¶17.)

22 As set forth in the accompanying proof of service, the LWDA has been provided notice of this
23 motion and the PAGA settlement. The decision of the LWDA to accept the PAGA Settlement and
24 not oppose the motion should be given considerable weight. This is not a situation where the Court
25 needs to be concerned about the rights of absent employees as in a class settlement, as this PAGA-
26 only settlement does not release the individual claims of absent employees, and the LWDA is a
27 sophisticated government entity that is more than able to look out for its own rights.
28

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 \$79,333 representing one-third of the \$238,000 PAGA Settlement amount. PAGA does not have
11 any requirements for reviewing attorneys' fees, and Plaintiff's position is that the payment of attorneys'
12 fees and costs in this settlement is a matter of contract for a contingent representation. Nevertheless,
13 should this Court review the requested attorneys' fees, it is clear that the requested fees and costs are
14 reasonable.

15 First, the requested fees are justified by the result achieved. Plaintiff's Counsel negotiated a
16 recovery of \$238,000, 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).

20 Second, the fee award is justified by the work performed. As detailed in the accompanying
21 Declaration of Shani O. Zakay at ¶19 and ¶21 and Declaration of Jean-Claude Lapuyade, the fee award
22 represents Plaintiff's Counsels' current combined lodestar of \$77,345 with a multiplier of 1.02 with
23 additional work to be performed such that the multiplier will ultimately be even lower. Generally, the
24 Ninth Circuit and California Courts award multipliers between 2 to 4 times the lodestar to reward
25 counsel for accepting the contingent risks of the litigation or obtaining good results. See, e.g., *Laffitte*,
26 1 Cal. 5th at 506 (approving one-third fee award with multiplier between 2.03 and 2.13); *Pellegrino*
27 *v. Robert Half Intern., Inc.*, 182 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0
28 are often applied and affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th

224, 254 (2001) (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa Capital Corp.*, 8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.52 multiplier of lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented a multiplier of 2.76 as falling within the "majority" range for risk multipliers).

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

Finally, as to litigation expenses, Plaintiff's Counsel will be recovering litigation expenses in the total amount of 11,909.09 which is less than the \$22,000 allocation for costs in the Settlement Agreement, so the difference of \$10,090.91 will be added to the PAGA Payment amount. These expenses are documented in the accompanying Declaration of Zakay at ¶20.

VII. CONCLUSION

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

Dated: August 13, 2021

ZAKAY LAW GROUP, APC

By:


Shani O. Zakay