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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN JOAQUIN

BAUDELIO MARISCAL, an individual,
CRISTIAN NEVAREZ, an individual, and
JANET VILLASANA, an individual, on
behalf of themselves and other aggrieved
employees,

Plaintiffs,

vs.

MUNGER BROS. LLC, a California
limited liability company; MUNGER
FARMS, LLC, a California limited liability
company; and CROWNE COLD
STORAGE, LLC, a California limited
liability company; and DOES 1 through
100, inclusive,

Defendants.

CASE NO. STK-CV-UOE-2020-4639

[Assigned for all purposes to the Hon.
Barbara Kronlund, Dept. 10D]

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
PRIVATE ATTORNEYS GENERAL
ACT SETTLEMENT AGREEMENT,
FOR ATTORNEYS' FEES AND COSTS
AND ADMINISTRATIVE FEES;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[Declaration of Ross E. Shanberg and
[proposed] Order filed concurrently
herewith]

Date: _____, 2021

Time: 9:00 a.m.

Dept.: 10D

1 PLEASE TAKE NOTICE that on _____, 2021, at 9:00 a.m., or as soon
2 thereafter as the matter may be heard before the Honorable Barbara Kronlund, Dept. 10D of the
3 Superior Court of the State of California, County of San Joaquin, located at 180 E. Weber
4 Avenue, Stockton, California 95202, Plaintiffs Baudelio Mariscal, Cristian Nevarez, and Janet
5 Villasana (together, "Plaintiffs") will and hereby do move for entry of an order and judgment as
6 follows:

7 1. Granting approval, pursuant to California Labor Code section 2699, subd. (l)(2) of
8 the proposed settlement between Plaintiffs and Defendants Munger Bros. LLC, Munger Farms,
9 LLC, and Crowne Cold Storage, LLC ("Defendants") of the claims brought pursuant to the
10 Private Attorneys General Act of 2004 ("PAGA") as set forth in the PAGA Settlement
11 Agreement ("Settlement Agreement"), attached as Exhibit 1 to the Declaration of Ross E.
12 Shanberg;

13 2. Approving the Net Distribution Amount payable to the State of California and
14 Aggrieved Employees as authorized by California Labor Code section 2699, subd. (i);

15 3. Appointing ILYM Group, Inc. as the Settlement Administrator;

16 4. Directing Defendant to transmit settlement funds to the Settlement Administrator
17 in the total amount of \$425,000 pursuant to the Settlement Agreement;

18 5. Directing the Settlement Administrator to distribute the settlement funds to the
19 Aggrieved Employees under a cover letter in the form and content substantially similar to
20 Exhibit A of the [proposed] Order, and distributing funds to the Labor and Workforce
21 Development Agency ("LWDA"), Plaintiffs' Counsel, and for Settlement Administration Costs,
22 in accordance with the terms of the Settlement Agreement;

23 6. Awarding to Plaintiffs' Counsel the amount of \$141,666.66 as compensation for
24 reasonable attorneys' fees ("Attorneys' Fees Payment"), \$8,691.36 for reimbursement of
25 litigation costs and expenses ("Litigation Costs Payment"), and \$10,000 for Settlement
26 Administration Costs.

27 This motion is based on this Notice of Motion and Motion, the Memorandum of Points
28 and Authorities, the Settlement Agreement, the Declaration of Ross Shanberg, the pleadings and

1 other records on file with the Court in this matter, and such evidence and oral argument as may
2 be presented at the hearing on this Motion.

3
4 Dated: December 15, 2020

SHANBERG, STAFFORD & BARTZ LLP

5
6 By: /s/Ross E. Shanberg/s/
7 Ross E. Shanberg
8 Aaron A. Bartz
9 Attorneys for Plaintiffs
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1 I.

2 **INTRODUCTION AND SUMMARY OF MOTION**

3 This is an action brought by Plaintiffs Baudelio Mariscal, Cristian Nevarez, and Janet
4 Villasana (together, “Plaintiffs”), pursuant to the Private Attorneys General Act of 2004
5 (“PAGA”), to recover civil penalties for themselves, other aggrieved employees and the State of
6 California. Plaintiffs and the other aggrieved employees are non-exempt employees who worked
7 for Defendants Munger Bros. LLC, Munger Farms, LLC and Crowne Cold Storage, LLC
8 (“Defendants”), and allege California wage and hour violations including failure to pay wages,
9 failure to authorize and permit meal and rest periods, and related violations.

10 Plaintiffs have agreed to settle the PAGA penalties for a Gross Settlement Fund of
11 **\$425,000**. The Gross Settlement Fund includes all attorneys’ fees and costs, settlement
12 administration expenses, and penalties payments to the aggrieved employees and the Labor and
13 Workforce Development Agency (LWDA). The Net Settlement Fund to be distributed to the
14 aggrieved employees and the LWDA is approximately \$264,641.98. The Net Settlement Fund
15 will be distributed 75% to the LWDA (\$198,481.48), and 25% to the aggrieved employees
16 (\$66,160.50).

17 The approximate number of aggrieved employees is 1,517. As such, each of the
18 aggrieved employees will receive, on average, approximately \$43 in penalties. In exchange for
19 such payment, the aggrieved employees are giving up no rights whatsoever to recover for
20 underlying violations of the Labor Code other than for PAGA penalties. Any aggrieved
21 employee may file a claim against Defendants for such violations.

22 This settlement is fair, reasonable and adequate, and therefore should be approved by this
23 Court.

24 II.

25 **PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

26 Defendants own and operate blueberry farms within the State of California, including in
27 the County of San Joaquin. Plaintiffs and other aggrieved employees worked for Defendants as
28 non-exempt employees working at Defendants’ blueberry plants during the applicable time

1 period.

2 Plaintiffs served their PAGA letter on the Labor and Workforce Development Agency
3 (LWDA) on February 26, 2020. Thereafter, Plaintiffs submitted a Complaint for filing on May
4 4, 2020, on behalf of themselves and other aggrieved employees for Civil Penalties under PAGA
5 based on Defendants' wage and hour violations, including failure to pay all wages, meal period
6 and rest break violations, and other wage violations.¹ (Shanberg Decl., ¶ 8).

7 Thereafter, Plaintiffs aggressively pursued this action, and agreed with Defendants on an
8 informal discovery exchange of payroll records, relevant employment policy documents, and
9 other extensive employment data. After engaging an expert to evaluate Plaintiffs' penalties
10 claims, the parties attended Mediation with retired Judge Carl West. Although the case did not
11 settle at the Mediation, Plaintiffs continued to aggressively pursue this matter, ultimately
12 resolving the case, and entering into a Settlement Agreement in December 2020.

13 III.

14 SUMMARY OF SETTLEMENT

15 A. Aggrieved Employees

16 The Settlement covers the following aggrieved employees:

17 Any and all current and former hourly-paid, non-exempt direct and staffing agency
18 packing house employees who worked for Defendants in the State of California at any time from
19 February 26, 2019 to December 31, 2020. (Shanberg Decl., ¶ 6, Ex. 1).

20 Based upon Defendants' records, there are approximately 1,517 aggrieved employees as
21 of the date of signing of the Settlement Agreement. (Shanberg Decl., ¶ 6).

22 B. Settlement Fund

23 Defendants will pay into a common fund the total amount of \$425,000. The settlement
24 payment by the Settlement Administrator shall be accompanied by a letter explaining why the
25 check is being sent, substantially in the form attached as "**Exhibit A** ("Letter") to the Settlement
26

27 ¹ Because of Covid-19 court closures, Plaintiffs' Complaint did not receive a filing date until one
28 month later, on June 5, 2020.

1 Agreement, to each of the Aggrieved Employees identified on the Aggrieved Employee List.
2 Prior to mailing the Letter, the Settlement Administrator shall review the addresses provided
3 using the National Change of Address database. Should any of the Letters be returned
4 undeliverable, the Settlement Administrator will have five (5) business days after it receives the
5 returned undeliverable mail to search for a more current address for the Aggrieved Employee
6 (via a skip trace or other reasonable method) and to re-mail Letters to any alternative or updated
7 address obtained by the Settlement Administrator. (Shanberg Decl., ¶ 4). The Net Distribution
8 Amount shall be calculated by deducting the Attorneys' Fees Payment, the Litigation Costs
9 Payment, and the Settlement Administration Costs Payment, from the Settlement Fund.

10 A breakdown of the Gross Settlement Fund of **\$425,000** is provided below:

- 11 1. Net Distribution Amount to Aggrieved Employees: \$66,160.50;
- 12 2. Net Distribution Amount to the LWDA: \$198,481.48;
- 13 3. Attorneys' Fees: \$141,666.66;
- 14 4. Litigation Costs: \$8,691.36;
- 15 5. Settlement Administration expenses: \$10,000.

16 **C. Release**

17 The "Released Parties" are the Defendants and each of its predecessors in interest,
18 successors in interest, parents, subsidiaries, affiliated companies, shareholders, directors,
19 officers, managers, employees, and agents.²

20 "Released Claims" include:

21 Any and all claims for civil penalties that could have been assessed upon
22 or collected from the Released Parties under California Labor Code § 2698, et
23 seq. ("PAGA"), based on the factual allegations of the Complaint, including
24 alleged violations of Labor Code §§ 201, 202, 203, 210, 226, 226.3, 226.7, 256,
25 510, 512, 550, 551, 1174, 1174.5, 1194, 1197, 1197.1, 1198, and 2699, arising
26

27 ² Released parties also include staffing companies contracted with by Defendants to staff
28 Defendants' operations. The released claims do not include any underlying Labor Code
violations, but only civil penalties recoverable under PAGA.

1 from the alleged failure to pay for all time worked or overtime wages, to pay
2 minimum wages, to provide compliant meal breaks and/or pay meal break
3 premiums, to provide compliant rest breaks and/or pay rest break premiums, to
4 timely pay wages during employment and upon termination, to provide compliant
5 wage statements, to maintain payroll records and/or satisfy other recordkeeping
6 requirements, to provide suitable seating, to provide one day's rest in a seven day
7 workweek, and those civil penalties recoverable under Labor Code § 558(a). The
8 Released Claims do not include any underlying claims or causes of action that
9 Aggrieved Employees may have, and relief that they may seek, against Released
10 Parties with respect to violations of the California Labor Code.

11 (Exhibit 1 to Shanberg Decl., pp. 2-3, ¶ 1(g)).

12 IV.

13 **LEGAL STANDARD FOR APPROVAL OF PAGA SETTLEMENT**

14 The PAGA statute allows an “aggrieved employee” to bring a civil action on behalf of
15 himself or herself and on behalf of other aggrieved employees and the State to recover civil
16 penalties which are specifically established by the PAGA with respect to provisions of the
17 California Labor Code which does not otherwise provide for civil penalties (Lab. Code §
18 2699(g)), and also, civil penalties which, outside of PAGA, only the LWDA can assess upon and
19 collect from an employer (Lab. Code § 2699(a)). Before bringing a civil action under PAGA, an
20 employee must comply with California Labor Code section 2699.3. *See* Labor Code § 2699(a).

21 The settlement of a PAGA claim requires court approval. *See* Labor Code § 2699, subd.
22 (1)(2) (“The superior court shall review and approve any settlement of any civil action pursuant
23 to this part”). However, “[a] PAGA claim asserted on a non-class representative basis . . . is not
24 considered a class action but a law enforcement action” and therefore one does not have to meet
25 the requirements of a class action. *Casida v. Sears Holding Corp.*, 2012 WL 253217, at *3 (E.D.
26 Cal. Jan. 26, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011 WL 2173715, at * 11 (E.D. Cal.
27 June 2, 2011); *Arias v. Superior Court*, 46 Cal.4th 969, 980-88 (affirming lower court’s holding
28 that “plaintiff need not satisfy class action requirements” to assert a PAGA claim); *Pedroza v.*

1 *PetSmart, Inc.*, 2013 WL 1490667, at *15 (C.D. Cal. Jan. 28, 2013). As such, a court’s review of
2 a PAGA settlement involves analysis of several unique features that render the approval process
3 distinct from approval of a class action settlement. A court reviewing a PAGA settlement need
4 only “ensur[e] that a negotiated resolution is fair to those affected.” *Williams v. Superior Court*,
5 3 Cal.5th 531, 549 (2017).

6 In a PAGA case, the Court’s focus is not the monetary amount which aggrieved
7 employees or the State are to receive, but instead, whether the total settlement amount achieves
8 the PAGA’s objectives. The purpose of the PAGA is “to incentivize private parties to recover
9 civil penalties for the government that otherwise may not have been assessed and collected by
10 overburdened state enforcement agencies.” See *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010
11 WL 1340777, at *4 (N.D. Cal. Apr. 2, 2010) (citing *Arias, supra*, 46 Cal.4th at 986). Penalties
12 recovered under the PAGA are, in part, to “be distributed to the [LWDA] for enforcement of
13 labor laws . . . and for education of employers and employees about their rights and
14 responsibilities under this code, to be continuously appropriated to supplement and not supplant
15 the finding to the agency for those purposes.” See Labor Code § 2699(j). The recovery of
16 penalties on behalf of the state, by way of a PAGA claim, is essentially a law enforcement
17 action. See *Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct.*, 46 Cal.4th 993, 1003
18 (2009) (stating that the PAGA is mechanism for “an aggrieved employee to recover civil
19 penalties—for Labor Code violations—that otherwise would be sought by state labor law
20 enforcement agencies”).

21 V.

22 **THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE**

23 This Settlement resulted from Plaintiffs’ aggressive litigation stance to obtain a
24 reasonable recovery after making a full and fair evaluation of the case. This PAGA settlement
25 should therefore be approved.

26 A. **The Settlement Is Presumed Fair**

27 A representative settlement is presumed fair where: (1) the settlement is reached through
28 arm’s length bargaining, (2) investigation and discovery are sufficient to allow counsel and the

1 court to act intelligently, (3) [and] counsel is experienced in similar litigation. (*See Dunk v. Ford*
2 *Motor Company* (1996) 48 Cal. App. 4th 1794, 1802.)³ A court may also consider relevant
3 factors such as the strength of the plaintiffs' case, the risk, expense, complexity and likely
4 duration of further litigation, the risk of maintaining class action status through trial, the amount
5 offered in settlement, the extent of discovery completed and the stage of the proceedings, the
6 experience and views of counsel, [and] the presence of a governmental participant. . . . (*See*
7 *Officers of Justice v. Civil Service Com'n of City and County of San Francisco* (9th Cir. 1995)
8 688 F.2d 615, 624.) "This list is not exhaustive and should be tailored to each case. Due regard
9 should be given to what is otherwise a private consensual agreement between the parties."
10 (*Dunk, supra*, 48 Cal. App. 4th at 1801.) Moreover, the trial court has broad powers to determine
11 whether a proposed [representative action] settlement is fair. (*See Mallick v. Superior Court*
12 (1979) 89 Cal. App. 3d 434.)

13 **B. The Settlement Is The Product of Arm's Length Negotiations**

14 In this action, Defendants have produced a sampling of personnel and policy documents,
15 detailed data regarding the aggrieved employees' pay records, and related employment
16 information for aggrieved employees. (Shanberg Decl., ¶ 9). Plaintiffs also hired statistical
17 expert James Toney to analyze the data on the aggrieved employees to create models reflecting
18 the total exposure to PAGA penalties in this case. (Shanberg Decl., ¶ 10).

19 The parties attended mediation before the Honorable Carl J. West (Ret.) on October 6,
20 2020. The mediation was vigorously contested, and at all times, the settlement negotiations were
21 non-collusive, and involved considerable disputes over payment terms. In fact, no settlement
22 was reached until more than one month after the mediation.

23 Plaintiffs did not settle this case until they had conducted sufficient investigation into the
24 claims, interviewed current and former non-exempt employees, and reviewed sufficient data to
25

26 ³ Although *Dunk* concerned a class action settlement, and class action settlements have stricter
27 requirements for approval than PAGA settlements, including giving notice to the class and the
28 right to opt out, Plaintiffs reference class action cases here because of the dearth of PAGA
appellate decisions addressing settlement standards, and because if Plaintiffs meet the class
action requirements, then they certainly meet the less stringent PAGA standards.

1 make a settlement determination. Plaintiffs believe that this is a good settlement of the PAGA
2 claims, which will not affect any aggrieved employee's right to pursue underlying Labor Code
3 violations against Defendants if he or she chooses to do so. (Shanberg Decl., ¶ 13).

4 **C. Plaintiffs' Counsel Is Experienced In Similar Litigation And Endorse The**
5 **Settlement**

6 The view of attorneys in representative litigation is "entitled to significant weight."
7 (*Fisher Bros. v. Cambridge-Lee Industries, Inc.* (E.D. Pa. 1985) 630 F.Supp. 482, 488; *see also*
8 *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18.) Plaintiffs' counsel have
9 significant experience in complex representative and class action wage and hour litigation.
10 (Shanberg Decl., ¶¶ 14-17.) As such, they are experienced and qualified to evaluate the claims
11 and defenses in this case, and unequivocally support the settlement reached herein.

12 **D. The Strength of Plaintiffs' Case, The Amount Offered In Settlement, and**
13 **The Risk, Expense, Complexity, and Duration of Further Litigation Favors Settlement**

14 Where both sides face significant uncertainty, the attendant risks favor settlement.
15 (*Hanlon v. Chrysler Comm.* (9th Cir. 1998) 150 F.3d 1011, 1026. Moreover, "[t]he expense and
16 possible duration of the litigation should be considered in evaluating the reasonableness of [a]
17 settlement." (*In re Mega Financial Corp. Securities Litigation* (9th Cir. 2000) 213 F.3d 454,
18 458.)

19 In this case, Plaintiffs seek PAGA penalties only. The sole PAGA claim that is at issue
20 in this settlement concerns Defendants' failure to: (1) pay all wages owed; (2) provide duty-free
21 meal periods; (3) authorize and permit duty-free rest periods; (4) pay all wages due upon
22 termination; (5) provide suitable seating; (6) provide one day's rest in seven; and (7) properly
23 maintain and submit accurate itemized wage statements. (Shanberg Decl., ¶ 18).

24 **1. Unpaid wages**

25 California Labor Code § 510(a) and the applicable Wage Orders regulating payment of
26 wages in the State of California, provide that eight (8) hours of labor constitutes a day's work
27 and any work in excess of eight (8) hours in one (1) workday and any work in excess of forty
28 (40) hours in any one workweek shall be compensated at the rate of no less than one and one-half

1 times the regular rate of pay for each employee and any work in excess of twelve (12) hours in
2 any one workday shall be compensated at the rate of no less than twice the regular rate of pay for
3 each employee. Plaintiffs and the aggrieved employees are also entitled to California's
4 minimum wage for each hour worked. Cal. Lab. Code § 1194.

5 Plaintiffs contend that Defendants have committed overtime and minimum wage
6 violations here because of Defendants' 30 minute automatic deduct policy whereby Defendants
7 deduct 30 minutes time from each employees' time whether he or she takes a meal period or not,
8 and whether or not Plaintiffs and the aggrieved employees receive a fully 30 minute meal period.
9 Based on interviews with aggrieved employees, Plaintiffs uncovered evidence that employees
10 must walk to a designated area for their meals, which is a long distance away from their
11 worksite. As such, Plaintiffs and the aggrieved employees contend that they do not receive a 30
12 minute meal period, and are short changed for all of their work hours.

13 Plaintiffs and the aggrieved employees also contend that they must undergo pre-shift and
14 post-shift security checks, before clocking in and after clocking out for work. Plaintiffs contend
15 that such activities are subject to the control of Defendants, and therefore must be compensated.
16 *See Frelkin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1056 (holding that exit searches are "hours
17 worked" and compensable under California law); *Cervantez v. Celestica Corp. et al.* (C.D. Cal.
18 2009) 618 F.Supp.2d 1208, 1215 (finding that pre-shift security checks are compensable because
19 they are under the employer's control).

20 Defendants contend that they have numerous defenses to Plaintiffs' unpaid wage claims.
21 Defendants allege that they allow employees extra time to walk to and from their meal periods,
22 and Defendants produced policy documents supporting their defense. Defendants also aver that
23 there are no post-shift security checks, and that any pre-shift security checks are *de minimis*, and
24 after aggrieved employees have already clocked into work.

25 The maximum potential PAGA penalties for the unpaid wage claim is \$1.87 million, as
26 calculated by Plaintiff's expert. (Shanberg Decl., ¶ 18.a). Based on the various issues raised
27 above, Plaintiffs believe they had a 20% chance of success on the various unpaid wage theories.
28 Nevertheless, Labor Code section 2699(e)(2) also gives a trial court broad discretion to reduce

1 PAGA penalties: “[A] court may award a lesser amount than the maximum civil penalty amount
2 specified by this part if, based on the facts and circumstances of the particular case, to do
3 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”
4 Case law supports a trial court’s discretion in downgrading penalties based on these factors. *See*
5 *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal.App.4th 1112, 1135-1136 (2012) (no
6 abuse of discretion by reducing penalty by 30 percent). Thus, Plaintiffs believe that the real
7 value of the unpaid wage penalties are \$261,800. (\$1,870,000 x .2 [chances of success] x .7
8 [court discretion] = \$261,800). (Shanberg Decl., ¶ 18.a).

9 2. Meal period violations

10 Plaintiffs contend that Defendant failed to provide Plaintiffs and other aggrieved
11 employees thirty-minute duty-free meal periods for every five hours of work as is required by
12 Labor Code § 512, the applicable wage orders, and in violation of *Brinker Restaurant Corp. v.*
13 *Superior Court* (2012) 53 Cal.4th 1004. In *Brinker*, the California Supreme Court held that
14 “under ... Labor Code § 512, subdivision (a), an employer must relieve the employee of all duty
15 for the designated period.” *Id.* at 1034.

16 *First*, Plaintiffs contend that the aggrieved employees are not relieved of all duties when
17 they have to walk long distances simply to get to the designated meal period area. *Second*,
18 Defendants’ 30 minute auto-deduct policy shortens the time for taking meal periods by a
19 substantial margin. *Third*, even for those employees who clocked out during their meal periods,
20 the evidence shows late and short meal breaks, thus violating California law.

21 Moreover, Plaintiffs contend that Defendants fail to document many of Plaintiffs’ and the
22 aggrieved employees’ meal periods, a prima facie violation of the Wage Orders. As such,
23 Plaintiffs claim that there is a presumption that Plaintiffs and the aggrieved employees were not
24 relieved of duty and no meal periods were provided. *See Brinker, supra*, 53 Cal.4th at 1053
25 (conc. opn. of Werdegar, J.).

26 In response to such arguments, Defendants contend that they permit all aggrieved
27 employees more than 30 minute meal periods to walk to the designated meal period location, and
28 for those aggrieved employees working on production lines, there is no requirement to keep

1 records because Defendants shut down the production lines during meal periods, and therefore
2 “operations cease.” See IWC Wage Order 8-2001, § 7(A)(3). Defendants further argue that
3 individual issues will predominate because of the various scenarios affecting different classes of
4 employees working for Defendants. As such, Defendants claim that PAGA claims must meet a
5 manageability requirement. See *Litty v. Merrill Lynch & Co., Inc.*, 2014 WL 5904904, *3-4
6 (C.D. Cal. Nov. 10, 2014) (finding that the “PAGA claim [is] unmanageable because a multitude
7 of individualized assessments would be necessary”).

8 The maximum potential PAGA penalties recoverable for meal period violations, as
9 calculated by Plaintiffs’ expert, is \$3.75 million. (Shanberg Decl., ¶ 18.b). Based on the various
10 issues raised above regarding proving meal period violations, Plaintiffs believe that they have a
11 10% chance of proving all of those penalties. Thus, Plaintiffs believe that the real value of the
12 meal period penalties are \$262,500. ($\$3,750,000 \times .10$ [chances of success] $\times .7$ [court
13 discretion] = \$262,500). (Shanberg Decl., ¶ 18.b).

14 3. Rest period claims

15 Section 12(A) of the IWC Wage Order(s) states: “Every employer shall authorize and
16 permit all employees to take rest periods, which insofar as practicable shall be in the middle of
17 each work period. The authorized rest period time shall be based on the total hours worked daily
18 at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However,
19 a rest period need not be authorized for employees whose total daily work time is less than three
20 and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which
21 there shall be no deduction from wages.”

22 Section 12(B) of the IWC Wage Order(s) states: “If an employer fails to provide an
23 employee a rest period in accordance with the applicable provisions of this order, the employer
24 shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for
25 each workday that the rest period is not provided.”

26 Under *Brinker, supra*, the California Supreme Court found that employers have a “duty
27 to make a good faith effort to authorize and permit rest breaks in the middle of each work period.
28 . . .” *Brinker, supra*, 53 Cal.4th at 1031. Plaintiffs allege that rest periods after 10 hours of work

1 were only provided at the end of employees' shifts, or sometimes not at all.

2 Defendants contend that they complied with California's rest period requirements, and
3 produced documentary evidence of aggrieved employees taking rest period breaks, even after
4 their 10th hour of work. Defendants also produced a rest period policy that complies with
5 California law.

6 Plaintiffs' damages expert calculates total penalties on the rest period claim of \$3.75
7 million. Given the documentary records produced by Defendants, and potential individual issues
8 relating to proving rest break violations, Plaintiffs believe they had a 10% chance of recovering
9 all of the above penalties on the rest period claim, in the absence of other mitigating factors.
10 (Shanberg Decl., ¶ 18.c). Given that a court has discretion regarding the amount of penalties to
11 be assessed, Plaintiffs therefore believe the real exposure of PAGA penalties on the rest period
12 claim is approximately \$262,500. ($\$3,750,000 \times .1$ [chances of success] $\times .7$ [court discretion] =
13 \$262,500.) (Shanberg Decl., ¶ 18.c).

14 4. Failure to pay all wages on termination

15 Plaintiffs further allege that pursuant to Labor Code §203, aggrieved employees terminated
16 from Defendants' employment are entitled to a penalty pursuant to Labor Code §256, because
17 Defendants did not pay them all wages due upon separation. Such a claim is derivative, and for the
18 same reasons as stated above, Defendants contend no wages are due, and thus no penalties owed
19 under PAGA. Defendants argue that because many of their workers were hired through temporary
20 staffing agencies, and for seasonal employment, that wages are not due immediately upon the end of
21 their employment for the season. See Cal. Labor Code § 201.3(b)(1)(A). Defendants further argue
22 that their failure to pay wages upon separation was not "willful," in that the law is uncertain as to
23 claims asserted in this case or whether the failure to pay is due to a good faith dispute. See *Barnhill*
24 *v. Robert Saunders & Co.*, 125 Cal.App.3d 1, 8 (1981) (employer's failure to pay is not willful if its
25 failure is due to uncertainty in the law); *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire*
26 *Sprinklers, Inc.*, 102 Cal.App.4th 765, 782 (2002) (willfulness not met if defendant's failure to pay a
27 result of a "good faith mistaken belief that wages are not owed").

28 Plaintiffs' expert calculates PAGA penalties on this claim of \$3.13 million. Based on the

1 heightened willfulness standard, Plaintiffs estimate that the real exposure of this claim is 10% of
2 those total penalties. Moreover, Plaintiffs apply the same discounts as set forth above in the
3 above analysis as to the court's discretion to reduce penalties. As such, Plaintiffs believe the real
4 exposure on this claim to be \$219,100 ($\$3,130,000 \times .1$ [chances of success] $.70$ [court
5 discretion] = \$219,100). (Shanberg Decl., ¶ 18.d).

6 5. Suitable seating

7 Plaintiffs initially alleged a claim for Defendants' failure to provide suitable seating for
8 non-exempt employees. After investigating this claim, however, Plaintiffs discovered that many
9 of the jobs cannot be accomplished without standing, and that Defendants do provide seating
10 when necessary. Moreover, seating is not required when it would interfere with the performance
11 of an employee's duties. *See, e.g., Singletary v. Teavana Corp.*, 2014 WL 1760884 (N.D. Cal.
12 2014) (granting summary judgment to employer because plaintiff's job required constant
13 movement and plaintiff could not work while seated). Thus, Plaintiffs do not believe they would
14 be able to realistically recover any civil penalties on this theory of liability.

15 6. One day's rest in seven

16 Plaintiff also initially brought a claim pursuant to Labor Code section 551 providing that
17 employees are entitled to "one day's rest therefrom in seven," and Labor Code section 552,
18 providing that "[n]o employer shall cause his employees to work more than six days in seven."
19 After filing the Complaint, however, Defendants produced documentary evidence establishing
20 that employees voluntarily waive their right to work more than 6 consecutive days. Moreover,
21 the applicable wage orders provide that seven consecutive days may be worked so long as
22 premium wages are paid, and the evidence establishes that Defendants paid such premium wages
23 when aggrieved employees worked seven consecutive days. As such, Plaintiffs also do not
24 believe they would be able to realistically recover any civil penalties on this theory of liability.

25 7. Improper pay stubs

26 Plaintiffs further allege that Defendants failed to provide proper pay statements that
27 complied with Labor Code § 226.
28

1 Plaintiffs allege similar theories of liability as above with respect to the paystub claim,
2 i.e. that the wage statements are defective because they do not reflect all wages owed, and fail to
3 show premium payments for missed meal and rest periods. Plaintiffs further allege that to obtain
4 PAGA penalties for pay stub violations, a plaintiff need not satisfy the “injury” or “knowing and
5 intentional” requirements of Labor Code section 226(e)(1). *See Raines v. Coastal Pacific Food*
6 *Distributors, Inc.*, 23 Cal.App.5th 667 (2018).

7 On the other hand, Defendants argue that their and their staffing companies’ pay stubs are
8 compliant, and therefore no such PAGA penalties are owed. Moreover, Defendants argue
9 derivative violations of Labor Code § 226 do not give rise to pay stub violations upon which
10 PAGA penalties arise. *See Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308 (2018); *see*
11 *also Culley v. Lincare Inc.*, 236 F.Supp.3d 1184, 1195-1196 (E.D. Cal. 2017). Defendants further
12 argue that any such violations were inadvertent, and therefore not actionable. *See Heritage*
13 *Residential Care, Inc. v. Division of Labor Standards Enforcement*, 192 Cal.App.4th 75 (2011).

14 Plaintiffs’ expert calculates pay stub penalties to be approximately \$18.36 million. Based
15 on recent law that derivative pay stub violations may not be actionable, and based on
16 Defendant’s other potential defenses, Plaintiffs believe they had a 1% chance of recovering all of
17 the potentially recoverable civil penalties. Moreover, Plaintiffs apply the same discounts as set
18 forth above in the analysis as to the court’s discretion to reduce penalties. As such, Plaintiffs
19 believe the real exposure on this claim to be \$128,520. ($\$18,360,000 \times .01$ [chances of success]
20 $\times .7$ [court discretion] = \$128,520). (Shanberg Decl., ¶ 18.g).

21 8. Total exposure to PAGA penalties

22 Based upon the alleged Labor Code violations, Plaintiffs’ believe the total actual PAGA
23 exposure is approximately \$1.13 million. Based on a settlement value of \$425,000, this amounts
24 to approximately 38% of the total exposure to PAGA penalties. Plaintiffs believe this to be a
25 good result, given that Defendants have valid defenses to Plaintiffs’ claims, and that there is a
26 substantial question as to whether a trial court will even award cumulative penalties sought by
27 Plaintiffs for alleged multiple Labor Code violations because there is no precedent for such an
28

1 award.⁴ Moreover, even to the extent any violations are proven, Defendants argue that any
2 heightened penalties from subsequent violations are not warranted. *See Amaral v. Cintas Corp.*
3 *No. 2, 163 Cal.App.4th 1157, 1208-1209 (2008)* (“Until the employer has been notified that it is
4 violating a Labor Code provision. . . , the employer cannot be presumed to be aware that its
5 continuing underpayment of employees is a ‘violation’ subject to penalties”). (Shanberg Decl., ¶
6 18.h).

7 The purpose of the PAGA is to “achieve maximum compliance with [California’s] labor
8 laws.” *See Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 379 (2014). The penalties
9 recovered here on behalf of the State and aggrieved employees achieve that purpose.

10 VI.

11 **NOTICE OF THE SETTLEMENT IS NOT REQUIRED**

12 “[A] PAGA action is a statutory action for penalties brought as a proxy for the State,”
13 and as such, “there is no need to protect absent employees’ due process rights[.]” *Williams v.*
14 *Superior Court*, 3 Cal.5th 531, 546 (2017). “Unnamed employees need not be given notice of the
15 PAGA claim, no do they have the ability to opt-out of the representative PAGA claim.” *Ochoa-*
16 *Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, at *5 (N.D. Cal. Apr. 2, 2010). A
17 representative PAGA action need not satisfy class action requirements, and no due process
18 concern arises from the fact that there are “nonparty aggrieved employees who are not given
19 notice if, and an opportunity to be heard in, a representative action that is not brought a class
20 action.” *Arias v. Sup. Ct.*, 46 Cal.4th 969, 984 (2009). “PAGA does not make other potentially
21 aggrieved employees parties” to the action and no “due process concerns arise under PAGA
22 because absent employees do not own a personal claim for PAGA civil penalties and whatever
23 personal claims the absent employees might have for a relief are not at stake.” *Williams, supra*, 3
24 Cal. 5th at 546-547 (internal references omitted, citing *Amalgamated Transit Union, Local 1756*,

25
26 ⁴ While there are cases allowing for the “stacking” of penalties when it comes to evaluating the
27 “amount in controversy” where a case has been removed to federal court (*see Schiller v. David’s*
28 *Bridal, Inc.*, 2010 WL 2793650 (E.D. Cal. July 14, 2010)), it appears to be an open question
whether such “stacked” penalties may be awarded when they potentially overlap and “double
count” remedies for similar violations.

1 *AFL-CIO v. Sup. Ct.*, 46th Cal.4th 993, 1003 (2009) and *Iskanian v. CLS Transportation Los*
2 *Angeles, LLC*, 59 Cal.4th 348, 381 (2014).)

3 Even though Notice is not required, the Settlement Administrator will send a cover letter
4 to the aggrieved employees with their penalty payments explaining the nature of the checks. As
5 such, Plaintiffs are going above and beyond the requirements of PAGA. Moreover, Plaintiffs
6 have served the LWDA with the Settlement Agreement, Motion and supporting papers.
7 (Shanberg Decl., ¶ 22).

8 VII.

9 ATTORNEYS' FEES AND COSTS

10 A. Fees Can Be Awarded As A Percentage of the Common Fund

11 When a common fund is created, attorneys who secured the fund are entitled to a
12 percentage of the fund. (*See Laffitte v. Robert Half Int'l, Inc.* (2016) 1 Cal.5th 480, 503 [“the
13 court may determine the amount of a reasonable fee by choosing an appropriate percentage of
14 the fund created]; *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 26 [“percentage fees
15 have traditionally been allowed in . . . common fund cases”]). Plaintiffs’ request for one-third of
16 the common fund is reasonable, falls within the Ninth Circuit’s historical benchmark for
17 attorneys fees of 25% to 50% of a common fund, and is fair compensation for undertaking
18 complex litigation on a contingent basis. (*See, e.g.,* Rubinstein, Conte and Newberg, Newberg
19 on Class Actions at § 14:6 [surveying cases, and finding that 30-50% of fees awarded in cases in
20 which the common fund is relatively small]; *see also In re Ampicillin Antitrust Litigation*
21 (D.D.C. 1981) 526 F.Supp. 494 [court approved attorney fee award equal to 45% of the
22 settlement fund].)

23 Under the common fund doctrine, “a litigant or a lawyer who recovers a common fund
24 for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee
25 from the fund as a whole.” (*Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478 [100 S.Ct. 745,
26 750, 62 L.Ed.2d 676].) The Supreme Court explained:

27 The doctrine rests on the perception that persons who obtain the benefit of a
28 lawsuit without contributing to its cost are unjustly enriched at the successful
litigant’s expense. Jurisdiction over the fund involved in litigation allows a court

1 to prevent this inequity by assessing attorney's fees against the entire fund, thus
2 spreading fees proportionately among those benefitted by the suit." (Citations
3 omitted.)

4 (*Id.*; see also *Laffitte, supra*, 1 Cal.5th at 503 ["the percentage method is a valuable tool that
5 should not be denied our trial courts"]; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 ["one who
6 expends attorneys' fees in winning a suit which creates a fund from which other derive benefits,
7 may require those passive beneficiaries to bear a fair share of the litigation costs"].)

8 Thus, the common fund doctrine ensures that each member of the class contributes
9 proportionately to the payment of attorney's fees recovered from monetary payments that the
10 prevailing party recovered in the lawsuit. "Put another way, in common fund cases, a variant of
11 the usual rule applies and the winning party pays his or her own attorneys fees. . . ." (*Stanton v.*
12 *Boeing* (9th Cir. 2003) 327 F.3d 938, 967, citing *Wininger v. SI Mgmt L.P.* (9th Cir. 2002) 301
13 F.3d 1115.)

14 Because Plaintiffs' attorneys secured a fund for Plaintiffs and the other aggrieved
15 employees, they are entitled to a reasonable percentage of that fund.

16 **B. Plaintiff's Attorneys Fees Are Also Recoverable Under The Lodestar**
17 **Adjustment Approach**

18 Fees in representative cases are also appropriate under the lodestar method, whereby the
19 number of hours reasonably expended is multiplied by a reasonable hourly rate. (*See Lealao,*
20 *supra*, 82 Cal.App.4th at 26.) Under PAGA, moreover, attorneys' fees and costs are statutorily
21 recoverable. See Cal. Labor Code § 2699, subd. (g)(1). Once a lodestar has been established, it
22 may "be adjusted, based on consideration of factors specific to the case, in order to fix the fee at
23 the fair market value for the legal services provided." (*PLCM Group, Inc. v. Drexler* (2000) 22
24 Cal.4th 1084, 1095). In evaluating the lodestar, and whether an upward adjustment is
25 appropriate, courts look to the qualifications of counsel, the reasonableness of the rates charged,
26 the novelty and difficulty of the case, the contingent nature of the case, the results achieved, and
27 related matters. (*See, e.g., Serrano, supra*, 20 Cal.3d 25, 49; see also *Press v. Lucky Stores, Inc.*
28 (1983) 34 Cal.3d 311, 321-322.) All such factors support the fee award here.

1 **1. Plaintiffs’ Counsel Are Well-Qualified To Represent The Aggrieved**
2 **Employees And Their Rates Are Reasonable**

3 Counsel for Plaintiffs are experienced employment lawyers, and have extensive
4 experience in the specific subcategory of wage and hour claims. (Shanberg Decl. ¶¶ 14-17).
5 Moreover, counsel for Plaintiffs have hourly rates that are reasonable in the relevant market, and
6 below that found with other class action employment lawyers with similar expertise. (Shanberg
7 Decl., ¶¶ 19, 21).

8 **2. Plaintiffs’ Counsel’s Lodestar Is Well Documented**

9 A properly supported motion for attorney's fees is prima facie evidence that the expenses
10 and services were necessarily incurred. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682.)
11 Here, counsel provide appropriately detailed declarations and detailed, contemporaneous billing
12 statements in support of the lodestar amounts. (Shanberg Decl., ¶ 19, Ex. 5).

13 **3. Novelty And Difficulty Of The Case**

14 Plaintiffs and their counsel were able to secure a favorable settlement only after
15 investigating the claims and researching the theories of potential liability in this case. For
16 instance, Defendants contended that they had no liability for paying final wages to employees
17 because Defendants use staffing agencies to supply seasonal workers. Plaintiffs, however,
18 interviewed many employees who were not simply dismissed at the end of the growing season,
19 but were terminated prior to then. As such, Plaintiffs argued that wages must be paid on the day
20 of the termination, not simply on the regular payday. *See* Cal. Labor Code 201.3(b)(4), (5).
21 Plaintiffs’ theory of liability regarding whether not receiving a full thirty-minute meal period
22 because the workers’ lunch area is no in their immediate work area is also a novel issue.
23 Nevertheless, Plaintiffs aggressively asserted these claims, and secured a favorable settlement.

24 **4. Plaintiffs’ Counsel Worked Efficiently And Skillfully**

25 Immediately after filing the Complaint, Plaintiffs and their counsel worked with
26 Defendants and their counsel to secure the necessary discovery in attempting to evaluate and
27 investigate the alleged wage and hour violations. Plaintiffs and their counsel worked through the
28 Covid-19 pandemic to ensure that they secured the necessary discovery to evaluate the claims,

1 and resolved the case only after challenging Defendants at every turn to obtain the highest and
2 best settlement possible from Defendants.

3 **5. Plaintiffs' Counsel Worked Entirely On A Contingency Basis**

4 Plaintiffs' counsel worked on a complete contingency and advanced all expenses and
5 costs. The contingent risk included liability issues, damage issues, and evolving changes under
6 PAGA. According to the California Supreme Court:

7 A contingent fee must be higher than a fee for the same legal services paid as they
8 are performed. The contingent fee compensates the lawyer not only for the legal
9 services he renders but for the loan of those services. The implicit interest rate on
10 such a loan is higher because the risk of default (the loss of the case, which
11 cancels the debt of the client to the lawyer) is much higher than that of
12 conventional loans.

13 (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-1133, quoting Posner, *Economic Analysis of*
14 *Law* (4th ed. 1992) pp. 534, 567.)

15 The lodestar adjustment here is modest when compared with other cases. Here, the
16 lodestar adjustment is approximately 1.18. Multipliers of 3 or higher are routinely granted in
17 other comparable representative actions, well in excess of the adjustment sought here. *See*
18 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) (multiplier of 3.65 affirmed on
19 appeal); *Van Vranken v. ARCO*, 901 F.Supp. 294 (N.D. Cal. 1995) (3.6 adjustment to lodestar);
20 *Buccellato v. AT&T Operations, Inc.*, 2011 WL 3348055, *2 (N.D. Cal. 2011) (4.3 multiplier);
21 *Steiner v. American Broadcasting Co.*, 248 Fed.Appx. 780 (9th Cir. 2007) (6.85 multiplier
22 approved).

23 **6. Plaintiffs' Counsel Achieved A Good Result**

24 Plaintiffs' counsel obtained a \$425,000 settlement, which would not have been achieved
25 but for Plaintiffs' and their attorneys' ability to efficiently prosecute the case to a successful
26 conclusion.

C. Plaintiffs' Counsel's Costs Are Documented and Reasonable

Plaintiffs' counsel are also entitled to their reasonable out-of-pocket costs incurred in prosecuting this action, in the amount of \$8,691.36, which includes mediation and expert witness fees, and other costs necessary to the prosecution of this case. (Shanberg Decl., ¶ 19, Ex. 6). Moreover, ILYM Group, Inc. has agreed to provide settlement administration services in the amount of \$10,000, including preparing and mailing the notices to the aggrieved employees, distributing the payments, and performing other administration duties for this PAGA settlement. (Shanberg Decl., ¶ 20, Ex. 7). All such amounts should be deducted from the common fund created, and Defendants do not oppose Plaintiffs' counsel's request for costs and administration expenses.

VIII.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court grant its Motion to Approve the PAGA Settlement.

Dated: December 15, 2020

SHANBERG, STAFFORD & BARTZ LLP

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