

Janelle Carney, Esq. (Bar No. 201570)
JANELLE CARNEY – ATTORNEY AT LAW, APC
14758 Pipeline Ave., Suite E, 2nd Floor
Chino Hills, CA 91709-6025
Tel.: (909) 521-9609/ Fax: (909) 393-0471

Adam M. Rose (210880)
adam@frontierlawcenter.com
Manny M. Starr (319778)
manny@frontierlawcenter.com
FRONTIER LAW CENTER
23901 Calabasas Road, STE #2074
Calabasas, CA 91302
Telephone: (818) 914-3433/ Facsimile: (818) 914-3433

Attorneys for Plaintiff Keith Williams
(Additional Plaintiff's counsel listed on next page)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

KEITH WILLIAMS, on behalf of himself and
all other similarly situated and aggrieved
employees,

Plaintiff,

v.

ST. JOSEPH HEALTH PERSONAL CARE
SERVICES, LLC., ST. JOSEPH PERSONAL
CARE SERVICES, LLC., and DOES 1 to 100,
inclusive,

Defendants.

Case No. 30-2020-01134268-CU-OE-CXC
Assigned to: Hon. William Claster
Dept. CX104

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

Date: July 28, 2023
Time: 9:00 a.m.
Dept.: CX104
Reservation No.: 74050335

Complaint Filed: February 25, 2020
Trial Date: Vacated

MAYRA MIRANDA, ROBERT RASHAD,
CLAUDIA MORALES-ALVAREZ, DIANA
HOMER, DEBORAH MONTLE, individuals

Plaintiff,

v.

ST. JOSEPH HEALTH PERSONAL CARE
SERVICES, LLC., and DOES 1 to 100,

Defendants.

RELATED CASE NO. 30-2022-01270521-
CU-OE-CXC
Hon. Randall Sherman
Dept. CX105
Action Filed: July 18, 2022
Trial Date: None set

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

1 Joseph Antonelli, Esq. (Bar No. 137039)
2 **LAW OFFICE OF JOSEPH ANTONELLI**
3 14758 Pipeline Ave., Suite E, 2nd Floor
4 Chino Hills, CA 91709-6025
5 Tel.: (909) 393-0223 / Fax: (909) 393-0471

6 Attorney for Plaintiff Keith Williams
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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY OF MOTION	1
II.	PROCEDURAL HISTORY AND FACTUAL BACKGROUND.....	2
III.	SUMMARY OF SETTLEMENT	3
	A. Aggrieved Employees.....	3
	B. Settlement Fund	3
	C. Release (See Carney Decl., Exh. 1, ¶5)	4
IV.	LEGAL STANDARD FOR APPROVAL OF PAGA SETTLEMENT	4
V.	THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE.....	5
	A. The Settlement Is Presumed Fair	6
	B. The Settlement Is The Product of Arm’s Length Negotiations	6
	C. Plaintiff’s Counsel Is Experienced in Similar Litigation And Endorse The Settlement.....	7
	D. The Strength of Plaintiffs’ Case, The Amount Offered In Settlement, and The Risk, Expense, Complexity, and Duration of Further Litigation Favors Settlement 7	
	1. Total exposure to PAGA penalties.....	8
VI.	NOTICE OF THE SETTLEMENT IS NOT REQUIRED.....	12
VII.	PLAINTIFF’S ATTORNEYS’ FEES, COSTS, AND ADMINISTRATIVE EXPENSES ARE FAIR AND REASONABLE	13
	A. Fees Can Be Awarded As A Percentage of the Common Fund	13
	B. Plaintiffs’ Attorneys Fees Are Also Recoverable Under The Lodestar Adjustment Approach	14
	1. Plaintiffs’ Counsel Are Well-Qualified To Represent The Aggrieved Employees And Their Rates Are Reasonable	14
	2. Plaintiffs’ Counsel’s Lodestar Is Well Documented	15
	3. Novelty And Difficulty Of The Case.....	15
	4. Plaintiff’s Counsel Worked Efficiently And Skillfully	15
	5. Plaintiff’s Counsel Worked Entirely On A Contingency Basis.....	16
	6. Plaintiff’s Counsel Achieved A Good Result	16
	C. Plaintiffs’ Counsel’s Costs and Administrative Expenses Are Appropriate and	

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

Well Documented.....16

CONCLUSION16

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Rules and Statutes

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1 **I. INTRODUCTION AND SUMMARY OF MOTION**

2 Plaintiff, Keith Williams, filed the original Complaint on February 25, 2020, and the First
3 Amended Complaint (“FAC”) on September 8, 2020, as a proposed class and representative
4 Private Attorneys General Act (“PAGA”) action, seeking recovery of unpaid wages and penalties
5 under California Business and Professions Code (“B&PC”) §17200, et seq., and California Labor
6 Code (“Labor Code”) §§ 201, 202, 226, 226.7, 558, 1194, 1197.1, 2802 and 2699, et seq.

7 Plaintiff Williams filed a Motion for Class Certification on June 30, 2021, which was heard on
8 May 13, 2022, and was denied. The case is proceeding on a PAGA only representative basis as to
9 Mr. Williams’ individual wage claims and the PAGA representative claims.

10 On July 18, 2022, Plaintiffs Mayra Miranda, Robert Rashad, Claudia Morales-Alvarez,
11 Diana Homer, and Deborah Montle, filed an individual Complaint, alleging the same claims as
12 Mr. Williams. (The related matter is a non-PAGA case pending in Judge Randall’s court.) After
13 discovery, Plaintiff Mayra Miranda was found to not have any valid claims as alleged, and she
14 dismissed her claims since her claims were outside the statute of limitations.

15 Plaintiff Williams has agreed to settle the PAGA claim and the individual wage claims in
16 both matters, for a Gross Settlement Fund of \$275,000.00. The settlement is a fair compromise
17 after three (3) years of litigating the underlying wage and hour claims.

18 The Gross Settlement Fund includes all attorneys’ fees and costs, settlement administration
19 expenses, and penalties payments to the aggrieved employees and the Labor and Workforce
20 Development Agency (LWDA). The individual wage settlement amount is \$24,000.00, split up
21 between the Plaintiffs in both actions based on the amount of their alleged damages. The Net
22 Settlement Fund is approximately \$49,418.33, whereby 75% or \$37,063.75 is directed to go to the
23 LWDA, and 25% or \$12,354.58 to aggrieved employees on a *pro rata* basis.

24 In exchange for such payment, the aggrieved employees are giving up no rights whatsoever
25 to recover for predicate violations of the Labor Code other than for PAGA penalties. Any
26 aggrieved employee may file a claim against Defendant for such violations. As the Plaintiffs in
27 these actions, Keith Williams, Robert Rashad, Claudia Morales-Alvarez, Diana Homer, and
28 Deborah Montle have entered into a separate wage release agreements, separate and apart from the

1 PAGA payment, which totals \$24,000.00 as set forth in the agreement attached to the Declaration
2 of Janelle Carney (“Carney Decl.”) as **Exhibit 1**.

3 Based upon the discovery and investigation performed in this case, and given the
4 considerable risks based on this Court’s discretion to decrease penalties, and contemporaneous
5 case law undermining several of Plaintiff’s claims in this case, the proposed settlement is fair,
6 adequate and reasonable and should be approved by this Court.

7 **II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

8 Plaintiff, Keith Williams, filed the original Complaint on February 25, 2020, and the First
9 Amended Complaint (“FAC”) on September 8, 2020, as a proposed class and representative
10 Private Attorneys General Act (“PAGA”) action, seeking recovery of unpaid wages and penalties
11 under California Business and Professions Code (“B&PC”) §17200, et seq., and California Labor
12 Code (“Labor Code”) §§ 201, 202, 226, 226.7, 558, 1194, 1197.1, 2802 and 2699, et seq.

13 Plaintiff Williams filed a Motion for Class Certification on June 30, 2021, which was heard on
14 May 13, 2022.

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16 Diana Homer, and Deborah Montle, filed an individual Complaint, alleging the same claims as
17 Mr. Williams. (The related matter is a non-PAGA case pending in Judge Randall’s court.) After
18 discovery, Plaintiff Mayra Miranda was found to not have any valid claims as alleged, and she
19 dismissed her claims since her claims were outside the statute of limitations.

20 The Defendant filed a Motion for Summary Judgment that was heard on May 5, 2022. The
21 Court granted Defendant’s motion as to the rounding claim and denied as to the 2802 claim.

22 Plaintiffs worked for Defendant as Constant Care Attendants (“CCA”). Plaintiff, Keith
23 Williams, worked as a Constant Care Attendant (“CCA”) from approximately October 4, 2017, to
24 August 9, 2019. Plaintiff, Robert Rashad, worked as a Constant Care Attendant (“CCA”) from
25 approximately mid-2017 to late 2017. Plaintiff, Claudia Morales-Alvarez, worked as a Constant
26 Care Attendant (“CCA”) from approximately November 2015 to May 2017. Plaintiff, Diana
27 Homer, worked as a Constant Care Attendant (“CCA”) from approximately January 2018 to
28 January 2021. Plaintiff, Deborah Montle, worked as a Constant Care Attendant (“CCA”) from

1 approximately late 2016 to late 2019. All CCAs are sent to client's homes and provide a variety
2 of services for the clients.

3 **III. SUMMARY OF SETTLEMENT**

4 **A. Aggrieved Employees**

5 The Settlement covers the following aggrieved employees:

6 "All current and former non-exempt employees who have worked for Defendant in
7 California during the time period of February 25, 2019 through the date the Court enters an order
8 granting approval of the settlement (the "PAGA Period") or September 1, 2023, whichever occurs
9 first."

10 Based upon Defendant's records, there are approximately 1,300 aggrieved employees as of
11 March 16, 2023.

12 **B. Settlement Fund**

13 Defendant will pay into a common fund the total amount of \$275,000.00. Each settlement
14 payment by the Settlement Administrator shall be accompanied by a letter explaining why the
15 check is being sent, substantially in the form attached as "**Exhibit 2** ("Letter") to Carney
16 Declaration filed concurrently herewith. Prior to mailing the Letter, the Settlement Administrator
17 shall review the addresses provided using the National Change of Address database. Should any of
18 the Letters be returned undeliverable, the Settlement Administrator will have five (5) business
19 days after it receives the returned undeliverable mail to search for a more current address for the
20 Aggrieved Employee (via a skip trace or other reasonable method) and to re-mail Letters to any
21 alternative or updated address obtained by the Settlement Administrator.

22 The Net Distribution Amount shall be calculated by deducting the Attorneys' Fees
23 Payment, the Litigation Costs Payment, the Individual Settlement Payments, and the Settlement
24 Administration Costs Payment, from the Settlement Fund. The Net Distribution Amount is
25 estimated to be approximately \$49,413.33. Pursuant to the PAGA statute, one hundred percent of
26 the Net Distribution Amount shall be considered payment of penalties and thus will not be subject
27 to local, state, or federal payroll taxes or withholdings. (**Carney Decl. Exhibit 1**)

28 A breakdown of the Gross Settlement Fund of **\$275,000.00** is provided below:

1. Net Distribution Amount to Aggrieved Employees: \$12,354.58 (25%);
2. Net Distribution Amount to the LWDA: \$37,063.75 (75%);
3. Attorneys' Fees: \$91,666.67;
4. Litigation Costs: \$100,000.00;
5. Individual Settlement Payments: \$24,000;
6. Settlement Administration expenses: \$9,915.00. (**Carney Decl., Exh. 3**)

C. Release (See Carney Decl., Exh. 1, ¶5)

Plaintiffs and the Aggrieved Employees will release Defendant in the Action as set forth below. The release includes Aggrieved Employees, their heirs, executors, administrators, attorneys, agents and assigns, who will fully and finally release and discharge Defendant and its former, present and future agents, employees, servants, officers, directors, partners, representatives, shareholders, stockholders, attorneys, parents, subsidiaries, equity sponsors, related companies/corporations and/or partnerships, divisions, assigns, predecessors, successors, insurers, consultants, service providers, joint venturers, joint employers, co-employers, dual employers, alleged joint employers, alleged co-employers, alleged dual employers, affiliates, alter-egos, and affiliated organizations, and all of their respective past, present and future employees, directors, officers, agents, attorneys, stockholders, fiduciaries, parents, subsidiaries, and assigns (collectively, the "Released Parties"), from all claims, rights, demands, liabilities and causes of action for civil penalties under the Labor Code Private Attorneys General Act ("PAGA"), Labor Code § 2698 *et seq.* pled in the operative complaint in the PAGA Lawsuit, or that could have been brought based on the factual allegations that are pled in the operative complaint in the PAGA Lawsuit, that arose during the PAGA Period, including but not limited to alleged violations of Labor Code sections 201, 202, 203, 204, 226, 226.3, 558, 1194, 1194.2, 1197, 1197.1, 2802, including any related claims for attorneys' fees, costs, or interest resulting therefrom ("Released Claims").

IV. LEGAL STANDARD FOR APPROVAL OF PAGA SETTLEMENT

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

The settlement of a PAGA claim requires court approval. *See Labor Code* §2699(1)(2)

1 (“The superior court shall review and approve any settlement of any civil action pursuant to this
2 part”). However, “[a] PAGA claim asserted on a non-class representative basis . . . is not
3 considered a class action but a law enforcement action” and therefore one does not have to meet
4 the requirements of a class action. *Casida v. Sears Holding Corp.*, 2012 WL 253217, at *3 (E.D.
5 Cal. Jan. 26, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011 WL 2173715, at * 11 (E.D. Cal.
6 June 2, 2011); *Arias v. Superior Court*, 46 Cal.4th 969, 980-88 (affirming lower court’s holding
7 that “plaintiff need not satisfy class action requirements” to assert a PAGA claim); *Pedroza v.*
8 *PetSmart, Inc.*, 2013 WL 1490667, at *15 (C.D. Cal. Jan. 28, 2013). As such, a court’s review of a
9 PAGA settlement involves analysis of several unique features that render the approval process
10 distinct from approval of a class action settlement. A court reviewing a PAGA settlement need
11 only “ensur[e] that a negotiated resolution is fair to those affected.” *Williams v. Superior Court*, 3
12 Cal.5th 531, 549 (2017).

13 In a PAGA case, the Court’s focus is not the monetary amount which aggrieved employees
14 or the State are to receive, but instead, whether the total settlement amount achieves the PAGA’s
15 objectives. The purpose of the PAGA is “to incentivize private parties to recover civil penalties for
16 the government that otherwise may not have been assessed and collected by overburdened state
17 enforcement agencies.” See *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, at *4
18 (N.D. Cal. Apr. 2, 2010) (citing *Arias, supra*, 46 Cal.4th at 986). Penalties recovered under the
19 PAGA are, in part, to “be distributed to the [LWDA] for enforcement of labor laws . . . and for
20 education of employers and employees about their rights and responsibilities under this code, to be
21 continuously appropriated to supplement and not supplant the finding to the agency for those
22 purposes.” See *Labor Code* §2699(j). The recovery of penalties on behalf of the state, by way of a
23 PAGA claim, is essentially a law enforcement action. See *Amalgamated Transit Union, Local*
24 *1756, AFL-CIO v. Sup. Ct.*, 46 Cal.4th 993, 1003 (2009) (stating that the PAGA is mechanism for
25 “an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise
26 would be sought by state labor law enforcement agencies”).

27 **V. THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE**

28 This Settlement resulted from litigation in this action. The Settlement fulfills the purposes

1 of the PAGA, and is fair, adequate and reasonable.

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

3 A representative settlement is presumed fair where: (1) the settlement is reached through
4 arm's length bargaining, (2) investigation and discovery are sufficient to allow counsel and the
5 court to act intelligently, (3) [and] counsel is experienced in similar litigation. (*See Dunk v. Ford*
6 *Motor Company* (1996) 48 Cal. App. 4th 1794, 1802.)¹ A court may also consider relevant factors
7 such as the strength of the plaintiffs' case, the risk, expense, complexity and likely duration of
8 further litigation, the risk of maintaining class action status through trial, the amount offered in
9 settlement, the extent of discovery completed and the stage of the proceedings, the experience and
10 views of counsel, [and] the presence of a governmental participant. . . . (*See Officers of Justice v.*
11 *Civil Service Com'n of City and County of San Francisco* (9th Cir. 1995) 688 F.2d 615, 624.)
12 "This list is not exhaustive and should be tailored to each case. Due regard should be given to
13 what is otherwise a private consensual agreement between the parties." (*Dunk, supra*, 48 Cal.
14 App. 4th at 1801.) Moreover, the trial court has broad powers to determine whether a proposed
15 [representative action] settlement is fair. (*See Mallick v. Superior Court* (1979) 89 Cal. App. 3d
16 434.)

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

18 The stage of the proceedings and the amount of discovery completed is an important factor
19 for courts to consider in determining whether a settlement is fair, adequate and reasonable. (*See In*
20 *re Warner Communications Sec. Lit.* (S.D.N.Y. 1985) 618 F.Supp. 735, 741, *affd.*, 198 F.2d 35
21 (2d Cir. 1986); *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18, *affd.*, 661
22 F.2d 939 (9th Cir. 1981).)

23 In this action, Plaintiff has propounded interrogatories and document requests, has taken
24 numerous depositions, Defendant has produced documents and data, including payroll records,
25

26 ¹ 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, Plaintiff's reference class action cases here because of the dearth of PAGA
appellate decisions addressing settlement standards, and because if Plaintiff meets the class
action requirements, then he certainly meets the less stringent PAGA standards.

1 policy documents, and related employment records for aggrieved employees. The matter was set
2 for trial after the Defendant’s motion for summary judgment was denied in part and granted in
3 part.

4 Plaintiff hired experts in this matter, including a statistician, Brian Kriegler Ph.D., and a
5 survey expert, Jeff Peterson and were preparing for Plaintiff’s individual trial and the bifurcated
6 PAGA trial.

7 The parties attended a mediation on March 16, 2023, with experienced employment law
8 mediator David Phillips. The case did not settle at mediation. Counsel for the parties continued to
9 work on potential resolution and on the eve of trial negotiated at arms-length to reach a resolution
10 of this case, with the help of Mr. Phillips. All of the parties’ negotiations have been non-collusive
11 and involved considerable disputes over payment terms. Plaintiff did not settle this case until they
12 and their counsel have conducted sufficient investigation into the claims, and exhausted all
13 avenues before agreeing to this settlement.

14 **C. Plaintiff’s Counsel Is Experienced in Similar Litigation And Endorse The**
15 **Settlement**

16 The view of attorneys in representative litigation is “entitled to significant weight.”
17 (*Fisher Bros. v. Cambridge-Lee Industries, Inc.* (E.D. Pa. 1985) 630 F.Supp. 482, 488; *see also*
18 *Ellis, supra*, 87 F.R.D. at 18.) Plaintiff’s counsel has significant experience in complex,
19 representative, and class action wage and hour litigation. As such, they are experienced and
20 qualified to evaluate the claims and defenses in this case, and unequivocally support the settlement
21 reached herein. (Decl. Carney ¶5-8; Decl. Starr ¶ 6)

22 **D. The Strength of Plaintiffs’ Case, The Amount Offered In Settlement, and The**
23 **Risk, Expense, Complexity, and Duration of Further Litigation Favors Settlement**

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

28 In this case, Plaintiff has individual wage claims, the wage claims of the four other

1 Plaintiffs in the related action and seeks PAGA penalties. The sole PAGA claim that is at issue in
2 this settlement concerns Defendant's failure to: (1) pay all wages owed due to rounding; (2)
3 reimburse Plaintiff and Aggrieved Employees for the use of their personal cell phone; (3) pay
4 waiting time penalties; and (4) maintain and submit accurate itemized wage statements.

5 **1. Total exposure to PAGA penalties**

6 During the PAGA period, there were approximately 77,685 pay periods through March 16,
7 2023, for approximately 1,200 aggrieved employees. Because there is no evidence that Defendant
8 has been the subject of prior Labor Code citations for the conduct alleged in this case, subsequent
9 and heightened penalty amounts are unlikely here. *See Amaral v. Cintas Corp. No. 2*, 163
10 Cal.App.4th 1157, 1208-1209 (2008) ("Until the employer has been notified that it is violating a
11 Labor Code provision. . . , the employer cannot be presumed to be aware that its continuing
12 underpayment of employees is a 'violation' subject to penalties").

13 **Exposure Analysis Relating to Rounding**

14 Plaintiff contends that Plaintiff and the aggrieved employees do not receive all their wages
15 due to an illegal rounding policy, whereby Defendant rounds Plaintiffs' and other aggrieved
16 employees' time instead of actual time spent.

17 Defendant contends that it pays the appropriate compensation to all non-exempt hourly
18 employees and was successful at MSJ demonstrating to the court that Plaintiff's claim had little
19 merit. (See Dkt. 217). Additionally, this Court already denied Class Certification of the rounding
20 claim on the basis of manageability, among other things. If this case were to proceed to a
21 representative PAGA trial, there is a significant risk that this Court could find that the rounding
22 claims are similarly unmanageable on a PAGA basis.

23 An analysis of the time and payroll records by Plaintiff's expert found that there were
24 47,466 pay periods with an underpayment due to rounding. *Labor Code* §1197.1 sets forth
25 penalties of \$100 for initial minimum wage violations, and \$250 per pay period for subsequent
26 minimum wage violations. Thus, the maximum civil penalty attributable to the rounding claim is
27 (47,466 x \$100) \$4,746,600. However, for the reasons set forth above, Plaintiff believes there was
28 less than a 5% chance of prevailing on the rounding claim. Thus, the maximum recovery of PAGA

1 penalties on the rounding claim, adjusted for risk, is **\$237,330**.

2 **Exposure Analysis Relating to the Work Expense Reimbursement Claim**

3 Plaintiff contends that Defendant requires CCAs to use their personal cell phones to
4 perform their regular job duties, including but not limited to the following:

- 5 • Clocking in and out when arriving and leaving a patient's home;
- 6 • Contacting Defendant if running late or any issues at client's home;
- 7 • Receiving and returning calls from the office;
- 8 • Having the client sign off on the tasks performed at their home;
- 9 • Reviewing patient's plan of care; and
- 10 • Reviewing work schedule.

11 Defendant's position is that the use of cell phones over its Telephony system is a matter of
12 personal choice. Plaintiff was prepared to argue that the Defendant knew or should have known
13 that employees were using their cell phones for their jobs and were still not reimbursing
14 employees for such use. While Plaintiffs overcame summary adjudication on this issue, this Court
15 previously denied Class Certification on this issue as well. Furthermore, there was competing
16 deposition testimony on this issue, with some employees stating that cell phone use was required,
17 while others stated that it was a personal choice.

18 An analysis of the records by Plaintiff's expert found that there were 66,634 pay periods
19 where the Telephony System was used by an Aggrieved Employee. *Labor Code* §2699 sets forth
20 penalties of \$100 for initial work expense violations, and \$200 per pay period for subsequent work
21 expense violations. Thus, the maximum civil penalty attributable to the rounding claim is (66,634
22 x \$100) \$6,663,400. However, for the reasons set forth above, Plaintiff believes there was less
23 than a 10% chance of prevailing on the work expense claim. Thus, the maximum recovery of
24 PAGA penalties on the work expense claim, adjusted for risk, is **\$666,340**.

25 **Exposure Analysis Relating to the Wage Statement Penalty Claim**

26 Plaintiff further alleges that Defendant failed to provide legally compliant wage statements,
27 a.k.a. "paystubs" pursuant to *Labor Code* § 226. Plaintiff alleges that the pay stubs are inaccurate
28 as a result of the Defendant's rounding practice. Defendant's pay stubs violate LC §226 and such

1 violation is on every check distributed to Defendant's employees. LC §226 requires, inter alia,
2 that the pay stub accurately itemize the "gross wages earned" and the "total hours worked."
3 Defendant fails to include accurate "total hours worked," a vital component to determine if
4 employees are being paid properly. For example, Defendant violates §226(a) by printing the
5 rounded time under the column "total hours worked." Plaintiff further alleges that to obtain
6 PAGA penalties for pay stub violations, a plaintiff need not satisfy the "injury" or "knowing and
7 intentional" requirements of *Labor Code* § 226(e)(1). See *Raines v. Coastal Pacific Food*
8 *Distributors, Inc.*, 23 Cal.App.5th 667 (2018).

9 On the other hand, Defendant argues that its pay stubs are compliant, and therefore no such
10 PAGA penalties are owed. Moreover, Defendant argues derivative violations of *Labor Code* §
11 226 do not give rise to pay stub violations upon which PAGA penalties arise – a finding which
12 this Court already alluded to in its decision to deny class certification on this issue. See
13 *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal.App.5th 1308 (2018); see also *Culley v. Lincare Inc.*,
14 236 F.Supp.3d 1184, 1195-1196 (E.D. Cal. 2017). Defendant further argues that any such
15 violations were inadvertent, and therefore not actionable. See *Heritage Residential Care, Inc. v.*
16 *Division of Labor Standards Enforcement*, 192 Cal.App.4th 75 (2011).

17 An analysis of the records by Plaintiff's expert found that there were 47,466 pay periods
18 where the wage statements were inaccurate due to rounding. *Labor Code* §2699 sets forth
19 penalties of \$100 for initial wage statement violations, and \$200 per pay period for subsequent
20 wage statement violations. Thus, the maximum civil penalty attributable to the wage statement
21 violation claim is (47,466 x \$100) \$4,746,600. However, for the reasons set forth above, Plaintiff
22 believes there was less than a 2.5% chance of prevailing on the wage statement penalty claim.
23 Specifically, Plaintiff must have first prevailed on the rounding claim, with a 5% probability of
24 success, and then must have prevailed on the underlying wage statement claim. Thus, the
25 maximum recovery of PAGA penalties on the wage statement claim, adjusted for risk, is
26 **\$118,665.**

27 **Exposure Analysis Relating to the Waiting Time Penalty Claim**

28 Plaintiff further alleges that pursuant to *Labor Code* §§201 and 202, aggrieved employees

1 terminated from Defendant's employment are entitled to a penalty pursuant to *Labor Code* §203,
2 because Defendant did not pay them all wages due upon separation. Such a claim is derivative,
3 and for the same reasons as stated above, Defendant contends no wages are due, and thus no
4 penalties owed under PAGA. Defendant further argues that its failure to pay wages upon
5 separation was not "willful," in that the law is uncertain as to claims asserted in this case or
6 whether the failure to pay is due to a good faith dispute. See *Barnhill v. Robert Saunders & Co.*,
7 125 Cal.App.3d 1, 8 (1981) (employer's failure to pay is not willful if its failure is due to
8 uncertainty in the law); *Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers,*
9 *Inc.*, 102 Cal.App.4th 765, 782 (2002) (willfulness not met if defendant's failure to pay a result of
10 a "good faith mistaken belief that wages are not owed").

11 The maximum civil penalty attributable to waiting time penalty violations is (1,008 former
12 employees x \$100) \$100,800. However, the waiting time penalty claim was wholly derivative of
13 the rounding claim, and Plaintiff attributes a 5% chance of success to the rounding claim. Thus,
14 the maximum recovery of PAGA penalties on the waiting time penalty claim, adjusted for risk, is
15 **\$5,040.**

16 In sum, Plaintiff estimates that the risk adjusted maximum penalty exposure is **\$1,027,375.**
17 Based on the risks outlined above, the substantial costs that would be expended to proceed to trial,
18 the fact that class certification was denied on the issues which remain in the case, and the
19 discretionary natures of the penalties, Plaintiff believes the \$275,000 settlement, representing
20 26.8% of the risk adjusted potential recovery, is fair, reasonable, and serves the purpose of PAGA.

21 Plaintiff further believes this to be a good result, given that there is a substantial question
22 as to whether a trial court will even award cumulative penalties sought by Plaintiff for alleged
23 multiple Labor Code violations because there is no precedent for such an award. Moreover, *Labor*
24 *Code* §2699(e)(2) also gives a trial court broad discretion to reduce PAGA penalties: "[A] court
25 may award a lesser amount than the maximum civil penalty amount specified by this part if, based
26 on the facts and circumstances of the particular case, to do otherwise would result in an award that
27 is unjust, arbitrary and oppressive, or confiscatory." Case law supports a trial court's discretion in
28 downgrading penalties based on these factors. See *Thurman v. Bayshore Transit Management,*

1 *Inc.*, 203 Cal.App.4th 1112, 1135-1136 (2012) (no abuse of discretion by reducing penalty by 30
2 percent).

3 Because of the discretionary nature of PAGA penalties, oftentimes the penalties are
4 discounted by approximately 75%-85%. See, e.g., *Magadia v. Wal-Mart Associates, Inc.* (N.D.
5 Cal. May 31, 2019) 384 F.Supp.3d 1058, 1104 (penalties on wage statement claim reduced by
6 80%); *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011) 2011 WL 7563047, *4 (penalties
7 reduced by over 82% of maximum amount requested).

8 **VI. NOTICE OF THE SETTLEMENT IS NOT REQUIRED**

9 “[A] PAGA action is a statutory action for penalties brought as a proxy for the State,” as
10 such, “there is no need to protect absent employees’ due process rights[.]” *Williams v. Superior*
11 *Court*, 3 Cal.5th 531, 546 (2017). “Unnamed employees need not be given notice of the PAGA
12 claim, nor do they have the ability to opt-out of the representative PAGA claim.” *Ochoa-*
13 *Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, at *5 (N.D. Cal. Apr. 2, 2010). A
14 representative PAGA action need not satisfy class action requirements, and no due process
15 concern arises from the fact that there are “nonparty aggrieved employees who are not given
16 notice of, and an opportunity to be heard in, a representative action that is not brought as a class
17 action.” *Arias v. Sup. Ct.*, 46 Cal.4th 969, 984 (2009). “PAGA does not make other potentially
18 aggrieved employees parties” to the action and no “due process concerns arise under PAGA
19 because absent employees do not own a personal claim for PAGA civil penalties and whatever
20 personal claims the absent employees might have for a relief are not at stake.” *Williams, supra*, 3
21 Cal. 5th at 546-547 (internal references omitted, citing *Amalgamated Transit Union, Local 1756,*
22 *AFL-CIO v. Sup. Ct.*, 46th Cal.4th 993, 1003 (2009) and *Iskanian v. CLS Transportation Los*
23 *Angeles, LLC*, 59 Cal.4th 348, 381 (2014).)

24 Even though Notice is not required, the Settlement Administrator will send a cover letter to
25 the aggrieved employees with their penalty payments explaining the nature of the checks. As
26 such, Plaintiff is going above and beyond the requirements of PAGA. Moreover, Plaintiff has
27 served (uploaded) the LWDA with the Settlement Agreement and will upload this motion and
28 supporting documents after they are filed. (**Carney Decl. ¶24; Exh 4**)

1 **VII. PLAINTIFF’S ATTORNEYS’ FEES, COSTS, AND ADMINISTRATIVE**
2 **EXPENSES ARE FAIR AND REASONABLE**

3 Pursuant to the PAGA Settlement Agreement, Plaintiffs’ counsel requests that this Court
4 approve an award of attorneys’ fees of \$91,666.67, or one-third of the total PAGA settlement.
5 Pursuant to *Labor Code* §2699 subd. (g)(1): “Any employee who prevails in any [PAGA] action
6 shall be entitled to an award of reasonable attorney’s fees and costs.” Further, under California
7 *Code of Civil Procedure* §1021.5, attorneys’ fees are recoverable because this PAGA action is “for
8 the benefit” of aggrieved employees and benefits the State of California. *See Estrada v. FedEx*
9 *Ground Package System, Inc.*, 154 Cal.App.4th 1, 16-17 (2007) The payment to the LWDA will
10 also benefit the State of California “for [the] education of employers and employees about their
11 rights and responsibilities under [the Labor Code].” Cal. *Labor Code* §2699(i). Attorneys’ fees
12 are also recoverable under a common fund theory, as further set forth below.

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

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

25 Under the common fund doctrine, “a litigant or a lawyer who recovers a common fund for
26 the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from
27 the fund as a whole.” (*Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *see also Laffitte,*
28 *supra*, 1 Cal.5th at 503 [“the percentage method is a valuable tool that should not be denied our
trial courts”]; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 [“one who expends attorneys’ fees in

1 winning a suit which creates a fund from which other derive benefits, may require those passive
2 beneficiaries to bear a fair share of the litigation costs”].)

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

9 Because Plaintiff’s attorneys secured a settlement fund for Plaintiff and the other aggrieved
10 employees, they are entitled to a reasonable percentage of that fund.

11 **B. Plaintiffs’ Attorneys Fees Are Also Recoverable Under The Lodestar**
12 **Adjustment Approach**

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

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

24 Counsel for Plaintiff is experienced employment lawyers and have extensive experience in
25 the specific subcategory of wage and hour claims. (**Carney Decl. ¶5-8; Decl. Starr ¶ 6**)
26 Moreover, counsel for Plaintiff have hourly rates that are reasonable in the relevant market. They
27 are as follows:

28 /////

1 **LAW OFFICE OF JOSEPH ANTONELLI**

2 Joseph Antonelli (32 years exp) \$850

3 **JANELLE CARNEY – ATTORNEY AT LAW, APC**

4 Janelle Carney (24 years exp) \$800

5 **FRONTIER LAW CENTER**

6 Adam Rose (22 years experience) \$800.00

7 Manny Starr (5 years experience) \$650.00

8 Plaintiffs' counsel's rates are reasonable market rates in Southern California and have been
9 reasonably incurred in connection with this litigation. (**Carney Decl. ¶21**)

10 **2. Plaintiffs' Counsel's Lodestar Is Well Documented**

11 A properly supported motion for attorney's fees is prima facie evidence that the expenses
12 and services were necessarily incurred. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682.) Here,
13 counsel provides an appropriately detailed declaration. (**Decl. Carney**) Plaintiff's counsel's
14 collective lodestar is approximately \$387,157.50 with 525.80 hours to date. Plaintiff anticipates
15 that counsel will incur up to another 15 hours to appear at the hearing, ensure the settlement
16 receives approval, and comply with the filing of post hearing filings once the settlement is
17 distributed to the aggrieved employees as well as answer any questions any aggrieved employee
18 may have.

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

20 Given Defendant's two system timekeeping methods, this case was novel and required
21 time learning the system and determining how Plaintiff would be able to prove the use of cell
22 phones was mandatory. Further, the Defendant fails to pay for all time worked due to its rounding
23 of time. This despite having the actual records of the time clocked in and the travel time
24 monitored.

25 **4. Plaintiff's Counsel Worked Efficiently And Skillfully**

26 Since the beginning of this case, Plaintiff's counsel worked diligently for the aggrieved
27 employees, both in the PAGA case and in Plaintiff's individual claims, with an eye at proving the
28 claims on a representative basis once the individual trial was concluded.

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A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-1133, quoting Posner, *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567.)

Plaintiff's counsel believes the \$275,000.00 PAGA settlement is a good result given the substantial risks of going to trial on this case and the discretionary nature of the penalties.

Plaintiff's counsel is also entitled to their reasonable out-of-pocket costs incurred in prosecuting this action. Plaintiff's counsel has incurred costs of approximately \$96,565.87 as of the date of filing this motion. It is anticipated that additional costs will be incurred for final filing costs for the motion and the post motion filings of approximately \$150-\$200.00. The costs incurred were necessary to prosecute this case. (**Carney Decl., ¶20**) Moreover, after obtaining three (3) quotes to be the administrator, Phoenix has agreed to provide settlement administration services in the amount of \$9,500.00 including preparing and mailing the notices to the aggrieved employees, distributing the payments, and performing other administration duties for this PAGA settlement. (**Carney Decl., ¶20**) All such amounts should be deducted from the common fund created, and Defendant does not oppose Plaintiff's counsel's request for costs up to \$100,000.00 and administration costs up to \$9,915.00.

Based on the foregoing, Plaintiff respectfully requests that this Court grant his Motion to Approve PAGA Settlement.

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Dated: July 6, 2023

JANELLE CARNEY – ATTORNEY AT LAW, APC
FRONTIER LAW CENTER
LAW OFFICE OF JOSEPH ANTONELLI

By: 
Janelle Carney, Attorney for Plaintiffs