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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO**

TYLER NUNALEY, an individual and on
behalf of all other aggrieved employees,

Plaintiff,

v.

SIZEWISE RENTALS LLC, DOES 1-50
inclusive,

Defendants.

Case No. CGC-20-587743

**PLAINTIFF'S MOTION FOR APPROVAL
OF PAGA SETTLEMENT AND ENTRY OF
JUDGMENT**

Hearing Date: October 5, 2023

Time: 10:00 a.m.

Judge: Hon. Ethan P. Schulman

Location: Department 304

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23
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25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION 5

II. PROCEDURAL HISTORY 5

 A. The Terms of the *Buys* Settlement Set Aside \$15,000 to Settle PAGA Claims ... 6

 B. Plaintiff Seeks Court Approval of Agreement to Resolve PAGA Claims Not Resolved in *Buys* for \$10,000.00 6

 C. Significant Changes Occurred Following the *Buys* Settlement 7

III. LITIGATION OVERVIEW 7

IV. THE GOALS OF PAGA AND ITS REQUIREMENTS 8

V. BECAUSE THE EMPLOYEES HAVE NO SUBSTANTIVE CLAIMS TRADITIONAL NOTICE IS NOT REQUIRED 12

VI. RELEVANT ISSUES AND PROCEDURAL HISTORY 12

VII. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES 13

 A. Summary of Settlement Terms 14

 B. The Notice 14

 C. Settlement Allocation to the PAGA Settlement Aggrieved Employees 14

 D. The Release 15

VIII. THE SETTLEMENT IS FAIR AND REASONABLE AND WARRANTS COURT APPROVAL 15

 A. Evaluation of the PAGA Settlement 15

IX. SUBMISSION TO THE LWDA 17

X. THE SETTLEMENT ADMINISTRATOR 17

XI. CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Amalgamated Transit Union, Local 1756 v. Superior Court,

(2009) 46 Cal.4th 993 5

Arias v. Superior Court,

(2009) 46 Cal.4th 969 5, 10

Baumann v. Chase Inv. Servs. Corp.,

(9th Cir. 2014) 747 F.3d 1117 6

Bernstein v. Virgin Am., Inc.,

(9th Cir. 2021) 3 F.4th 1127 6, 7

Jacob Buys vs. Sizewise Rentals, Inc.,

Case No. 2018-00225848-CU-OE 6, 7

Carrington v. Starbucks Corp.,

(2018) 30 Cal.App.5th 504 13

Doe v. Google, et al.,

Case No. CGC-16-556034 17

Dunk v. Ford Motor Co.,

(1996) 48 Cal.App.4th 1794 11, 12

Enombang v. Target,

Alameda Superior Court, Case No. RG17853948 13

Fleming v. Covidien,

(C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590 12

Franco v. Ruiz Food Products, Inc.,

2012 WL 5941801 (E.D. Cal. 2012) 12

Gunther v. Alaska Airlines, Inc.,

(2021) 72 Cal.App.5th 334 7

In re Taco Bell Wage & Hour Actions,

2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) 12

1	<i>Iskanian v. CLS Transportation,</i>	
2	(2014) 59 Cal. 4th 348	3, 5, 6
3	<i>Makabi v. Gedalia,</i>	
4	(2nd Dist. Ct. of App. Mar. 6, 2016) 2016 Cal.App.Unpub. 1489, *5–7	12
5	<i>Mallick v. Superior Court,</i>	
6	(1979) 89 Cal.App.3d 434	12
7	<i>Moniz v. Adecco USA, Inc.,</i>	
8	(2021) 72 Cal.App.5th 56	7, 11
9	<i>Officers of Justice v. Civil Service Com’n of City and County of San Francisco,</i>	
10	(9th Cir. 1981) 688 F.2d 615	12
11	<i>Pickett v. 99 Cents Only Stores,</i>	
12	Los Angeles Superior Court, Case No. BC473038.....	13
13	<i>Sakkab v. Luxottica Retail N. Am., Inc.,</i>	
14	(9th Cir. 2015) 803 F.3d 425	5, 8
15	<i>Schiller v. David’s Bridal, Inc.,</i>	
16	2012 WL 217001 (E.D. Cal. 2012).....	12
17	<i>Turrieta v. Lyft, Inc.,</i>	
18	(2021) 69 Cal.App.5th 955	5
19	<i>Urbino v. Orkin Servs. of Cal.,</i>	
20	(9th Cir. 2013) 726 F.3d 1118	8
21	Statutes	
22	California Labor Code	
23	§ 2698.....	4
24	California Labor Code	
25	§ 2698(1).....	8
26	California Labor Code	
27	§ 2699(1)(2)	11
28	California Labor Code	
	§ 2699(a)	6
	California Labor Code	
	§ 2699.3(a)(2)(A)	8

1	California Labor Code	
2	§ 2699(e)	7
3	California Labor Code	
4	§ 2699(e)(1)	9
5	California Labor Code	
6	§ 2699(e)(2)	9
7	California Labor Code	
8	§ 2699(g).....	g
9	California Labor Code	
10	§ 2699(g)(1)	3
11	California Labor Code	
12	§ 2699(i).....	5, 7
13	California Labor Code	
14	§ 2699(l).....	3
15		
16		
17		
18		
19		
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21		
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23		
24		
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1 **I. INTRODUCTION**

2 This case was filed by Plaintiff Tyler Nunaley on October 21, 2020 **after** he opted out of
3 a class action and PAGA settlement in 2020 in the Sacramento Superior Court in the case entitled
4 *Jacob Buys vs. Sizewise Rentals, Inc.* Case No. 2018-00225848-CU-OE. [Declaration of
5 Glugoski, para. 12. See also Ex.1 to Declaration of John Glugoski, Order Granting Final
6 Approval of class action and PAGA settlement and granting Nunaley’s request for exclusion].
7 The PAGA claims settled in *Buys* include pay periods up to August 18, 2020.¹

8 Plaintiff Nunaley was the sole opt out of the settlement.² After opting out of the *Buys*
9 matter, Plaintiff Nunaley filed his own lawsuit alleging individual claims. Plaintiff’s individual
10 claims were based on **wrongful termination, retaliation**, and various labor code wage and hour
11 violations, stemming primarily from missed meal periods and rest breaks. Declaration of
12 Glugoski, para. 13.

13 Although Plaintiff did not allege any class claims, Plaintiff did allege PAGA claims on
14 behalf of Plaintiff and the aggrieved employees not covered by the *Jacob Buys vs. Sizewise*
15 *Rentals, Inc.* action. Declaration of Glugoski, para. 14.

16 Plaintiff Nunaley has entered into a settlement agreement with Defendant Sizewise to
17 resolve the remaining PAGA claims (post-*Buys*) for \$10,000.00.³ PAGA requires that Plaintiff
18 seek approval of the PAGA settlement and therefore brings this motion for approval.

19 **II. PROCEDURAL HISTORY**

20 At the time of Preliminary Approval of the *Buys* settlement, Mr. Nunaley was a current
21

22 ¹ The statute of limitations for PAGA is one-year from the filing of the Complaint which
23 would October 21, 2019; however, the *Buys* settlement covered pay periods up to August 18,
24 2020.

25 ² Mr. Nunaley was never provided notice of the *Buys* settlement. Mr. Nunaley intervened
26 in the action to request exclusion from the settlement at the time of final approval because he was
never provided notice. The Court granted his request for exclusion on the grounds that he never
was provided notice of the *Buys* Settlement and therefore was not a class member. See Ex. 1.

27 ³ Plaintiff has separately negotiated and agreed to resolve his wrongful termination and
28 individual claims. Upon, approval of the PAGA settlement, Plaintiff will seek a dismissal of his
individual claims.

1 employee of Defendant. At the same time as the *Buys* settlement, Mr. Nunaley had raised
2 concerns about off-the-clock, meal period, and rest break violations. He was terminated before
3 the Court granted Final Approval of the *Buys* Settlement. Once he began to pursue his individual
4 claims, Defendant claimed he was a member of the *Buys* settlement and he was barred from
5 bringing his own lawsuit. Ultimately, the Court found otherwise. Decl. of Glugoski, para. 11.

6 **A. The Terms of the *Buys* Settlement Set Aside \$15,000 to Settle PAGA Claims**
7 **Up Through August 18, 2020**

8 The prior class action and PAGA settlement occurred in *Jacob Buys vs. Sizewise Rentals,*
9 *Inc.* Case No. 2018-00225848-CU-OE in August of 2020. The deal points were as follows:

- 10 • The parties agreed to settle this action with a non-reversionary, Gross Settlement
11 Amount ("GSA") in the total sum of \$300,000.00, from which the following
12 amounts will be deducted:
- 13 • The California Labor and Workforce Development Agency ("LWDA") will
14 receive \$11,250, representing its 75% portion of the settlement allocated to
15 settlement of the PAGA claim (\$15,000.00).

16 See Ex. 1, Order Granting Approval of Buys Settlement attached to the Decl. of J. Glugoski.

17 **B. Plaintiff Seeks Court Approval of Agreement to Resolve PAGA Claims Not**
18 **Resolved in *Buys* for \$10,000.00.**

19 Plaintiff Nunaley has not alleged a class action but as part of this individual lawsuit, he
20 added a cause of action under PAGA to cover any individuals who fell outside the *Buys*
21 settlement. This settlement involves less than one-half of the pay periods settled in the *Buys*
22 matter.

23 The *Buys* case, filed on January 23, 2018, covered a **3.8-year PAGA period** (January 23,
24 2017 to August 18, 2020).⁴ The number of employees covered by the settlement was 179. (See
25 Ex. 1) Declaration of Glugoski, para. 16.

26
27 ⁴ The Statute of Limitations under PAGA is one-year from the filing of the Complaint (i.e.,
28 January 23, 2017).

1 Here, the PAGA period covered by this lawsuit following the *Buys* settlement release date
2 is **1.7 years** (i.e., August 18, 2020 to March 22, 2022).⁵ There are 178 aggrieved employees –
3 one less than in the *Buys* case and these employees worked a total of 4,228 pay periods. This is
4 approximately 45% of the PAGA pay periods at issue in the *Buys* Settlement that were settled
5 for \$15,000.00. *Id.*

6 **C. Significant Changes Occurred Following the *Buys* Settlement.**

7 After the filing of the *Buys* case, Defendant implemented a time keeping system that
8 automatically generated a one-hour of pay meal period premium for missed and late meal periods.
9 Furthermore, Defendant increased efforts to enforce meal periods and rest breaks requirements
10 resulted in Defendant reaching a 98% compliance rate. Prior to these efforts, Plaintiff alleged
11 that employees would be forced to work off-the-clock during what would otherwise be meal
12 periods and rest breaks. These changes in policy were in place during the PAGA period at issue
13 here. Declaration of Glugoski, para. 17.

14 **III. LITIGATION OVERVIEW**

15 The PAGA claim has been litigated for close to three (3) years. The parties reached an
16 agreement to settle the matter in its entirety for \$10,000.00.⁶ Marked and attached as Ex. 2 to the
17 Declaration of J. Glugoski is a true and correct copy of the PAGA Settlement and Release
18 Agreement.

19 The Private Attorneys General Act of 2004 (“PAGA”) provides:

20 The superior court shall review and approve any settlement of any civil action
21 filed pursuant to this part. The proposed settlement shall be submitted to the
22 agency at the same time that it is submitted to the court.

23 (3) A copy of the superior court’s judgment in any civil action filed pursuant to
24 this part and any other order in that action that either provides for or denies an

25 ⁵ Defendant ceased doing business in California on March 22, 2022 and thus there are no
26 more pay periods after that date.

27 ⁶ This is only a settlement of the PAGA claims for civil penalties. It is not a class settlement
28 and does not release the individual claims, if any, of the affected employees. (Cal. Labor Code
§2699(g)(1); *Iskanian v. CLS Transportation*, (2014) 59 Cal. 4th 348, 381.)

award of civil penalties under this code shall be submitted to the agency within 10 days after entry of the judgment or order.

(Cal. Labor Code §2699(I).)

This case alleged PAGA claims based on a variety of alleged Labor Code violations and was filed on behalf of non-exempt employees (hereinafter referred to as “PAGA Settlement Aggrieved Employees”) dating back to August 18, 2020 (i.e., the end date the of the *Buys* settlement release).⁷ Plaintiff has represented himself individually and faithfully served as the representative for the State of California to collect civil penalties from for the alleged California Labor Code violations. At the time of settlement, the central issue involved whether Defendant’s meal and rest break policies were complaint with California Law as the other relief sought was tied to the alleged illegal meal and rest break practices.

This motion seeks approval of a non-reversionary settlement that consists of \$10,000.00.

Defendant has steadfastly denied that it violated the Labor Code as to Plaintiff and the alleged Aggrieved Employees. The settlement reached by the parties is intended to resolve the PAGA claims on behalf of Plaintiff, the State of California, and all PAGA Settlement Aggrieved Employees employed from August 18, 2020 (i.e., the end of the *Buys* settlement release period) until Defendant ceased doing business in California.

The PAGA settlement is set forth in the accompanying Settlement Agreement. See Ex. 2, attached to the Declaration of J. Glugoski, filed herewith. The LWDA received notice of this settlement and this motion as set forth in the Declaration of Glugoski, para. 21.

A proposed order confirming review and approval of the PAGA settlement has been lodged with the Court.

IV. THE GOALS OF PAGA AND ITS REQUIREMENTS

In 2003, the Legislature, recognizing the historic underfunding of the LWDA and the

⁷ After substantial investigation, Plaintiff concluded that the alleged violations for unpaid wages, meal periods, rest breaks, inaccurate wage statements, and waiting time penalties were not strong claims. Defendant had made substantial improvements on its practices and implemented an automatic premium pay for missed and late meal periods.

1 California Division of Labor Standards & Enforcement (“DLSE”), passed the PAGA in an effort
2 to both spur more consistent compliance with California’s labor laws and discourage employers
3 from engaging in unlawful and anti-competitive business practices. (See Cal. Labor Code § 2698,
4 note §1.) The parties’ settlement agreement achieves the PAGA’s goals.

5 While procedurally a PAGA claim may be filed as a class action, a PAGA claim is really
6 an enforcement action pursued on behalf of the California Labor and Workforce Development
7 Agency—the real party in interest. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) The
8 PAGA Settlement Aggrieved Employees have *no* substantive claims under the PAGA.
9 (*Amalgamated Transit Union, Local 1756 v. Superior Court* (2009) 46 Cal.4th 993, 1003.)

10 The differences between a traditional class action and a PAGA representative action are
11 well settled. Following the California Supreme Court’s decision in *Iskanian v. CLS*
12 *Transportation* (2014) 59 Cal.4th 348, the Ninth Circuit in *Sakkab* explained:

13 The class action is a procedural device for resolving the claims of absent parties
14 on a representative basis. See Fed.R.Civ.P. 23; *Ortiz v. Fibreboard Corp.*, 527
15 U.S. 815, 832- 33 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-17
16 (1997). By contrast, a PAGA action is a statutory action in which the penalties
17 available are measured by the number of Labor Code violations committed by the
18 employer. An employee bringing a PAGA action does so “as the proxy or agent
19 of the state’s labor law enforcement agencies,” *Iskanian*, 59 Cal.4th at 380
20 (quoting *Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009)), who are the real
21 parties in interest, *see id.* at 382. As the state’s proxy, an employee-plaintiff may
22 obtain civil penalties for violations committed against absent employees, Cal.
23 Lab.Code § 2699(g)(l), just as the state could if it brought an enforcement action
24 directly. However, by obtaining such penalties, the employee-plaintiff does not
25 vindicate absent employees’ claims, for the PAGA does not give absent
26 employees any substantive right to bring their “own” PAGA claims. *See*
27 *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th
28 993. 1003 (2009); *see also Iskanian*, 59 Cal.4th at 381 (explaining that “[t]he civil
penalties recovered on behalf of the state under the PAGA are distinct from the
statutory damages to which employees may be entitled in their individual
capacities”).

24 *Sakkab v. Luxottica Retail N. Am., Inc.* (9th Cir. 2015) 803 F.3d 425, 435–436 *en banc review*
25 *denied.*

26 The approval process in a PAGA case differs from a traditional class action as PAGA
27 aggrieved employees do not hold substantive rights. (See *Turrieta v. Lyft, Inc.* (2021) 69
28

1 Cal.App.5th 955, 972–974 (stating that aggrieved employees’ ability to file PAGA claims on
2 behalf of the state does not convert the state’s interest into their own or render them real parties
3 in interest and that PAGA settlements bind the government and do not injure the personal
4 interests of aggrieved employees)). While the PAGA Settlement Aggrieved Employees are to
5 receive 25% of the penalties the State collects (*see* Cal. Labor Code § 2699(i)), they lack a
6 substantive right to these penalties. Rather, the State authorizes the penalties to incentivize
7 bringing a suit on its behalf:

8 The nature of PAGA penalties is also markedly different than damages sought in
9 Rule 23 class actions. In class actions, damages are typically restitution for
10 wrongs done to class members. But PAGA actions instead primarily seek to
11 vindicate the public interest in enforcement of California’s labor law. *See Sample*
12 *v. Big Lots Stores, Inc.*, No. C 10-03276 SBA, 2010 WL 4939992 at *3 (N.D. Cal.
13 Nov. 30, 2010); *Franco v. Athens Disposal Co.*, 171 Cal.App.4th 1277 (2009). The
14 bulk of any recovery goes to the LWDA, not to PAGA Settlement Aggrieved
Employees. And, the twenty-five percent portion of the penalty awarded to the
aggrieved employee does not reduce any other claim that the employee may have
against the employer – in this case, for example, for withheld overtime pay. *See*
Caliber Bodyworks, Inc. v. Super. Ct., 134 Cal.App.4th 365 (2005). The
employee’s recovery is thus an incentive to perform a service to the state, not
restitution for wrongs done to members of the class.

15 In the end, Rule 23 and PAGA are more dissimilar than alike. A PAGA action is
16 at heart a civil enforcement action filed on behalf of and for the benefit of the
state, not a claim for class relief.

17 *Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1123–1124. *Iskanian* makes
18 clear the 25% share of penalties does not make the employees real parties in interest:

19 A PAGA representative action is therefore a type of *qui tam* action.
20 “Traditionally, the requirements for enforcement by a citizen in a *qui tam* action
21 have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid
22 to the informer; and (3) that, in some way, the informer be authorized to bring suit
23 to recover the penalty.” (*Sanders v. Pacific Gas & Elec. CO.* (1975) 53
24 Cal.App.3d 661, 671 (*Sanders*). The PAGA conforms to these traditional criteria,
except that a portion of the penalty goes not only to the citizen bringing the suit
but to all employees affected by the Labor Code violation. The government entity
on whose behalf the plaintiff files suit is always the real party in interest in the
suit. (*See In re Marriage of Biddle* (1997) 52 Cal.App.4th 396, 399.)

25 *Iskanian*, 59 Cal.4th at 382; *Turrieta*, Cal.App.5th at 973–974.

26 PAGA provides that PAGA Settlement Aggrieved Employees may bring actions to
27 recover civil penalties. (*See* Cal. Labor Code § 2699(a), (g).) Those civil penalties are a maximum
28 of \$100 per employee per pay period escalating to \$200 per employee per pay period under

1 certain circumstances and subject to reduction based on statutory factors; *see Bernstein v. Virgin*
2 *Am., Inc.* (9th Cir. 2021) 3 F.4th 1127 at *1144:

3 Until the employer has been notified that it is violating a Labor Code provision
4 (whether or not the [Labor] Commissioner or court chooses to impose penalties),
5 the employer cannot be presumed to be aware that its continuing underpayment
6 of employees is a ‘violation’ subject to penalties.

7 Virgin was not notified by the Labor Commissioner or any court that
8 it was subject to the California Labor Code until the district court partially granted
9 Plaintiffs’ motion for summary judgment. On this basis, we reverse the district
10 court’s holding that Virgin is subject to heightened penalties for any labor code
11 violation that occurred prior to that point.

12 (*Bernstein v. Virgin America, Inc.* (C.A. 9th 2021) 3 F.4th 1127, 1144; *see Gunther v. Alaska*
13 *Airlines, Inc.* (2021) 72 Cal.App.5th 334, 355–356.) Courts retain discretion to reduce the PAGA
14 penalty below the maximum based on a variety of factors. (Cal. Labor Code § 2699(e).) Of any
15 civil penalties collected, 75% belongs to the LWDA and 25% belongs to the PAGA Settlement
16 Aggrieved Employees. (Cal. Labor Code § 2699(i).)

17 The appropriate focus of the Court’s review here should be on whether or not the real
18 party in interest, i.e., the LWDA, objects to this proposed settlement and whether the proposed
19 settlement enhances the State’s enforcement of the State’s labor regulations. *See Moniz v. Adecco*
20 *USA, Inc.* (2021) 72 Cal.App.5th 56, 64.

21 It is submitted that this settlement warrants approval by the Court. The settlement amount
22 of \$10,000.00 on the heels of the *Buys* settlement is outstanding, especially in this case where
23 Defendant made changes to its practices and compliance such that Plaintiff would face challenges
24 in proving his case in the requisite bench trial.

25 With respect to the amounts to be paid to the Aggrieved Employees from these settlement
26 funds, the payment of \$10,000.00 for 4228 pay periods equates to an approximate \$2.36 per pay
27 period, or an average gross settlement of \$56.00 for each of the approximate 178 PAGA
28 Settlement Aggrieved Employees identified by Defendant’s counsel. As noted above, at any trial
on the merits, Defendant made clear it would argue that Defendant had achieved a 98%
compliance rate on meal and rest breaks and implemented an automatic one hour of premium

1 pay to employees for missed and/or late meal periods. This, Defendant would argue constitutes
2 a “fact and/or circumstance,” warranting the imposition of a lesser PAGA penalty sanction if
3 Plaintiff succeeded on the merits of this case.

4 After payment of administration costs, the proposed settlement provides a Net Settlement
5 Amount of \$7,500 with approximately \$5,625 allocated to the LWDA and \$1,875 to the PAGA
6 Settlement Aggrieved Employees. Based on this Settlement, the PAGA Settlement Aggrieved
7 Employees will receive an average payment of \$10.50 to be mailed to each of the 178, PAGA
8 Settlement Aggrieved Employees. (Declaration of J. Glugoski (“Glugoski Decl.”) ¶12.)

9 **V. BECAUSE THE EMPLOYEES HAVE NO SUBSTANTIVE CLAIMS,**
10 **TRADITIONAL NOTICE IS NOT REQUIRED**

11 In a PAGA action, the real party in interest is the LWDA and the employees are nominal
12 parties. (*See Urbino v. Orkin Servs. of Cal.* (9th Cir. 2013) 726 F.3d 1118, 1122–1123.) The
13 LWDA, as the real party in interest has, of course, received formal notice of the terms of the
14 settlement as required under California Labor Code section 2698(l). In contrast, the employees
15 do not receive the traditional class notice because none is required:

16 Because a PAGA action is a statutory action for penalties brought as a proxy for
17 the state, rather than a procedure for resolving the claims of other employees, there
18 is no need to protect absent employees’ due process rights in PAGA arbitrations.
19 *Compare Concepcion*, 131 S.Ct. at 1751-52 (observing “it is...odd to think that
an arbitrator would be entrusted with ensuring that third parties’ due process rights
are satisfied”), *with Arias*, 46 Cal.4th at 984-87, 95 Cal.Rptr.3d 588, 209 P.3d
023. PAGA arbitrations therefore do not require the formal procedures of class
arbitrations. *See Baumann*, 747 F.3d at 1123.

20 Unlike Rule 23(c)(2), PAGA has no notice requirements for unnamed PAGA
21 Settlement Aggrieved Employees, nor may such employees opt out of a PAGA
22 action. In a PAGA action, the court does not inquire into the named plaintiff’s and
23 class counsel’s ability to fairly and adequately represent unnamed employees –
critical requirements in federal class actions under Rules 23(a)(4) and
(g)...Moreover, unlike Rule 23(a), PAGA contains no requirements of
numerosity, commonality, or typicality *Id.* at 1122-23 (citations omitted).

24 (*Sakkab*, 803 F.3d at 436.)

25 **VI. RELEVANT ISSUES AND PROCEDURAL HISTORY**

26 On January 14, 2019, Defendant hired Plaintiff and terminated him on or about April 1,
27 2020.

1 Plaintiff alleged that Defendant failed to pay him all wages owed, denied him meal and
2 rest breaks, failed to provide accurate wage statements, and failed to timely pay him upon
3 separation. Plaintiff alleged that Defendant subjected all Settlement Aggrieved Employees in
4 California to the same policies.

5 On May 20, 2020, Plaintiff provided notice of Plaintiff's allegations to the Labor and
6 Workforce Development Agency (LWDA). Plaintiff provided notice to Defendant as well. The
7 LWDA did not respond to these notices, thus allowing Plaintiff to initiate the PAGA lawsuit
8 under California Labor Code section 2699.3(a)(2)(A). Declaration of J. Glugoski ¶21.

9 The parties engaged in hard-fought litigation and intended to take their claims and
10 defenses to trial; however, Plaintiff also performed extensive work in this case attempting to
11 prepare a trial plan that would meet the Court's standards for a representative PAGA trial as to
12 both liability and penalties. Given the problems identified above and the feedback from
13 employees, Plaintiff concluded that a settlement of the action was in the best interest of all.
14 Declaration of J. Glugoski ¶ 23.

15 In terms of an award of penalties under California Labor Code Section 2699(e)(1) & (2),
16 Defendant was prepared to argue—and the Court could very well agree— that a lesser penalty
17 was more appropriate than the statutory maximum penalty given the compliance rate and changes
18 to its practices post-*Buys*. (Glugoski Decl. ¶23.)

19 These facts and the continuing risk and expense of further litigation, appeals, and a
20 delayed trial led the parties to pursue mediation twice with different mediators. In preparation
21 for the mediation, Defendant provided Plaintiff with information and data necessary for penalty
22 calculations; for example, employment files, sampling data for all PAGA Settlement Aggrieved
23 Employees, the total number of PAGA Settlement Aggrieved Employees, and total number of
24 pay periods between August 18, 2020 and March 22, 2022. Using this information, Plaintiff was
25 able to calculate Defendant's total penalty exposure for the one-year statutory PAGA period.
26 (Glugoski Decl. ¶24.)

27 On April 20, 2023, the parties attended a mediation with the Honorable Ronald S. Prager
28 (Ret.), a respected mediator. The parties resolved the case with Judge Prager on the terms set

1 forth within the Settlement Agreement. (Glugoski Decl. ¶25.)

2 **VII. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

3 **A. Summary of Settlement Terms**

4 The proposed Settlement Agreement (Glugoski Decl., Exhibit 2) involves the formation
5 of a non-reversionary fund consisting of \$10,000.00 (“Gross Settlement Fund”). The Gross
6 Settlement Fund will be used to make payments to the LWDA and PAGA Settlement Aggrieved
7 Employees after, costs of administration. Plaintiff requests settlement administration costs to
8 ILYM Group Inc. in the amount of \$2,500.00. The Net Settlement Fund will be distributed as
9 follows: Seventy-five percent (75%), i.e., \$5,625 will be distributed to the California Labor &
10 Workforce Development Agency (“LWDA”) as required by the PAGA and the remaining
11 twenty-five percent (25%), i.e., approximately \$1,875 will be distributed to all PAGA Settlement
12 Aggrieved Employees on a pro-rata share basis based on the number of pay periods worked by
13 each Settlement Aggrieved Employee. (Glugoski Decl. ¶ 26.)

14 **B. The Notice**

15 Defendant agreed to fund the Settlement Amount within 75 days of the Court’s Order
16 approving the Settlement. (Settlement Agreement ¶¶ I *Definitions* & V B.) The PAGA Settlement
17 Aggrieved Employees will have 180 days to negotiate their checks. If for any reason a check is
18 un-cashed, the by the Administrator to Refugee Net for the benefit of child services, a cy pres
19 charitable organization. The Administrator will prepare and issue IRS Form 1099s to PAGA
20 Settlement Members who received payments and cashed checks, if so required under Federal or
21 California law. (Settlement Agreement ¶ V B.) A Notice informing the PAGA Settlement
22 Aggrieved Employees of the nature of the payment will be provided with the settlement check.

23 **C. Settlement Allocation to the PAGA Settlement Aggrieved Employees**

24 As noted, twenty-five percent (25%) of the PAGA penalties will be allocated to the
25 PAGA Settlement Aggrieved Employees. Based on the numbers Defendant provided,
26 approximately 178 former employees will share in this fund in proportion of the pay periods each
27 member worked. The portion to each of the PAGA Settlement Aggrieved Employees will be
28 treated as non-wages since these are civil penalties and reported by the Settlement Administrator

1 by law PAGA Settlement Aggrieved Employees will receive, on average, \$10.50. (Glugoski
2 Decl. ¶ 28.)

3 **D. The Release**

4 The California Supreme Court has explained that a judgment in “a representative action
5 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of
6 2004...is binding not only on the named employee plaintiff but also on government agencies and
7 any aggrieved employee not a party to the proceeding.” (*Arias*, 46 Cal. 4th at 985–986.)

8 The release in the Settlement Agreement narrowly binds the PAGA Settlement Aggrieved
9 Employees for civil penalty claims brought in the Action (Settlement Agreement ¶ VI A.), as
10 follows:

11 all claims for PAGA penalties during the PAGA Period that were alleged
12 in, or that could have been alleged based on the facts alleged in, the PAGA
13 Notice and the Action (the “Released PAGA Claims”). (Settlement
Agreement § VI A.)

14 **VIII. THE SETTLEMENT IS FAIR AND REASONABLE AND WARRANTS COURT
15 APPROVAL**

16 In 2016, the PAGA was amended to require the Court to “review and approve any
17 settlement of any civil action filed pursuant to this part.” (Cal. Labor Code § 2699(1)(2).) The
18 amendment also required that the “proposed settlement shall be submitted to the agency at the
19 same time that it is submitted to the court.” As such, this Settlement and Motion have been
20 concurrently submitted to the LWDA in accordance with this section. (Glugoski Decl. ¶21, Ex.3.)

21 **A. Evaluation of the PAGA Settlement**

22 Although PAGA and the legislative history do not require a Court to analyze a PAGA
23 settlement in comparison to the “value” of the claims, the Court should pay particular attention
24 to the views, if any are presented, of the LWDA. Plaintiff does not expect the LWDA to object
25 to this proposed settlement because the penalties obtained here are reasonable and should be
26 viewed as a successful resolution in favor of the PAGA Settlement Aggrieved Employees and
27 the State of California.

28 As well, a representative settlement is presumed fair where: (1) the settlement is reached

1 through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel
2 and the court to act intelligently; (3) (and) counsel is experienced in similar litigation. (*Dunk v.*
3 *Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802; see *Moniz v. Adecco USA, Inc.* (2021) 72
4 Cal.App.5th 56, 77 (stating factors used in determining the fairness of class action settlements
5 are useful in evaluating a PAGA settlement).)

6 A court may also consider relevant factors such as the strength of the plaintiffs' case, the
7 risk, expense, complexity and likely duration of further litigation, the risk of maintaining class
8 action status through trial, the amount offered in settlement, the extent of discovery completed
9 and the stage of the proceedings, the experience and views of counsel, [and] the presence of a
10 governmental participant. (*Officers of Justice v. Civil Service Com'n of City and County of San*
11 *Francisco* (9th Cir. 1981) 688 F.2d 615, 625.) "This list is not exhaustive and should be tailored
12 to each case. Due regard should be given to what is otherwise a private consensual agreement
13 between the parties." (*Dunk*, 48 Cal.App.4th at 1801.) Moreover, the trial court has broad powers
14 to determine whether a proposed [representative action] settlement is fair. (*Mallick v. Superior*
15 *Court* (1979) 89 Cal.App.3d 434, 438.)

16 In this case, Plaintiff's entire theory centers around Defendant's alleged practice of failing
17 to pay all wages owed and denial of meal and rest breaks. Defendant maintains data for all 178
18 PAGA Settlement Aggrieved Employees. The data produced by Defendant confirms 4228 pay
19 periods (Glugoski Decl. ¶30.)

20 Therefore, based on this analysis, Plaintiff believes the maximum total exposure value of
21 the claims is based on 4228 pay periods (x \$100 per violation). (Glugoski Decl. ¶30.)

22 Under the PAGA, Courts have considerable discretion to reduce the penalty award below
23 the maximum. In *Fleming v. Covidien* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, a federal
24 court reduced PAGA penalties by 82.2%, because the court found maximum penalties "unjust."
25 Some trial courts have awarded no civil penalties, even when Labor Code violations were
26 established. Examples of such reductions include but are not limited to the following:

27 • *Makabi v. Gedalia* (2nd Dist. Ct. of App. Mar. 6, 2016) 2016 Cal.App.Unpub.
28 1489, *5-7 (no PAGA penalties were awarded by the Los Angeles County Superior Court)

(unpublished decision).

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

- *Franco v. Ruiz Food Products, Inc.*, 2012 WL 5941801 (E.D. Cal. 2012), where the court approved a total PAGA penalty amount of \$10,000, for as many as 2,055 current and former employees.

- *Schiller v. David's Bridal, Inc.*, 2012 WL 217001 (E.D. Cal. 2012), the court approved a PAGA penalty amount of \$10,000 for 3,326 individuals.

- *Enombang v. Target*, Case No. RG17853948, on July 24, 2018 for a total amount of \$9,000,000. The dispute involved 90,462 allegedly aggrieved employees and 1,939,006 pay periods in Alameda Superior Court. [\$4.66 per pay period].

- *Pickett v. 99 Cents Only Stores*, Case No. BC473038, on August 1, 2017, for a total amount of \$1,290,000. The dispute involved approximately 10,000 allegedly aggrieved employees and approximately 1,592,592.6 pay periods in Los Angeles Superior Court. [\$.81 per pay period.]

- *Carrington v. Starbucks Corp.*, (2018) 30 Cal.App.5th 504, the Court of Appeal affirmed a judgment after trial which provided for a PAGA penalty of \$5 per pay period. In *Doe v. Google, et al.*, Case No. CGC-16-556034, the court approved \$15 per aggrieved employee. (Declaration of Righetti ¶18).

This result is positive and favorable to the State, which will receive \$5,625. The PAGA Settlement Aggrieved Employees will receive \$1,875, which amounts on average to \$10.50 per aggrieved employee. (Declaration of Glugoski ¶ 31).

IX. SUBMISSION TO THE LWDA

As set forth in the Glugoski Decl. at ¶22, the settlement and this motion are concurrently being submitted to the LWDA in accordance with California Labor Code section 2699(1)(2). The proof of electronic submission is attached as Exhibit “3” to the Glugoski Declaration.

X. THE SETTLEMENT ADMINISTRATOR

ILYM will serve as the Settlement Administrator and will be responsible for processing

the settlement payments and providing notice to the PAGA Settlement Aggrieved Employees. The Settlement Agreement authorizes up to \$4,000.00 in administration costs; however, IYLM has agreed to do the work for \$2,500.00. (Settlement Agreement ¶ 23).

XI. CONCLUSION

In light of the foregoing, Plaintiff respectfully requests that the Court approve the parties' Settlement Agreement attached as Exhibit 2 to the Glugoski Declaration, including Plaintiff's request for administrative expenses, so that ILYM Group Inc. may begin administering the settlement in accordance with the terms of the Agreement.

Dated: September 12, 2023

Respectfully submitted,

RIGHETTI GLUGOSKI, P.C.

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