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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ULADZIMIR TABOLA, individually and
on behalf of all others aggrieved
employees,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., RASIER,
LLC AND RASIER-CA, LLC AND DOES
1 THROUGH 25,

Defendants.

CASE NO.: CGC-16-550992

Assigned for All Purposes to
Hon. Andrew Y.S. Cheng, Dept. 613

**JOINT APPLICATION FOR APPROVAL OF
PAGA SETTLEMENT**

Date: March 4, 2020
Time: 10:30 AM
Dept.: 613
Judge: Hon. Andrew Y.S. Cheng

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1 Plaintiff and PAGA Representative Uladzimir Tabola (“Plaintiff”) together with Defendants
2 Uber Technologies, Inc., Rasier, LLC and Rasier-CA, LLC (“Defendants”) (collectively, the
3 “Parties”) jointly seek this Court’s approval of the Parties’ agreement to settle the Private Attorneys
4 General Act of 2004, California Labor Code sections 2698, *et seq.* (“PAGA”) claims asserted in this
5 litigation (the “Settlement”), pursuant to Labor Code section 2699(1)(2).

6 I. INTRODUCTION

7 By way of this Settlement, the Parties seek to fully and finally resolve any and all potential
8 claims for PAGA penalties against Defendants relating to the alleged independent contractor
9 misclassification of individuals who used Uber’s software applications to generate leads in California
10 at any time from January 30, 2017 through December 31, 2019 (“PAGA Cohort Members”).¹

11 The Parties executed the Settlement Agreement and Release (“Agreement,” or “PAGA
12 Settlement”) under which Defendants will pay a gross settlement amount of \$10,831,500.00
13 (“Settlement Amount”).² After a \$1,500 Enhancement Award and Settlement Payment (as defined in
14 the Agreement), Claims Administration Costs (as defined in the Agreement), and Attorneys’ Fees and
15 Costs (as defined in the Agreement) are deducted, 75% of the remaining settlement amount shall be
16 distributed to the Labor and Workforce Development Agency (“LWDA”) and 25% shall be distributed
17 to the PAGA Cohort Members, as required by the PAGA. Cal. Lab. Code § 2699(i).

18 The PAGA Cohort Members will be subject to only a limited release confined to the civil
19 penalties available under the PAGA. The proposed release will not impact the individuals’ ability to
20 pursue individual or class claims.

21 As will be explained in further detail below, based on the California Supreme Court’s decision
22 in *Arias v. Superior Court*, 46 Cal. 4th 969 (2009), Plaintiff can seek appropriate civil penalties as
23 called for under the PAGA on behalf of the State of California and other “aggrieved employees”
24 without seeking class certification or meeting the requirements of class certification (i.e. numerosity,
25 typicality, commonality, and adequacy). As such, the usual two-step preliminary approval and final
26

27 ¹Additionally, claims for penalties arising out of the alleged failure to pay for all hours worked or unlawful deductions are
28 released from January 5, 2015 to December 31, 2019, and claims for penalties arising out the alleged failure to provide
sick leave are released from July 1, 2015 to December 31, 2019.

² A true and correct copy of the Agreement is attached as Exhibit 2 to the Declaration of Alexei Kuchinsky.

1 approval process is not required. Rather, as called for under Labor Code § 2699(1), all that is required
2 is court approval of the proposed PAGA settlement. This Settlement represents a reasonable and fair
3 compromise of heavily disputed claims reached after more than three years of litigation and it meets
4 the standards for approval.

5 **First**, this Settlement will serve the PAGA’s objectives of enforcing minimum labor standards
6 because it provides for a payment of approximately \$5,160,412.50 to fund the LWDA in achieving its
7 educational and enforcement objectives. Based on information Plaintiff’s counsel received from the
8 LWDA, he believes this is the fourth largest PAGA settlement in California, far exceeding the results
9 of nearly all other PAGA settlements.

10 **Second**, the Settlement represents a reasonable and fair compromise given that the risk of no
11 recovery in this all-or-nothing PAGA action is significant. Plaintiff faces considerable obstacles in
12 proving the employment status of PAGA Cohort Members—the threshold issue in this case. Various
13 administrative and civil adjudications have found such individuals to be independent contractors. For
14 example, four arbitrators (including three retired judges) have determined that drivers using Uber’s
15 software applications in California are independent contractors and not employees. In addition, the
16 only two courts in the country to rule on drivers’ status determined that drivers are independent
17 contractors. The Equal Employment Opportunity Commission (“EEOC”) and dozens of state
18 administrative agencies have also found individuals using Uber’s software applications to be
19 independent contractors, in some instances on a statewide basis. If Defendants were to prevail on the
20 underlying classification question, the PAGA Cohort Members would not be “aggrieved employees”
21 under the PAGA, and neither the LWDA nor the PAGA Cohort Members would recover anything.

22 **Third**, at trial, Plaintiff will face serious challenges proving that the issue of independent
23 contractor misclassification can be manageably tried for approximately 700,000 individuals on a
24 representative basis. This also strongly supports the reasonableness of the Settlement.

25 **Fourth**, this Settlement is within the range appropriate for approval. For example, in a related
26 prior-filed PAGA case against Defendants in Los Angeles Superior Court, *Price v. Uber Technologies,*
27 *Inc.*, No. BC554512 (L.A. Sup. Ct.) (“*Price*”), Judge Nelson approved a PAGA settlement of virtually
28 identical claims for \$7,775,000 as “fair, just and reasonable.” (Request for Judicial Notice, Ex. 1.)

1 This settlement provides for a much greater payment to the LWDA.

2 In sum, this Settlement appropriately balances the objectives of the PAGA and the risks of
3 litigation posed to each side, while avoiding an unjust result. The Parties respectfully request that the
4 Court approve the Settlement and enter judgment in accordance with its terms.

5 **II. FACTUAL AND PROCEDURAL HISTORY**

6 **A. The Parties**

7 Uber Technologies, Inc. (including its affiliates, collectively “Uber”) is a software company
8 that builds software applications that connect consumers seeking services with independent businesses
9 providing those services through a virtual marketplace. The first and most widely known marketplace
10 the company built is the Rides marketplace and it enables consumers to connect with independent
11 transportation providers (“drivers”) offering transportation services using a software application called
12 the Uber Rides App. Uber also created the Uber Eats marketplace, which connects restaurants with
13 eaters in need of food and delivery providers available to deliver the food using a software application
14 called the Uber Eats App.

15 Any individual who wishes to access Uber’s marketplaces to generate leads for transportation
16 or delivery services must first enter into an agreement with Uber. These agreements define the
17 relationship between the individual and Uber as a relationship between independently contracting
18 parties. (See Declaration of Sophia Behnia (“Behnia Decl.”), Exs. A-D.) Plaintiff Tabola signed up to
19 use the Uber Rides App and accepted the applicable Uber agreement in April 2015, and then accepted
20 the operative agreement in April 2016. (*Id.* at Ex. A.)

21 **B. PAGA Notice and the Complaint**

22 On January 6, 2016, pursuant to Labor Code section 2966.3, Plaintiff notified Defendants and
23 the LWDA via certified mail of Defendants’ alleged violations of the following sections of the
24 California Labor Code: 200-204, 210, 221-224, 225.5, 226, 226.7, 226.8, 245-249, 350-354, 500, 510,
25 512; 1174, 1182.11-1182.13, 1194, 1197, 1198, 2802. (Declaration of Alexei Kuchinsky (“Kuchinsky
26 Decl.”), ¶ 2, Ex. 1.) Plaintiff’s claims were all based on the alleged misclassification of drivers as
27 independent contractors, and his LWDA notice stated his intent to pursue a representative civil action
28 under the PAGA to recover civil penalties on behalf of the State of California and drivers. (*Id.*) The

1 LWDA declined to investigate the alleged violations, permitting Plaintiff to initiate a PAGA action in
2 superior court. (*Id.*)

3 On March 16, 2016, Plaintiff filed a lawsuit in San Francisco Superior Court on behalf of
4 himself, as well as the State of California and other allegedly aggrieved drivers, based on alleged
5 misclassification as independent contractors and derivative violations of the Labor Code and Industrial
6 Welfare Commission (“IWC”) Wage Orders. Plaintiff’s Complaint alleged the following causes of
7 action: (1) failure to pay for all hours worked (Cal. Lab. Code §§ 200-204); (2-3) failure to pay
8 minimum wage and overtime (Cal. Lab. Code §§ 510 and 1194); (4) failure to provide meal periods
9 (Cal. Lab. Code § 512); (5) unlawful deductions (Cal. Lab. Code §§ 221-223); (6) failure to pay all
10 wages due at termination (Cal. Lab. Code § 203); (7) failure to provide sick leave (Cal. Lab. Code §§
11 245-249); (8) failure to provide accurate itemized wage statements (Cal. Lab. Code § 226); (9)
12 unlawful collection and conversion of gratuities (Cal. Lab. Code §§ 350-354); (10) failure to provide
13 employment records upon request (Cal. Lab. Code § 226(c); (11) failure to reimburse business
14 expenses (Cal. Lab. Code § 2802); and (12) violation of the PAGA based on the foregoing and
15 additional provisions of the Labor Code and IWC Wage Orders.³ (Kuchinsky Decl., ¶ 3.) In addition
16 to his representative PAGA claims, Plaintiff alleged individual claims to recover unpaid wages based
17 on the same underlying violations as his PAGA claims, including restitution under Unfair Competition
18 Law (Cal. Bus. & Prof Code §§ 17200 *et seq.*). (*Id.*)

19 C. Procedural Background

20 On May 3, 2016, in lieu of filing an Answer to the Complaint, Defendants filed a Motion to
21 Stay or in the Alternative to Compel Arbitration. Plaintiff filed his opposition and also initiated written
22 discovery; however, on May 31, 2016, the Court granted Defendants’ Motion to Stay pending other
23 related actions. (Kuchinsky Decl., ¶ 4.) Ultimately, this Action remained stayed pending the PAGA
24 settlement in *Price*. (*Id.*)

25 On January 18, 2018, Judge Nelson approved the *Price* PAGA Settlement, pursuant to which
26 Defendants agreed to pay \$7,775,000 to settle all PAGA claims on behalf of all drivers who used the

27 _____
28 ³ The PAGA action was originally filed on behalf of Uladzimir Tabola, Alexander Kazakov, Yahor Zgurski, and Maksim Hancharuk, however, Kazakov, Zgurski, and Hancharuk subsequently dismissed their claims, with the Court’s approval.

1 Uber applications from July 8, 2013 to January 29, 2017. (Kuchinsky Decl., ¶ 5.) Judge Nelson found
2 that the “\$7.75 million PAGA settlement [was] fair, just and reasonable in all the circumstances,”
3 including that “even if plaintiffs prevail, trial courts have discretion to award less than the maximum
4 penalties” and “the unsettled nature of the legal question (whether drivers are employees) and the
5 likelihood of appeal if plaintiffs’ prevail.” (Request for Judicial Notice, Ex. 1.) Recognizing the
6 preclusive effect of the *Price* PAGA settlement on Plaintiff’s PAGA claims, Plaintiff agreed to amend
7 his original complaint to exclude duplicative claims settled in *Price*. (Kuchinsky Decl., ¶ 5.)

8 In February 2018, this case was assigned to Complex Department 305 of San Francisco
9 Superior Court. On May 1, 2018, the Court lifted the stay and on June 1, 2018, Plaintiff filed his First
10 Amended Complaint (“FAC”). (*Id.* at ¶ 6.)

11 In August 2018, Defendants demurred to Plaintiff’s FAC and moved to strike certain portions
12 of the FAC. The Court overruled Defendants’ demurrer but granted, in part, Defendants’ motion to
13 strike. (*Id.* at ¶ 7.) Specifically, the Court limited the liability period of certain PAGA claims in light
14 of the *Price* PAGA Settlement. On November 2, 2018, Defendants’ answered the FAC. (*Id.*)

15 In October 2018, Plaintiff served his second set of written discovery requests, including
16 Requests for Production of Documents and Special and Form Interrogatories. (Kuchinsky Decl., ¶ 8.)
17 In January 2019, Uber responded to Plaintiff’s written requests and starting on January 16, 2019,
18 Plaintiff engaged in a meet-and-confer process with Uber regarding its responses. (*Id.*)

19 As a result of meet-and-confer efforts, the Parties stipulated to, and, on March 29, 2019, the
20 Court entered a Bifurcation Order. (*Id.*) Specifically, the Court ordered the issue of whether Plaintiff
21 was properly classified as an independent contractor to be bifurcated from all other issues and limited
22 all discovery, motion practice, and merits to the issue of Plaintiff’s independent contractor status only.
23 All other claims, including all discovery unrelated to the issue of Plaintiff’s independent contractor
24 status, were ordered stayed. (*Id.*)

25 **D. Settlement Negotiations**

26 In April 2019, the Parties agreed to submit Plaintiff’s individual and PAGA claims to
27 mediation. Plaintiff requested and Defendants disclosed information and data related to Plaintiff and
28 the PAGA Cohort Members, including a randomly selected sample of 500 drivers’ Uber software

1 application usage data in a CSV format, showing miles driven while on trip, trip durations, and
2 compensation paid. (Kuchinsky Decl., ¶ 9.) Uber also disclosed the number of workweeks for all
3 PAGA Cohort Members for the relevant time period prior to mediation. (*Id.*) In preparation for the
4 mediation, Plaintiff's counsel analyzed, researched, and investigated the potential issues including
5 matters related to the calculation of damages at trial and appellate issues and risks. (*Id.*)

6 On July 17, 2019, the Parties participated in a full-day mediation session before well-respected
7 wage-and-hour mediator, Joel M. Grossman, Esq. of JAMS. The mediation took place in San
8 Francisco. (Kuchinsky Decl., ¶ 10.) The Parties made considerable headway over the course of the
9 full-day mediation through robust discussions of the risks and rewards of continued litigation, possible
10 economic and non-economic terms, as well as several rounds of offers and counter-proposals. (*Id.*)
11 While the Parties were able to agree on the principal amount of the PAGA settlement on July 17, 2019,
12 the Parties continued negotiations with respect to the remaining key terms until September 2019 and
13 on January 28, 2020 a long form settlement agreement was executed.⁴ (*Id.* at ¶ 10, Ex. 2.)

14 As part of the Settlement, on September 25, 2019, Plaintiff served the LWDA with a
15 supplemental notice pursuant to Labor Code section 2699.3(a), notifying the LWDA of additional
16 alleged violations by Defendants, including the following sections of the Labor Code: 206, 206.5, 208,
17 212, 216, 226.2, 232.5, 432.5, 515, 551, 552, 558.1, 1174.5, 1175, 1182.12, 1197.1, 1198.5, 1199,
18 2753, 2804, 2810.5 ("September 2019 Letter"). (Kuchinsky Decl., ¶ 11, Ex. 3.) Pursuant to Labor
19 Code section 2699.3(a)(2)(A), Plaintiff's administrative remedies with respect to the additional
20 violations alleged in the September 2019 Letter were exhausted on November 29, 2019. (*Id.*)

21 On January 29, 2020, Plaintiff filed a Second Amended Complaint incorporating the additional
22 alleged violations that Plaintiff notified the LWDA about on September 25, 2019. (Kuchinsky Decl.,
23 ¶ 12.)

24 E. Later-Filed PAGA Actions

25 After *Price*, this Action is the first-filed action against Defendants alleging a violation of the
26 PAGA based on alleged misclassification of drivers in California as independent contractors.

27
28 ⁴ On September 3, 2019, Plaintiffs Kazakov and Hancharuk filed a request for dismissal. (Kuchinsky Decl., ¶ 10.)

1 However, *after* Plaintiff sent his letter to the LWDA, several other individuals also sent letters
2 to the LWDA and filed suit against Defendants seeking to recover penalties under many of the same
3 sections of the Labor Code, and all based on the same underlying theory that Uber misclassified
4 individual drivers in California as independent contractors. (Kuchinsky Decl., ¶ 14.) These later-filed
5 matters (the “Later-Filed PAGA Cases”) are identified below:

- 6 (1) *Sherman v. Uber Technologies, Inc.*, Superior Court of California, County of Los Angeles,
7 Case No. BC656880, filed April 6, 2017;
- 8 (2) *Rosales v. Uber Technologies, Inc.*, Superior Court of California, County of Los Angeles,
9 Case No. BC685555, filed December 4, 2017;
- 10 (3) *Rowe v. Rasier-CA, LLC*, Superior Court of California, County of Orange, Case No. 30-
11 2018-00989673-CU-OE-CXC, filed May 1, 2018;
- 12 (4) *Alamas v. Uber Technologies, Inc.*, Superior Court of California, County of Los Angeles,
13 Case No. 19STCV29939, filed August 23, 2019;
- 14 (5) *Gregg v. Uber Technologies, Inc.*, Superior Court of California, County of Los Angeles,
15 Case No. BC719085, filed August 29, 2018;
- 16 (6) *Adolph v. Uber Technologies, Inc.*, Superior Court of California, County of Orange, Case
17 No. 30-2019-01103801-CU-OE-CXC, filed October 10, 2019;
- 18 (7) *Ramon Segarra v. Uber Technologies, Inc.* (notice of PAGA claims), dated June 17, 2019;
19 and
- 20 (8) *In re Jericho Nicolas, Anthony Sanchez, Barton Lasheem, Benjamin Laney, Carlos*
21 *Alvarez, Christine Tringali, David Kim, Dora Waters, Eric Calvillo Hernandez, Gary*
22 *Baumgarten, Jackson Rodriguez, Jaime Del Real, Jamin Goodner, Jason Thais, Jorge*
23 *Jimenez, Jose Contreras, Juan Jamarron, Juan Montalvo, Kamal Suri, Kelly Clifton, Kevin*
24 *Byler, Kevin Neely, Lisette Castillo, Lorianne Blakey, Marcos Montes, Mark Glinoga,*
25 *Michael Kramer, Michael Vela, Richard Trujillo, Rick Anderson, Sherbas Khalid, Steven*
26 *Robert Callahan, William Hooper IV, Yazmin Garcia, and Yhon Lara v. Uber*
27 *Technologies, Inc.* (notice of PAGA claims), dated November 1, 2019.

28 (Kuchinsky Decl., ¶ 14; Request for Judicial Notice, Exs. 3-14.) The Settlement in this Action
encompasses and is intended to extinguish to the fullest extent possible all of the claims alleged in the
Later-Filed PAGA Cases.

III. NOTICE OF THE PAGA SETTLEMENT AND NOTICE OF THIS MOTION TO THE LWDA

Pursuant to Labor Code section 2699(l)(3), on February 10, 2020, Plaintiff’s Counsel uploaded

1 to the LWDA website this Joint Application For Approval of PAGA Settlement as well as the papers
2 in support. (Kuchinsky Decl., ¶ 15.) As of the time of the filing of this Motion, Plaintiff did not receive
3 any communication from the LWDA. (*Id.*)

4 **IV. TERMS OF THE PROPOSED SETTLEMENT AGREEMENT**

5 The Parties have agreed to settle Plaintiff's PAGA claims, inclusive of attorneys' fees and
6 costs for \$10,831,500. (Kuchinsky Decl., ¶ 10, Ex. 2.) The material terms of this Settlement Agreement
7 are as follows:

8 **A. The Payment**

9 Defendants will pay a total of \$10,831,500 ("Settlement Sum") to resolve the PAGA Claims
10 (as defined below) during the PAGA Release Period (as defined in the Agreement and on page 10,
11 *infra*) on behalf of Plaintiff as a representative of the LWDA and PAGA Cohort Members. (Kuchinsky
12 Decl., ¶ 10, Ex. 2.) The Settlement Sum covers civil penalties (to be shared between the LWDA and
13 PAGA Cohort Members), as well as an Enhancement Award to Plaintiff, Attorneys' Fees and Costs,
14 and Claims Administration Costs. (*Id.* at ¶ 10, Ex. 2, Sec. III(c).) The LWDA will receive 75% of the
15 Net Settlement Amount (after fees, costs, and enhancement award are deducted, as defined in the
16 Agreement). (*Id.*) The PAGA Cohort Members will receive 25% of the Net Settlement Amount on a
17 pro-rated basis. (*Id.*)

18 **B. Attorneys' Fees, Costs, and Enhancement**

19 The Agreement permits Plaintiff to apply for an Enhancement Award of \$1,500 in exchange
20 for a release of his individual claims, and Attorneys' Fees and Costs not to exceed 30% of the
21 Settlement Sum. (Kuchinsky Decl., ¶ 10, Ex. 2, Sec. III(C)(a).)

22 **C. Settlement Administration**

23 The Parties have agreed that the cost of administering the Settlement shall be deducted from
24 the Settlement Sum. The Settlement Administrator mutually selected by the Parties, Epiq Class Action
25 & Claims Solutions, Inc., has provided the Parties with an anticipated cost of administration of the
26 Settlement, of approximately \$700,000. (Kuchinsky Decl., ¶ 10, Ex. 2, Sec. III(C)(a)(3).) If the claims
27 administration fees are less than the estimated amount, the remainder will be included in the Payment
28 of PAGA Penalties (as defined in the Agreement). (*Id.*)

1 **D. The Scope of Release**

2 The Settlement provides for an Individual Release and PAGA Cohort Member Release as set
3 forth in the Agreement. The PAGA Cohort Member Release, is as follows:

4 Upon entry of the Final Order, Plaintiff as representative of the State of California on
5 behalf of all PAGA Cohort Members shall be deemed to have fully, finally, and forever
6 waived, released, relinquished, and discharged each and all of the Released Parties from
7 any PAGA Claims that arose or may be alleged to have arisen, or that have been
8 brought or could have been brought by Plaintiff, the State of California, or any PAGA
9 Cohort Member, at any time during the PAGA Release Period.

10 Moreover, notwithstanding the provisions of Section 1542 of the California Civil Code
11 (above), and to implement a full and complete release and discharge of Released
12 Parties, Plaintiff on behalf of himself and the State of California, expressly
13 acknowledges this Agreement is intended to include in its effect, without limitation, all
14 PAGA Claims Plaintiff and the State of California on behalf of the PAGA Cohort
15 Members do not know or suspect to exist in their favor at the time of signing this
16 Agreement, and that this Agreement contemplates the extinguishment of any and all
17 known or unknown PAGA Claims related to the claims being released.

18 (Kuchinsky Decl., ¶ 10, Ex. 2, Sec. V(C).) Under this PAGA Settlement, the PAGA Cohort Members
19 are defined as any individual who used the Uber software applications to generate leads in California
20 during the PAGA Release Period. (*Id.* at ¶ 10, Ex. 2, Sec. I(o).) The PAGA Release Period means:

- 21 (1) For PAGA Claims arising out of or relating to alleged failure to pay for
22 all hours worked or unlawful deductions, from January 5, 2015 through
23 December 31, 2019.
- 24 (2) For PAGA Claims arising out of or relating to alleged unpaid sick leave
25 violations, from July 1, 2015 through December 31, 2019.
- 26 (3) For PAGA Claims arising out of or relating to all other allegations,
27 from January 30, 2017 through December 31, 2019.

28 (*Id.* at ¶ 10, Ex. 2, Sec. I(p).)

And “PAGA Claims” are defined as:

[A]ny and all claims under or pursuant to PAGA based on alleged
misclassification of PAGA Cohort Members as independent contractors or any
PAGA-enabling violation of any law arising from any act or omission by the
Released Parties, whether known or unknown, suspected or unsuspected, to
which Plaintiff or the State of California on behalf of the PAGA Cohort
Members may have been entitled or may be entitled under the California Labor
Code including, but not limited to, penalties based on or arising from alleged
violations of California Labor Code sections 200, 201, 202, 203, 204, 206,
206.5, 208, 210, 212, 216, 221, 222, 222.5, 225.5, 223, 224, 226, 226.2, 226.3,
226.7, 226.8, 232.5, 245, 245.5, 246, 246.5, 247, 247.5, 248, 248.5, 249, 351,

352, 353, 354, 355, 356, 432.5, 500, 510, 512, 515, 551, 552, 558, 558.1, 1174, 1174.5, 1175, 1182.11 – 1182.3, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2753, 2802, 2804, 2810.5, 2699(f); and to the fullest extent permissible under governing law, the California Code of Regulations and/or Industrial Welfare Commission Wage Orders, including, but not limited to Wage Order 9-2001, and any and all other statutes, laws, or regulations on which a claim for penalties under PAGA may be based.

(*Id.* at ¶ 10, Ex. 2, Sec. I(n).)

E. Settlement Administration Process

The Agreement provides that the Claims Administrator will distribute the Settlement Sum as follows:

The total sum available for payment of PAGA penalties shall be calculated by deducting the Attorneys' Fees and Costs awarded, the Enhancement Award and Settlement Payment and Claims Administration Costs from the Settlement Sum (this will yield the "Net Settlement Amount"). Of the Net Settlement Amount, seventy-five percent (75%) shall be distributed to the LWDA ("LWDA Payment") and the remaining twenty-five percent (25%) shall be distributed to the PAGA Cohort Members ("Driver Penalty Payments").

The Driver Penalty Payment for each PAGA Cohort Member shall be calculated based on a pro rata allocation of that PAGA Cohort Member's "Active Weeks." An "Active Week" means any week, measured from Monday at 12:00 a.m. until Sunday at 11:59 p.m., in which a PAGA Cohort Member accepted a lead using Uber's software application. For Active Weeks during the period of January 5, 2015 through January 29, 2017, a PAGA Cohort Member will be awarded 0.5 points. For Active Weeks during the Period of January 30, 2017 through December 31, 2019, a PAGA Cohort Member will be awarded 1 point. The pro rata allocation will be determined by dividing the Driver Penalty Payments by the total number of Active Week points for all PAGA Cohort Members. Each PAGA Cohort Member will then be paid an individual Driver Penalty Payment equal to the Active Week Amount multiplied by that PAGA Cohort Member's total number of Active Week points.

(Kuchinsky Decl., ¶ 10, Ex. 2, Sec. III(C)(a)(4).)

F. Amendment of the Complaint

As part of the Settlement, the Parties stipulated to the filing of the Second Amended Complaint to add claims under the PAGA for the alleged violations outlined in Plaintiff's September 2019 Letter to the LWDA. (Kuchinsky Decl., ¶ 10, Ex. 2, Sec. VI(D).) Should the Court not approve the Settlement, the Settlement and the Second Amended Complaint shall be void and the operative Complaint at the time of the July 2019 mediation will remain operative. (*Id.*)

V. LEGAL STANDARD FOR APPROVAL OF PAGA SETTLEMENTS

A. PAGA Overview

In 2003, California enacted the Private Attorneys General Act of 2004. California Labor Code Section 2699(a) provides:

Notwithstanding any other provision of law, any provision of [the Labor Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees.

The PAGA allows allegedly aggrieved employees, on behalf of the LWDA and other similarly situated employees, to bring suit against their employers for alleged violations of the California labor laws and to obtain penalties that previously could only be obtained by the State. *Iskanian v. CLS Trans. Los Angeles, LLC*, 59 Cal. 4th 348, 360 (2014). The PAGA was enacted because the Legislature determined that it was “in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations,” since the State had not been able to fully or adequately enforce its labor laws. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009).

A plaintiff who brings a PAGA claim “does so as the proxy or agent of the state’s labor law enforcement agencies.” *Id.* at 986. Because the “plaintiff represents the same legal right and interest as state labor law enforcement agencies, . . . a judgment in an employee’s action under [PAGA] binds not only that employee but also the state labor law enforcement agencies.” *Id.* In addition, the judgment “binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government.” *Id.*

B. Legal Standard for Approval

The settlement of a PAGA claim requires court approval pursuant to the Labor Code, which states that the “[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part.” See Cal. Lab. Code § 2699(1)(2).

In reviewing a PAGA settlement, the courts must determine whether the proposed settlement is “fair, reasonable, and adequate.” (Request for Judicial Notice, Exh. 2.) This standard is based on the express language of the PAGA itself, case law discussing the PAGA, and interpretive guidance

1 provided by the LWDA. *Id.*

2 Labor Code section 2699(i) states that:

3 [C]ivil penalties recovered by aggrieved employees shall be distributed as follows:
4 75 percent to the Labor and Workforce Development Agency **for enforcement of**
5 **labor laws, including the administration of this part, and for education of**
6 **employers and employees about their rights and responsibilities under this**
7 **code.** to be continuously appropriated to supplement and not supplant the funding
8 to the agency for those purposes; and 25 percent to the aggrieved employees.

9 Cal. Lab. Code § 2699 (emphasis added). The LWDA has stated that:

10 The touchstone for the adequacy of the settlement must always be the purposes
11 and policies underlying California's labor laws, and PAGA as a proxy for a
12 state action. To that end, a PAGA settlement must provide relief that is
13 genuine, meaningful, and consistent with the State's goal of benefitting the
14 public through enforcement of its labor laws.

15 (Request for Judicial Notice, Exh. 2.)⁵ Several federal district court cases have also observed that the
16 touchstone for whether a PAGA settlement is adequate is whether the relief it provides is “genuine
17 and meaningful, [and] consistent with the underlying purpose of the [PAGA] to benefit the public.”
18 *Viceral v. Minstras Group, Inc.*, 2016 WL 5907869 at * 9 (N.D. Cal. Oct. 11, 2016). *See, also, Ferreri*
19 *v. Bask Technology, Inc.*, 2016 WL 6833927 at *5 (S.D. Cal Nov. 21, 2016) (evaluating PAGA
20 settlement in light of purposes and policies of the PAGA).⁶ Accordingly, the appropriate standard to
21 consider when determining whether to approve this PAGA settlement is whether it is “fundamentally
22 fair, reasonable, and adequate” and furthers the State's goal of benefitting the public through
23 enforcement of its labor laws.

24 C. Class Action Settlement Standards Do Not Govern the Settlement Approval 25 Process for PAGA Claims

26 Notably, the standard for evaluating a PAGA settlement is different, and less stringent, than
27 that for evaluating a class action settlement. As explained in *Arias*, 46 Cal. 4th 969, the Parties are *not*
28 obligated to “satisfy class action requirements,” including the standards for class action settlement

⁵ *See also, Salazar v. Sysco Central California, Inc.*, No. 1:15-cv-01758-DAD (E.D. Cal. Feb. 2, 2017), ECF No. 25 at 3,
(approved a settlement of PAGA claims upon a showing that the settlement terms (1) meet the statutory requirements set
forth by PAGA, and (2) are fundamentally fair, reasonable, and adequate in view of PAGA's public policy goals).

⁶ Courts defer to the agency's interpretation of a statute where authority has been delegated to that agency. *See New*
Cingular Wireless PCS, LLC v. Pub. Utilities Comm'n, 246 Cal. App. 4th 784, 807 (2016).

1 approval. *Arias*, 46 Cal. 4th at 980-988 (affirming lower court’s holding that “plaintiff need not satisfy
2 class action requirements” to assert a PAGA claim). Indeed, *Arias* expressly distinguished a class
3 action from a PAGA action, and rejected the defendants’ argument that the Legislature intended to
4 require class action procedures for PAGA actions. *Id.* at 984; *see also Casida v. Sears Holdings Corp.*,
5 2012 WL 253217, *3 (E.D. Cal. 2012) (“A PAGA claim asserted on a non-class representative basis
6 ... is not considered a class action but a law enforcement action” and thus does not have to meet the
7 requirements of a class action.). This is because the purpose of the PAGA is to benefit the public by
8 augmenting the state’s enforcement capabilities, encouraging compliance with Labor Code provisions,
9 and deterring noncompliance. *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 972 (N.D.
10 Cal. 2019).

11 As a result, the standard for evaluating a PAGA settlement is not the same as (or even remotely
12 similar to) that which governs “a class action lawsuit, [since] PAGA claims such as the one before the
13 court here are intended to serve a decidedly different purpose—namely to protect the public rather
14 than for the benefit of private parties.” *Gutilla v. Aerotek, Inc.*, No. 1:15-cv-00191-DAD-BAM, 2017
15 U.S. Dist. LEXIS 41655, at *6 (E.D. Cal. Mar. 21, 2017) (recognizing the distinct issues presented by
16 class actions and adopting “fundamentally fair, reasonable, and adequate with reference to the public
17 policies underlying the PAGA” standard of review with respect to PAGA-only settlement); *see also*,
18 *Arias*, 46 Cal. 4th at 986; *Iskanian*, 59 Cal. 4th at 387 (holding that “[t]he civil penalties recovered on
19 behalf of the state under the PAGA are distinct from the statutory damages to which employees may
20 be entitled in their individual capacities”). Thus, unlike the class action settlement approval process,
21 in a PAGA-only settlement such as here, there is no statutory requirement for this Court to conduct a
22 two-step settlement approval review. Cal. Lab. Code § 2699(1). In addition, “[u]nnamed employees
23 need not be given notice of the PAGA claim, nor do they have the ability to opt-out of the
24 representative PAGA claim” or “contest a settlement, if any, reached between the parties.” *Ochoa-*
25 *Hernandez v. CJADERS Foods, Inc.*, 2010 U.S. Dist. LEXIS 32774, *13 (N.D. Cal. 2010).⁷ An

26 _____
27 ⁷ In *Arias*, 46 Cal. 4th at 975, the California Supreme Court made clear that a PAGA case is not a class action and non-
28 party employees are not entitled to any notice under the PAGA. In *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117,
1122 (9th Cir. 2014) the Ninth Circuit similarly held that “[u]nlike Rule 23(c)(2), PAGA has no notice requirements for
unnamed aggrieved employees, nor may such employees opt out of a PAGA action.” *Hernandez v. DMSI Staffing, LLC*,

1 individual employee bringing a PAGA claim is vindicating only the alleged injury to the public and
2 not a personal claim for underpaid wages. *Williams v. Superior Court*, 3 Cal. 5th 531, 547, fn. 4 (2017)
3 (noting that in a PAGA action aggrieved employees’ personal claims are “not at stake.”).⁸ In fact, if
4 this PAGA Settlement is approved by the Court, any PAGA Cohort Member other than Plaintiff is
5 free to pursue and obtain all other remedies available under the Labor Code, including claims for
6 unpaid wages, meal and rest period premiums, and wage statement violations. *See Arias*, 46 Cal. 4th
7 at 987 (recognizing that employee plaintiff may obtain civil penalties under the PAGA separate and
8 apart from other remedies under the Labor Code such as lost wages or an additional hour of pay).

9 Therefore, to approve a PAGA settlement, the Court need not evaluate the settlement value
10 based on how it compares to the dollar value of the maximum potential PAGA penalties at issue in the
11 case, but rather whether the PAGA settlement serves the PAGA’s statutory purpose in deterring Labor
12 Code violations through the imposition of civil penalties as measured by the “fundamentally fair,
13 reasonable and adequate” standard. Thus, absent a conclusion by the Court that, under the relevant
14 circumstances, the settlement as a whole runs afoul of the purpose and goals of the PAGA, there is no
15 reason for the Court to reject a proposed PAGA settlement.

16 VI. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

17 A. The Settlement Serves the PAGA’s Public Policy Goals

18 The Settlement here encompasses only PAGA claims for civil penalties, and the Parties request
19 that this Court approve this Settlement because it is fair, reasonable, adequate, and enhances the
20 resources to the LWDA and the purposes and policies of the PAGA. (Kuchinsky Decl., ¶ 29-30.)

21 First, under the PAGA, the penalties recovered are meant to supplement agency funding for
22 education and enforcement purposes. *See* Cal. Lab. Code § 2699(i). This Settlement will dramatically
23 enhance the resources available to the LWDA to serve its law enforcement and education role. This is
24 the fourth largest PAGA settlement in California based on the data provided to Plaintiff’s Counsel by

25 _____
26 79 F. Supp. 3d 1054, 1063 (N.D. Cal. 2015) (Chen, J.) (“The due-process-related procedural requirements of formal class
actions do not obtain in PAGA representative actions.”).

27 ⁸ In *Williams*, the Court compared the absent PAGA employees’ due process rights with those of similarly situated employees
28 of a class action. The Court explained that “no similar due process concerns arise under PAGA because absent employees do not
own a personal claim for PAGA civil penalties ... and whatever personal claims the absent employees might have for relief are
not at stake.” 3 Cal. 5th at 547, fn. 4.

1 the LWDA. (Kuchinsky Decl., ¶¶ 30-31.) Specifically, as of August 2, 2019, there were only eight
2 PAGA cases in which the LWDA received \$2 million or more in civil penalties and only three cases
3 exceeding \$6 million. (*Id.*) This is an excellent result which will greatly supplement the funding
4 available to the agency for education and enforcement. Cal. Lab. Code § 2699(i) (penalties recovered
5 under the PAGA shall be distributed to the LWDA for enforcement of labor laws and education of
6 employers and employees).

7 Second, the Settlement is consistent with the State's public policy favoring resolution of
8 disputes. California law favors the settlement of disputes as our high court clarified in *Neary v. Regents*
9 *of Univ. of Cal.*, 3 Cal. 4th 273, 277-278 (1992). “Settlement is efficient; it reduces costs, saves
10 resources, and minimizes court congestion. The parties are best positioned to understand their interests
11 and resolve a dispute in a mutually beneficial manner without court intervention into the settlement.”
12 *Consumer Advocacy Group, Inc. v. Kintetsu Enters. of Am.*, 141 Cal. App. 4th 46, 62-63 (2006)
13 (quoting *Neary*).

14 Finally, the Settlement accomplishes the PAGA’s objectives in that it puts California
15 businesses on notice that the potential penalties for alleged worker misclassification can be significant.
16 (Request for Judicial Notice, Exh. 2 at p. 6 (evaluating settlement’s adequacy must consider whether
17 the “proposed penalty amounts effectively promote PAGA’s compliance and deterrence goals”).)

18 **B. The Settlement is Reasonable Given the Various Obstacles to Recovery**

19 A Court’s review of a PAGA settlement is limited to an assessment of whether the Settlement
20 effectuates the PAGA’s goals. Nevertheless, a number of additional factors weigh in favor of
21 Settlement approval here.

22 **1. There is a Risk Plaintiff’s Case Could Fail on the Threshold Issue of** 23 **Employee Status**

24 To recover any civil penalties under the PAGA, Plaintiff must first prove he was an employee
25 of Uber. *See Arnold v. Mutual of Omaha Ins. Co.*, 202 Cal. App. 4th 580, 582-583 (2011); Cal. Lab.
26 Code, §§ 2699(a), (c) (PAGA claim may be brought by an “aggrieved employee,” defined as “any
27 person who was employed by the alleged violator and against whom one or more of the alleged
28 violations was committed.”). However, it is unsettled which test applies to determine whether Plaintiff

1 was properly classified as an independent contractor. In addition, regardless of which test applies, this
2 settlement must be viewed in light of the real possibility that Uber would ultimately prevail and
3 Plaintiff and the alleged aggrieved workers would get nothing.

4 **a. It is unsettled which independent contractor test applies to**
5 **Plaintiff's claims**

6 Applicable law⁹, as established in *Dynamex Operations West, Inc. v. Superior Court of Los*
7 *Angeles*, 4 Cal. 5th 903, 930 (2018) (“*Dynamex*”), creates a presumption that a worker who performs
8 services for a hirer is an employee for purposes of claims for wages and benefits arising under wage
9 orders issued by the Industrial Welfare Commission. In *Dynamex*, the California Supreme Court
10 applied an “ABC” test¹⁰ to establish whether a worker is an independent contractor for those purposes.
11 Because Plaintiff’s Second, Third, Forth, and Ninth causes of action are based on Industrial Welfare
12 Commission Wage Order No. 9, Plaintiff contends the “ABC” test applies to determine Plaintiff’s
13 status for purposes of Wage Order violations. In contrast, Defendants assert that *Dynamex*’s “ABC”
14 test does not apply retroactively, and even if it did, it would not apply to Plaintiff’s PAGA claims
15 because, as stated above, the *Dynamex* holding was limited to claims under the wage orders, and thus
16 has no bearing on Plaintiff’s PAGA claims brought under the Labor Code. *See, e.g., Henry v. Central*
17 *Freight Lines, Inc.*, 2019 WL 2465330 (E.D. Cal. June 13, 2019) (writing “[t]his Court declines to
18 expand the application of the *Dynamex* ABC test beyond the ‘one specific context’ endorsed by the
19 California Supreme Court,” and ruling that waiting-time penalties, wage statement penalties, and
20 PAGA claims must be decided under *Borello*); *Garcia v. Border Transportation Group, LLC*, 28 Cal.
21 App. 5th 558, 571 (2018) (holding *after* the *Dynamex* decision: “Garcia’s claims for overtime,
22 wrongful termination, waiting time penalties, and UCL claims resting on the foregoing are governed
23 by the common law test articulated in *Borello*.”).

24 ⁹ The Parties are aware of Assembly Bill 5 (“AB5”), which codifies the decision in *Dynamex* and became effective on
25 January 1, 2020. However, AB5 will not be applied to Tabola’s PAGA claims retroactively for violations that were
allegedly committed in 2015-2018 (the relevant time period for this Settlement). Cal. Lab. Code § 2750.3.

26 ¹⁰ Under *Dynamex*’s “ABC” test, a worker is considered an employee under the Wage Orders unless the hiring entity
27 establishes all three of these prongs: (A) the worker is free from the control and direction of the hirer in connection with
the performance of the work, both under the contract for the performance of such work and in fact; (B) the worker performs
28 work that is outside the usual course of the hiring entity’s business; and (C) the worker is customarily engaged in an
independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.
Dynamex Operations West, Inc. v. Superior Court of Los Angeles, 4 Cal. 5th 903, 917- 917 (2018).

1 While the parties dispute these issues, the California Supreme Court recently granted the Ninth
2 Circuit’s request to certify for decision the very questions of whether *Dynamex* applies retroactively
3 and to PAGA claims at all in *Vazquez v. Jan-Pro Franchising Int’l*, No. S258191, 2019 Cal. LEXIS
4 8736, at *1 (Nov. 20, 2019). Thus, the application of *Dynamex* to Plaintiff’s PAGA claims remains,
5 at best, unsettled.

6 To the extent the ABC test does not apply, the Court will apply the *Borello* test to determine
7 Plaintiff and the alleged aggrieved workers’ employment status.¹¹

8 The *Borello* standard is a fact-intensive inquiry as established in *S.G. Borello & Sons, Inc. v.*
9 *Department of Industrial Relations*, 48 Cal. 3d 341, 350 (1989) (“*Borello*”) to determine whether a
10 worker is an employee or independent contractor. In *Borello*, the California Supreme Court set forth
11 a “multi-faceted” and multi-factored test for making this determination. *Narayan v. EGL, Inc.*, 616
12 F.3d 895, 901, 904 (9th Cir. 2010). Under *Borello*, the key question is “whether [Uber] has the right
13 to control the manner and means of accomplishing the result desired.” *Borello*, 48 Cal. 3d at 350-51.
14 The following additional factors must also be considered, with the weight of each factor varying
15 depending on the circumstances: (1) whether the person performing services is engaged in an
16 occupation or business distinct from that of the company; (2) whether or not the work is an integral
17 part of the regular business of the company; (3) whether the worker supplies the tools and the place
18 for the person performing the work; (4) the individual’s investment in equipment; (5) the skill required
19 in the particular occupation; (6) industry practice in the locality; (7) the individual’s opportunity for
20 profit or loss depending on his managerial skill; (8) the length of time for which the services are to be
21 performed; (9) the degree of permanence of the working relationship; (10) the method of payment,
22 whether by time or by the job; (11) whether or not the parties believed they were creating an employer-
23 employee relationship; and (12) whether the worker is subject to discharge at will. *Id.* at 355. There is
24 uncertainty regarding whether a fact-finder—applying this multi-factored test—will ultimately find
25 that drivers who use the Uber App are employees or, alternatively, independent contractors.

26 **b. Courts, Arbitrators, and Government Agencies Have Determined**
27 **Drivers are Independent Contractors**

28 ¹¹ *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 48 Cal. 3d 341, 350 (1989).

1 Arbitrators, two courts, and numerous government agencies have been confronted with the
2 same misclassification claims involving other drivers and have found those drivers to be independent
3 contractors. On four separate occasions in the last three years, arbitrators (including three retired
4 judges) have determined that drivers using Uber's software applications in California are independent
5 contractors and not employees. Uber has won every time this issue has been presented to a fact-finder
6 in arbitration.

7 Following a three-day arbitration and extensive briefing by the parties, the Honorable Michael
8 D. Marcus (Ret.) found that Yosef Eisenberg, a driver who used Uber's software applications, was an
9 independent contractor and not an employee under the *Borello* standard. In a nearly 50-page order
10 dated November 23, 2016, Judge Marcus evaluated and found for Uber on every issue, holding: "Uber
11 drivers are not supervised; supply the cars they drive; do not wear Uber uniforms or signage; can drive
12 simultaneously for any competitor, including . . . Uber's biggest competitor; are paid for each ride and
13 have the unfettered option to work as little or as much as they want and wherever they want in the
14 geographical location assigned to their platform." (Request for Judicial Notice, Ex. 15.)

15 Following a four-day arbitration less than a year later, the Honorable Richard A. Kramer (Ret.)
16 issued a similar decision finding that Robert Gollnick, a driver who used Uber's software applications
17 to generate leads, failed to prove that Uber improperly classified him as an independent contractor
18 under the *Borello* standard. In fact, Judge Kramer ruled that Mr. Gollnick had failed to even meet the
19 factual predicate required to invoke the presumption of employment status under Labor Code section
20 3357—i.e. that Mr. Gollnick provided services for Uber. While Mr. Gollnick argued that he
21 established Uber was in the passenger transportation business and that he provided transportation
22 services in furtherance of that business, Judge Kramer disagreed. (Request for Judicial Notice, Ex.
23 16.)

24 Then in December 2017, the Honorable Jon Mayeda (Ret.) came to the same conclusion: that
25 another driver using the uberX product, Randolph Dorr, was an independent contractor, not an Uber
26 employee under the *Borello* standard. Judge Mayeda found that: drivers could work with Uber's direct
27 competitors; Uber places no restrictions on when or where drivers work; drivers determine their
28 driving routes and locations; drivers make investments in their own businesses without involvement

1 from Uber; drivers exercise complete discretion in accepting or rejecting work; Uber imposes no
2 uniform, training, or meeting requirements; drivers do not have supervisors at Uber; drivers need not
3 fill out a job application or interview; and the mutual right to terminate the relationship and lack of
4 economic dependence on Uber all suggests drivers are independent contractors. (Request for Judicial
5 Notice, Ex. 17.)

6 Finally, in January 2018, Arbitrator Jay McCauley held that two drivers using Uber’s software
7 applications are independent contractors and not employees under the *Borello* standard. In *Biafore*,
8 the arbitrator concluded that drivers using the Uber App never actually render services for Uber, but
9 rather for the riders themselves. “[Uber] did not make drivers give rides to Uber riders; it let them.
10 The difference is basic. A driver given an assignment receives a task he or she must perform. A driver
11 given a lead receives an opportunity he or she may freely choose to use or discard.” *Id.* at 7. The
12 arbitrator found that all the contractual requirements relating to driving came down to this summary:
13 “if the driver chooses to do the job, he or she takes on specified obligations to do the job right, but the
14 Driver’s relationship with Uber is not one where he or she has to do the job at all.” *Id.* Such a
15 relationship, the arbitrator found, perfectly exemplifies independent contractor status. (Request for
16 Judicial Notice, Ex. 18.)

17 Notably, these arbitrators also ruled that Uber is in a different business than the drivers who
18 use Uber’s applications, thereby suggesting that they would have found independent contractor status
19 even if the ABC test applied. (See Request for Judicial Notice, Ex. 16, *Gollnick* at pp. 13-14 (“[T]here
20 is no evidentiary support for the assertion that there is no distinction between [claimant’s] driving and
21 Uber’s supposed business of transporting passengers. The most obvious failure of evidence on this
22 point is that it was not shown that Uber workers who are admittedly employees drive passengers.”);
23 Ex. 17, *Dorr* at p. 34 (concluding that Uber is a software company that offers a mechanism to connect
24 those in need of transportation services with those who provide such services, while drivers are in the
25 distinct business of giving rides: “Uber does not provide rides any more than EBay provides
26 collectables or a freight broker transports freights.”); Ex. 18, *Biafore* at p. 6 (ruling that drivers—and
27 not Uber—are in the business of providing rides).

28 Furthermore, to date, the only two courts in the country to rule on drivers’ status determined

1 that drivers are independent contractors.¹² The United States District Court of the Eastern District of
2 Pennsylvania granted summary judgment in Uber’s favor on the question of whether three drivers who
3 used the Uber App to generate leads for riders were properly classified as independent contractors.
4 *See Razak v. Uber Technologies, Inc. et. al.*, 2018 WL 1744467 (E.D. Pa. April 11, 2018) (appeal
5 pending). The court ruled that Uber’s lack of control over drivers weighed heavily in favor of
6 independent contractor status. *Id.* at *16. Likewise, in December 2015, the State of Florida Department
7 of Economic Opportunity (“DEO”) in the matter of *McGillis v. Uber Technologies, Inc.* (Case No.
8 0026 2834 68-02) issued an order that a driver who used Uber’s software application was not an
9 employee for purposes of reemployment assistance. On February 1, 2017 the Third District Court of
10 Appeal of the State of Florida affirmed the DEO’s order. *McGillis v. Dep’t of Econ. Opportunity*, 210
11 So. 3d 220 (Fla. Dist. Ct. App. 2017). Like California’s *Borello* test, the common law independent
12 contractor test in Florida recognizes the “extent of control” as the most important factor in determining
13 whether a person is an employee or independent contractor. *McGillis*, 210 So. 3d at 224. In agreeing
14 with the DEO’s conclusion that drivers like McGillis are not employees, the Florida Court of Appeal
15 highlighted the key fact that drivers decide “whether, when, where, with whom, and how to provide
16 rides using Uber’s computer programs.” *McGillis*, 210 So. 3d at 226. The Court of Appeal determined
17 that the parties’ actual day-to-day practices reflect the terms of their written contract, which
18 unequivocally disclaims an employer-employee relationship. *Id.* at 225-226.

19 In addition, government agencies have agreed with the foregoing decisions in holding drivers
20 are independent contractors. The federal Equal Employment Opportunity Commission (EEOC) has
21 repeatedly found that it has no jurisdiction over claims brought by drivers using the Uber App. For
22 example, in the matter of *Palardy v. Uber Technologies, Inc.*, EEOC Case No. 12F-2018-00654, Uber
23 took the position that Mr. Palardy was an independent contractor, and thus the EEOC lacked
24 jurisdiction over his discrimination claims. The EEOC agreed and dismissed the matter based on lack
25 of jurisdiction. (Behnia Decl., Ex. E.) Numerous other EEOC charges filed across the country against
26 Uber have similarly been dismissed based on lack of jurisdiction. (*See id.*)

27
28 ¹² *See Razak v. Uber Technologies, Inc. et. al.*, 2018 WL 1744467 (E.D. Pa. April 11, 2018) (appeal pending); *McGillis v. Dep’t of Econ. Opportunity*, 210 So. 3d 220 (Fla. Dist. Ct. App. 2017).

1 State administrative agencies across the country have likewise issued dozens of decisions
2 finding drivers to be independent contractors, including under the ABC test. (*See, e.g.*, Behnia Decl.,
3 Ex. E, Pennsylvania Department of Labor Referee’s Decision/Order (June 9, 2019) (denying
4 unemployment benefits under modified “AC” test where claimant was “free from the control and
5 direction” of Uber and “engaged in an independent trade or business”); Georgia Department of Labor
6 Determination (February 22, 2017) (concluding that claimant that used the Uber Eats app “was
7 substantially free of direction and control and that she was independently established in her own trade,
8 occupation profession and/or business”); Illinois Department of Employment Security Claim
9 Determination (June 9, 2015) (concluding that claimant was an independent contractor Illinois
10 Unemployment Insurance Act, which uses the ABC test to distinguish between employees and
11 independent contractors).) Several of these decisions—including decisions from California, Colorado,
12 Florida, Idaho, Kansas, Michigan, Nebraska, Nevada, New York, Virginia, and Wisconsin—found
13 independent contractor status applied to drivers “similarly situated.” (Behnia Decl., Ex. E.)

14 Similarly, on April 29, 2019, the Department of Labor (“DOL”) issued an Opinion Letter
15 (“Letter) regarding the independent contractor status of service providers working with a “virtual
16 marketplace company” (like Uber) that operates in the “on-demand” or “sharing” economy. (Behnia
17 Decl., Ex. F.) After analyzing all the factors and legal authority (including the factors considered under
18 the Fair Labor Standards Act—FLSA), the DOL concluded that the services providers were
19 independent contractors. (*Id.*) The DOL also indicated that service providers would be properly
20 classified as independent contractors under the ABC test by concluding that the business was a
21 “referral system that connects service providers with consumers,” and that service providers “were not
22 operationally integrated” into the business.

23 Accordingly, this settlement must be viewed in light of the very real possibility that Plaintiff
24 will ultimately be unable to recover *anything* in this case.

25 **2. Defendants Dispute That This Case is Appropriate for Representative** 26 **Treatment**

27 Even if Plaintiff proves his employee status, he must also prove that both the question of
28 employment status and Defendants’ liability for the derivative Labor Code violations can be resolved

1 on a representative basis on behalf of other independent contractors in California. Even though
2 Plaintiff may not be required to meet the class certification requirements to proceed with his PAGA
3 claims, some courts have held that representative actions are not permitted when differences among
4 the represented individuals would require separate trials. *See, e.g., South Bay Chevrolet v. General*
5 *Motors Acceptance*, 72 Cal. App. 4th 861, 894-895 (1999); *Barnett v. Washington Mutual Bank, FA*,
6 2004 U.S. Dist. LEXIS 18491, *7-14 (N.D. Cal. 2004); *Lazar v. Trans Union, LLC*, 195 F.R.D. 665,
7 672-674 (C.D. Cal. 2000); *Wilner v. Sunset Life Ins. Co.*, 78 Cal. App. 4th 952, 969 (2000). If this
8 Settlement is not approved, Defendants will argue that Plaintiff must first establish that there are
9 sufficient common questions regarding drivers' putative employment status to warrant a single
10 representative proceeding.

11 Defendants contend that there are significant differences between experiences of drivers who
12 use Uber's software applications which render this case inappropriate for representative treatment. *See*
13 *Litty v. Merrill Lynch & Co., Inc.*, 2014 U.S. Dist. LEXIS 160448, *6 (C.D. Cal. 2014) (striking PAGA
14 claim where "[t]he circumstances of this case make the PAGA claim unmanageable because a
15 multitude of individualized assessments would be necessary").

16 For example, regardless of the applicable legal test, a key consideration is the degree of control
17 exercised by Uber over the particular driver. One consideration in determining whether a worker or
18 the principal retains control is whether and to what extent an individual worker would feel compelled
19 to obey any of the alleged employer's instructions against his or her will. *See Ayala v. Antelope Valley*
20 *6 Newspapers, Inc.*, 59 Cal. 4th 522, 535 (2014) ("Whether a right to control exists may be measured
21 by asking 'whether or not, if instructions were given, they would have to be obeyed.'"). Defendants
22 contend that the individual drivers vary in significant ways with respect to how much they rely on
23 Uber as a source of revenue (and thus how susceptible those drivers may be to any perceived
24 "instructions"), and therefore that this inquiry, among many others, will necessarily require an
25 examination of the facts and circumstances particular to each individual thus rendering representative
26 treatment unmanageable. *See Narayan v. EGL, Inc.*, 285 F.R.D. 473, 478 (N.D. Cal. 2012) (denying
27 class certification because an analysis of the *Borello* factors would require an inquiry into
28 individualized issues for each class member). Another consideration under the ABC test is whether

1 the individual drivers are engaged in an independently established business. This factor also requires
2 a fact-specific inquiry regarding whether and to what extent each individual has established and
3 promoted his or her independent business, such as “through incorporation, licensure, advertisements,
4 routine offerings to provide the services of the independent business to the public or to a number of
5 potential customers, and the like.” *Curry v. Equilon Enterprises, LLC*, 23 Cal. App. 5th 289, 315
6 (2018).

7 With regards to Plaintiff’s underlying PAGA claims, Defendants maintain that Plaintiff will
8 not be able to proceed on a representative basis because his claims would require the Court to make
9 individualized inquiries into the details of each allegedly aggrieved driver’s use of Uber’s software
10 applications, which are wholly unsuitable for representative action. *See Amey v. Cinemark USA Inc.*,
11 2015 U.S. Dist. LEXIS 63524, *50-51 (N.D. Cal. 2015) (“[W]hen the evidence shows, as it does here,
12 that numerous individualized determinations would be necessary to determine whether any class
13 member has been injured by [defendant’s] conduct, then allowing a representative action [under
14 PAGA] to proceed is inappropriate.”). With respect to Plaintiff’s meal and rest period claims, an
15 individualized person-by-person inquiry would have to be conducted to determine, for example, the
16 number of hours each driver was active on Uber’s software applications; if the driver ever logged off
17 to take a meal or rest break, and if not, why; and whether the driver was impeded or discouraged from
18 taking or completing a break. *See Koval v. Pac. Bell Tel. Co.*, 232 Cal. App. 4th 1050, 1062 (2014)
19 (decertifying meal break class after finding that trial would be “totally unmanageable”); *Cruz v. Sun*
20 *World Int’l, LLC*, 243 Cal. App. 4th 367, 370 (2015), *review denied* (Mar. 30, 2016) (affirming
21 decertification of meal/rest break and off-the-clock class finding that proving alleged violations would
22 require individualized proof that particular employees worked longer hours than reflected on their time
23 sheets or were not allowed to take their full meal or rest breaks).

24 In sum, there are significant risks that Plaintiff will not recover anything for the State or
25 allegedly aggrieved drivers.

26 **C. The Settlement Sum is “Fair, Reasonable, and Adequate” When Considered**
27 **in Light of the Potential Recovery**

28 Although the PAGA and its legislative history do not require a comparison with the maximum

1 value of the claims to the actual settlement amount, the amount offered in this PAGA Settlement to
2 the LWDA and PAGA Cohort Members is fair, adequate and reasonable in light of Plaintiff's
3 maximum expected recovery at trial and the risks of litigation.

4 1. Formulas for Calculating Civil Penalties under the PAGA

5 Under Section 2699(f), the default civil penalty for violating any provision of the Labor Code
6 is \$100 per "employee" per pay period for the initial violation and \$200 for each "subsequent
7 violation," unless the provision provides for a different specific penalty. Cal. Lab. Code §2699(f); *see*
8 *also, Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1126 (2012).

9 The operative Complaint seeks to recover the following civil penalties:

- 10 • \$100 or \$250 per "employee" per pay period for Defendants' failure to pay **minimum and**
11 **contractual wages**. (i.e., specific penalty under Labor Code Section 1197.1¹³ for violating
12 Labor Code sections 226.2, 1182.11-1182.13, 1194, 1194.2, 1197) (Second Amended
13 Complaint, ¶¶ 46-63, 128-139);
- 14 • \$50 or \$100 per "employee" per pay period for Defendants' failure to pay **overtime wages**
15 (i.e., specific penalty under Labor Code section 558 for violating Labor Code sections 510,
16 515, and 1194) (Second Amended Complaint, ¶¶ 64-72, 128-139);
- 17 • \$50 or \$100 per "employee" per pay period for Defendants' failure to provide **meal and rest**
18 **periods** (i.e., specific penalty under Labor Code Section 558¹⁴ for violating Labor Code
19 sections 512 and 226.7) (First Amended Complaint, ¶¶ 73-86, 128-139);
- 20 • \$100 or \$200 per "employee" per pay period for Defendants' **unlawful deductions** (or Failure
21 to include "Safe Rides Fees" into Gross Fare) (i.e., specific penalty under Labor Code Section
22 225.5¹⁵ for violating Labor Code section 221) (Second Amended Complaint, ¶¶ 87-93, 128-
23 139);
- 24 • \$250 or \$1,000 per "employee" per pay period for Defendants' **failure to provide accurate**
25 **wage statements** (i.e., specific penalty under Labor Code Section 226.3¹⁶ for violating Labor
26 Code section 226(a)) (Second Amended Complaint, ¶¶ 94-107, 128-139);

22 ¹³ Labor Code section 1197.1 authorizes a PAGA plaintiff to collect a \$100 civil penalty "for any initial violation that is
23 intentionally committed [. . .] for each underpaid employee for each pay period for which the employee is underpaid" and
\$250 for each subsequent violation. Cal. Lab. Code § 1197.1.

24 ¹⁴ Labor Code section 558 authorizes a PAGA plaintiff to collect a \$50 civil penalty for any initial violation of "a section
25 of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission" for
each underpaid employee for each pay period for which the employee is underpaid and \$100 for each subsequent violation
in in addition to an amount sufficient to recover underpaid wages. Cal. Lab. Code § 558.

26 ¹⁵ Labor Code section 225.5 authorizes a PAGA plaintiff to collect a \$100 for any initial violation per employer and for
each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each
employee, plus 25 percent of the amount unlawfully withheld.

27 ¹⁶ Labor Code section 226.3 authorizes a PAGA plaintiff to collect a civil penalty in the amount of \$250 per employee per
28 violation in an initial citation and \$1,000 per employee for each violation in a subsequent citation, where the employer
fails to provide the employee a wage deduction statement.

- \$100 or \$200 per “employee” per pay period for Defendants’ **failure to pay all wages owed at separation** (i.e., default penalty under Labor Code section 2699(f) for violating Labor Code sections 201-203, 204, 206, 206.5, 208, 210, 212, 216) (Second Amended Complaint, ¶¶ 104-107, 128-139);
- \$100 or \$200 per “employee” per pay period for Defendants’ **unlawful withholding of gratuities** (i.e., default penalty under Labor Code section 2699(f) for violating Labor Code sections 351-354) (Second Amended Complaint, ¶¶ 128-139);
- \$100 or \$200 per “employee” per pay period for Defendants’ **failure to reimburse vehicle-related expenses** (i.e., default penalty under Labor Code section 2699(f) for violating Labor Code sections 2802 and 2804) (Second Amended Complaint, ¶¶ 108-116, 128-139); and
- \$100 or \$200 per “employee” per Defendants’ violation of Labor Code sections 232.5, 432.5, 551-552, 1174, 1174.5, 1198.5, and 2810.5 (i.e., default penalty under Labor Code section 2699(f)) (Second Amended Complaint, ¶¶ 128-139).

Plaintiff does not believe he is entitled to recover civil penalties at a higher rate for each subsequent violation for each alleged underpaid “employee” for each pay period (i.e. \$100 under Section 558, \$250 under Section 1197.1, and \$1,000 under Section 226.3). Courts interpreting the meaning of a “subsequent violation” under Labor Code §§ 558, 1197.1, and 2699(f) and similar penalty provisions in the Labor Code that allow the award of enhanced penalties for “subsequent violations” have confirmed that a “subsequent violation” penalty does not apply unless the defendant has first been notified by the Labor Commissioner or a court that it is violating that provision of the Labor Code. *See e.g., Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1208 (2008) (holding that an employer cannot be penalized at the higher rate for subsequent violations unless it has received some notice that its previous underpayment was a “violation” of the law for purposes of calculating civil penalties under Labor Code sections 204 and 223 (former sections 210 and 225.5)).¹⁷ Here, Defendants argue that there has been no conclusive “notice” issued that Defendants are violating the law. On the contrary, every court and arbitrator to have considered the issue have concluded drivers are properly classified as independent contractors. Thus, penalties at a higher rate for subsequent violation penalties are not warranted.

Consistent with a recently decided PAGA case, *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175

¹⁷ *See also Allen v. Utilquest, LLC*, 2013 WL 4033673, at *8 n. 9 (N.D. Cal. Aug. 1, 2013) (rejecting subsequent violation penalties when determining the amount in controversy where there was no evidence the defendant had notice of Labor Code violations before or during the PAGA period).

(2019), this Settlement does not release any claims for unpaid wages¹⁸ under Labor Code sections 558 and 1197.1 (e.g. minimum wage, overtime, premiums for missed meal and rest periods) and restitution under Labor Code sections 245-249 for Defendants' alleged failure to provide paid sick leave, therefore, these claims for unpaid wages are not included in Plaintiff's valuation of the maximum civil penalty recovery.

2. Plaintiff's Theoretical Maximum Recovery

Based on the above formulas and the data provided by Uber in connection with the parties' settlement discussions, Plaintiff's counsel have calculated that the theoretical maximum civil penalty recovery that Plaintiff may pursue at trial is approximately \$8,960,400,050. This number is calculated as follows:

Cause of Action	Labor Code of Underlying Violation	Applicable Civil Penalty	PAGA Liability Period Start Date	Civil Penalty Per Pay Period	Number of Pay Periods	Total Civil Penalties
Failure to Pay Minimum Wage	§ 1194	§§ 1197.1	1/30/2017	\$ 100.00	14,977,039 ¹⁹	\$1,497,703,900
Failure to Pay Overtime	§ 510	§ 558	1/30/2017	\$50.00	14,977,039	\$748,851,950
Failure to Provide Meal Breaks	§§ 226.7, § 512	§ 558	1/30/2017	\$50.00	14,977,039	\$748,851,950
Improper Deductions (Failure to include "Safe Rides Fees" into Gross Fare)	§§ 221-224	§ 225.5	2/12/2015	\$100.00	4,648,041 ²⁰	\$464,804,100
Failure to Provide Accurate Itemized Wage	§ 226	§ 226.3	1/30/2017	\$250.00	14,977,039	\$3,744,259,750

¹⁸ In *ZB, N.A.*, the California Supreme Court held that a PAGA plaintiff, unlike the Labor Commissioner, is not entitled to recover "unpaid wages" as civil penalties under Section 558 in a PAGA action.

¹⁹ 14,977,039 is the total number of weeks worked by drivers during the period from February 1, 2017 to around June 25, 2019.

²⁰ Plaintiff's Counsel estimated that the average number of pay periods worked by all PAGA Cohort Members per month is 516,449 (=14,977,039 pay periods/29 months.) Therefore, during this 9-month period from February 12, 2015 to November 1, 2015, Plaintiff's Counsel estimate there were 4,648,041 pay periods worked by all California Drivers.

Statements and Maintain Accurate Records						
Unlawful Collection of Gratuities	§§ 351-354	§ 2699(f)	1/30/2017	\$100.00	2,582,245 ²¹	\$258,224,500
Failure to Reimburse Business Expenses	§ 2802		1/30/2017	\$100.00	14,977,039	\$1,497,703,900
Total:						\$8,960,400,050

(Kuchinsky Decl., ¶ 32.)

3. Plaintiff's Realistic or Expected Maximum Recovery

Plaintiff's theoretical maximum civil penalty recovery of \$8,960,400,050 is exactly that: a theoretical number that does not accurately reflect Plaintiff's realistic or expected maximum recovery at trial. It is more than likely that even on his best day in court, Plaintiff will not recover \$8,960,400,050 in civil penalties. This is because this theoretical number ignores many important variables, including, the following:

- a. A court overseeing a PAGA action has discretion to reduce any PAGA verdict where the amount awarded is unjust, arbitrary and oppressive, or confiscatory. *See* Cal. Lab. Code §2699(e)(2). Thus, even if Plaintiff were to prevail, any recovery would likely be subject to substantial reduction by the Court based on the open question concerning drivers' independent contractor status, and Uber's good faith reliance on authority finding drivers are properly classified as independent contractors.
- b. A PAGA plaintiff cannot "stack" civil penalties on top of one another for the same underlying conduct—in this case, the single decision to classify drivers as independent contractors. *See Aguirre v. Genesis Logistics*, 2015 U.S. Dist. LEXIS 78748, (C.D. Cal. June 16, 2015)*7-8 (*citing Villacres v. ABM Indus., Inc.*, 189 Cal. App. 4th 562, 577 (2010)) ("One injury gives rise to only one claim for relief

²¹ During this 5-month period from January 30, 2017 to July 1, 2017, Plaintiff's Counsel estimate there were 2,582,245 pay periods worked by all California drivers.

1 . . . The violation of one primary right constitutes a single cause of action.”); *Guifu*
2 *Li v. A Perfect Day Franchise, Inc.*, 2012 WL 2236752, * 17 (N.D. Cal. 2012)
3 (finding there is no authority that “would permit double recovery of essentially the
4 same penalties.”).²²

- 5 c. The significant risks that Plaintiff could fail to recover **anything** if there is a
6 finding that he is properly classified as an independent contractor; and
7 d. A court may dismiss all representative PAGA claims that are not manageable
8 because individualized assessments would be necessary to determine liability and
9 damage.

10 In light of the above factors, Plaintiff’s Counsel estimates that \$1,497,703,900 is a more
11 realistic number representing Plaintiff’s maximum recovery at trial, as more fully explained below.
12 (Kuchinsky Decl., ¶ 33.)

13 **4. The Court May Choose to Exercise Its Discretion in Awarding Penalties,**
14 **if Any, In This Case**

15 The PAGA vests the Superior Court with discretionary authority to limit the PAGA’s reach
16 and effect. Cal. Lab. Code §2699 (e)(2). Under the PAGA, courts are empowered to substantially
17 reduce any award of civil penalties based on discretionary factors. More specifically, Labor Code
18 §2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty amount
19 specified by this part if, based on the facts and circumstances of the particular case, to do otherwise
20 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” *See, Cotter v. Lyft,*
21 *Inc.*, 193 F. Supp. 3d 1030 (N.D. Cal. 2016) (finding \$1 million PAGA allocation reasonable and
22 noting that a “significant reduction” of PAGA penalties would be appropriate because “Lyft’s
23 obligations to its drivers are genuinely unclear . . . because there is no straight answer to the question
24 whether those drivers must be classified as employees or independent contractors under California
25 law.”). For example, in *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1135-1136
26 (2012), the Court of Appeal affirmed the trial court’s reduction of PAGA civil penalties by 30%,
27

28 ²² *Hale v. Morgan*, 22 Cal.3d 388, 404 (1978); *Kinney v. Vaccari*, 27 Cal.3d 348, 356 (1980) (holding that punitive assessment should be proportional to a defendant’s misconduct, sufficient to achieve the penalty’s deterrent purpose but not constitutionally excessive). *Smith v. Lux Retail N. Am., Inc.* 2013 WL 2932243 at *3 (N.D. Cal. 2013).

1 finding that awarding the full penalties would have been “unjust” because “the evidence showed . . .
2 defendants took their obligations . . . seriously and attempted to comply with the law,” and that the
3 defendants’ financial condition “rendered them unable to pay penalties from ongoing revenues.”
4 Similarly, in *Fleming v. Covidien, Inc.*, 2011 U.S. Dist. LEXIS 154590, *3-4 (C.D. Cal. 2011), *vacated*
5 *and remanded in part on other grounds*, 546 Fed. Appx. 616 (9th Cir. 2013), the court calculated the
6 civil penalties for an employer providing 28,000 non-compliant wage statements to be \$2.8 million
7 (\$100.00 per violation), but reduced to \$500,000 pursuant to Labor Code section 2699(e)(2) because
8 none of the employees suffered any injury because of this non-compliance. *Id.*

9 Therefore, the Court may reduce civil penalties to avoid an “unjust” or “oppressive” result
10 under Labor Code section 2699(e)(2) based on Defendants’ argument, supported by the numerous
11 favorable decisions they have obtained, that it acted in good faith in classifying drivers as independent
12 contractors. Defendants argue that it is reasonable to consider drivers to be independent contractors
13 based on, *inter alia*, the volume of decisions finding said individuals to be properly classified as
14 independent contractors. (See Behnia Decl., Ex. E; Request for Judicial Notice, Exs. 15-18.)

15 **5. An Award Amounting to the Maximum Amount of Potential PAGA**
16 **Penalties May Be Confiscatory and Subject to Reduction**

17 The Court could find that “stacking” PAGA penalties is inappropriate here because each
18 derivative Labor Code violation alleged stems from the same alleged misclassification violation.
19 Indeed, Defendants maintain that stacking is not permissible and that only one penalty (in the amount
20 of \$100 for an initial violation, and \$200 for any subsequent violation) may be imposed if it is found
21 that Uber has misclassified its drivers. Uber argues that it is inappropriate to stack penalties for
22 multiple violations when those violations all stem from the same alleged “injury,” *i.e.*, the alleged
23 misclassification. *See, e.g., Aguirre v. Genesis Logistics*, 2015 U.S. Dist. LEXIS 78748 (C.D. Cal.
24 June 16, 2015) (citing *Villacres v. ABM Indus., Inc.*, 189 Cal. App. 4th 562, 577 (2010)).

25 Uber also argues that it would be improper here to impose penalties for “subsequent
26 violations.” *See, e.g., Amaral*, 163 Cal. App. 4th at 1207 (the “subsequent violation” rate cannot be
27 assessed until the defendant has been put on notice that it is violating the law).

28 Therefore, in this case it may be that, even if Plaintiff prevails on the misclassification claim,

1 only one penalty may be imposed against Uber pursuant to PAGA (i.e., no stacking), for only the
2 initial pay period worked by drivers (i.e., no subsequent pay period penalties).

3 In addition, Defendants maintain that even an award amounting to the full *unstacked* penalty
4 amount implicates significant constitutional concerns.

5 Penalties should be proportional to a defendant's misconduct, sufficient to achieve the
6 penalty's deterrent purposes, and not constitutionally excessive. *See e.g., Amaral*, 163 Cal. App. 4th
7 at 1214 (citing *Kinney v. Vaccari*, 27 Cal. 3d 348, 356 (1980)); *The People ex rel. Bill Lockyer v. R.J.*
8 *Reynolds Tobacco Co.*, 37 Cal. App. 4th 707, 726-831 (2005) (reversing award of penalties as
9 excessive). The due process clause prohibits excessive and arbitrary penalties bearing little relation to
10 the magnitude of the alleged violations. *See State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 416
11 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly
12 excessive or arbitrary punishments on a tortfeasor.") Likewise, as the California Supreme Court has
13 ruled, "courts refuse to impose civil penalties against a party who acted with a good faith and
14 reasonable belief in the legality of his or her actions." *Lusardi Construction Co. v. Aubry*, 1 Cal. 4th
15 976, 996-97 (1992); *see also, BMW of N. Am.*, 517 U.S. 559, 574 ("Elementary notions of fairness
16 enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the
17 conduct that will subject him to punishment, but also of the severity of the penalty that a State may
18 impose.").

19 If the Court refuses to "stack" duplicative PAGA penalties for various derivative causes of
20 action based on the same underlying alleged violation of independent contractor misclassification,
21 Plaintiff asserts that \$1,497,703,900 is a more realistic number representing Plaintiff's maximum
22 recover at trial (14,977,039 pay periods x \$100). (Kuchinsky Decl., ¶ 32.) However, Defendants argue
23 that if stacking is not allowed and Uber is not subject to penalties for subsequent pay periods, the
24 maximum PAGA penalty in this case would be \$70,000,000, as each driver only worked one "initial"
25 pay period—the first week that they worked. Every pay period worked after their first week would
26 necessarily have been a subsequent pay period. Therefore, at a maximum rate of \$100 per initial pay
27 period, Uber would be subject to a maximum penalty of \$70,000,000 (\$100 x 700,000 California
28 drivers).

1 In this case, Defendants further submit that a PAGA award amounting to anything close to
2 “full” recovery *far* exceed constitutional limits, particularly given Defendants’ well-supported
3 contention that Uber was reasonable and acted in good faith when treating drivers as independent
4 contractors. *See* Request for Judicial Notice, Exs. 15-18; Behnia Decl., Ex. E; *Cotter v. Lyft, Inc.*, 60
5 F. Supp. 3d 1067, 1081-1082 (N.D. Cal. 2016) (court denied cross motions for summary judgment
6 and noted that even for drivers performing the same work, the employment classification could be
7 different); *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1093 (N.D. Cal. 2018) (holding after bench
8 trial that a delivery driver that used the Grubhub platform to provide delivery services was properly
9 classified as an independent contractor) (appeal pending); *BMW of N. Am. v. Gore*, 517 U.S. 559, 576-
10 578 (1996) (finding that defendant's conduct was not “sufficiently reprehensible” to justify \$2 million
11 punitive damages award because defendant “reasonably interpret[ed]” the laws at issue, even though
12 its interpretation was ultimately incorrect); *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 69-70 (2007) (a
13 defendant's conduct “falls well short” of being “reckless” if its “reading of [a] statute, albeit erroneous,
14 was not objectively unreasonable”). Where, as here, Defendants maintain they acted in good faith, the
15 Court could find that awarding the full amount of PAGA penalties would be unconstitutionally
16 disproportionate to the alleged misconduct.

17 Therefore, the Court’s assessment of the proposed Settlement must take into account that any
18 penalties awarded may be subject to substantial reduction, as the Court may reduce the full civil
19 penalty award under Labor Code section 2699(e)(2) to avoid being “unjust” and “oppressive,” and
20 may refuse to apply additional duplicative civil penalties for the same substantive wrongdoing of
21 misclassification to avoid a “confiscatory” effect. When this is considered, in conjunction with the
22 history of PAGA settlements (including in analogous cases) and the fact that Plaintiff may recover
23 nothing, the Settlement Sum here is patently reasonable.

24 **D. The Settlement Amount is Fair, Reasonable, and Adequate Compared to**
25 **Similar Cases**

26 The proposed PAGA settlement is also “fair, reasonable, and adequate,” when compared to the
27 PAGA settlement amounts approved by courts in other similar cases.

28 In *Price v. Uber Technologies, Inc.*, No. BC554512 (L.A. Sup. Ct.), Judge Nelson of the Los

1 Angeles Superior Court approved a PAGA settlement for \$7,775,000 as “fair, just and reasonable.”
2 (Request for Judicial Notice, Ex. 1.) *Price* was a PAGA action filed against the same defendants in
3 2014, alleging a misclassification claim and similar derivative claims for various Labor Code
4 violations.²³ Judge Nelson approved the proposed PAGA settlement and emphasized the following:

5 The proposed \$7,750,000 settlement represents approximately 15% of the low
6 value estimate (\$52 million) and 0.77% of the highest value (\$1 billion)... “[T]his
7 case is unusual in that the outcome as to liability uncertain, as is the range of
8 possible relief. Further, it could be many years before the legal issue are settled.”
9 The range of value of the claims could be zero, as in some of the arbitration awards,
10 or it could be \$121 billion if Plaintiffs were completely successful at trial, the
11 maximum penalties were assessed, and either no appeal is taken or the judgment is
12 affirmed on appeal. The \$7.75 million PAGA settlement is fair, just and reasonable
13 in all the circumstances, including that adequate discovery has been done; even if
14 plaintiffs prevail, trial courts have discretion to award less than the maximum
15 penalties to avoid unjust, arbitrary, oppressive or confiscatory awards; the unsettled
16 nature of the legal question (whether drivers are employees) and the likelihood of
17 appeal if plaintiffs' prevail; the experience of counsel; the fact that the settlement
18 does not preclude PAGA claims for time periods after January 29, 2017, allowing
19 the question of employee status to be further litigated; and the fact that the real party
20 in interest (LWDA) did not express any objection to the settlement.

21 (Request for Judicial Notice, Ex. 1 at p. 8.)

22 As explained above, the proposed \$10,831,500 settlement represents approximately 15% of
23 the low value estimate (\$70 million) and 0.72% of the highest value (\$1.5 billion). (Kuchinsky Decl.,
24 ¶ 32.) If Plaintiff had not succeeded on the merits at trial or if the Court had reduced the penalties
25 owed, the PAGA penalties could have been close to zero or even zero. (*Id.*)

26 Most importantly, the settlement amount proposed in this case is superior compared to *Price*.
27 In this case, Defendants agreed to almost double the settlement amount when measured on a dollar-
28 per-workday basis. Specifically, in *Price*, Defendants settled for \$5,957 per workday (i.e.
\$7,750,000/1,301²⁴ days) while in this case, the dollar-per-workday settlement amount is \$10,170 (i.e.
\$10,831,500/1,065 days²⁵). *Price*'s PAGA Settlement was approved; thus, there is no reason to deny
this fourth largest PAGA settlement in California.

²³ *Price*'s Complaint alleged the same causes of action with the exception claims for (1) failure to pay for all hours worked; (2) failure to provide sick leave; and (3) improper deductions, which were not alleged in *Price*.

²⁴ 1,301 is the number of workdays in *Price*'s PAGA liability period from July 8, 2013 through January 29, 2017.

²⁵ 1,065 is the number of workdays in *Tabola*'s PAGA liability period is from January 30, 2017 to December 31, 2019.

1 Another reliable method for determining the fairness, adequacy and reasonableness of a
2 proposed PAGA settlement is to compare the proposed settlement to the settlement value of the
3 underlying Labor Code claims. For example, in one driver misclassification case, *Cotter v. Lyft, Inc.*
4 193 F.Supp.3d 1030, 1037 (N.D. Cal. 2016), the Court approved a class action settlement of \$27
5 million in which only \$1 million (or 3.7% of the total settlement amount) was allocated to civil
6 penalties under the PAGA or a fraction of the PAGA claim's potential value. The court noted that the
7 PAGA allocation "might seem low when compared to the maximum PAGA penalties" but
8 acknowledged that it was in fact "quite high compared to the typical amount apportioned to claims for
9 PAGA penalties in wage and hour settlements" and where the defendant's obligations were "genuinely
10 unclear" and there was no evidence the defendant acted deliberately or negligently failed to learn about
11 its obligations. *Cotter*, 193 F.Supp.3d at 1037.

12 Similarly, in another driver misclassification case, *Alexander v. Fedex Ground Package*
13 *System*, the plaintiffs prevailed on summary judgment on the issue of whether FedEx Ground delivery
14 drivers were misclassified, something that has not happened in this case. 765 F. 3d 981, 997 (9th Cir.
15 2014). The district court subsequently approved the parties' class and representative PAGA settlement
16 for a total of \$226,500,000, with \$1.2 million—0.5% of the overall settlement—allocated towards
17 PAGA penalties paid to the State. *Alexander*, 2016 U.S. Dist. LEXIS 49201, *8 n. 5 (N.D. Cal. 2016).²⁶

18 Furthermore, there are numerous examples of PAGA cases in which trial courts have refused
19 to award or reduced civil penalties despite the fact that plaintiffs prevailed on their underlying claims.
20 For example, in *Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 589 (2010), the California

21 _____
22 ²⁶See, e.g., *Garcia v. Gordon Trucking, Inc.*, No. 1:10–CV–0324 AWI SKO, 2012 WL 5364575, at *11 (E.D. Cal. Oct.
23 31, 2012) (approving payment of \$7,500 to the LWDA, 0.2 percent of the \$3.7 million total settlement amount, in
24 satisfaction of plaintiffs' PAGA claims); *Chu v. Wells Fargo Investments, LLC*, Case Nos. C 05-4526 MHP, C 06-7924
25 MHP, 2011 WL 672645 at *1 (N.D. Cal. February 16, 2011) (approving PAGA payment of \$7,500 to the LWDA out of
26 \$6.9 million common-fund settlement, or 0.1 percent); *Singer v. Becton Dickinson & Co.*, No. 08–CV–821–IEG (BLM),
27 2010 WL 2196104, at *1–2 (S.D. Cal. June 1, 2010) (approving payment of \$3,000 to the LWDA, 0.3 percent of the \$1
28 million gross fund value, for PAGA penalties); *Lazarin v. Pro Unlimited, Inc.*, Case No. C11-03609 HRL, 2013 WL
3541217, at *10 (N.D. Cal. July 11, 2013) (approving PAGA payment of \$7,500 to the LWDA out of \$1.25 million
common-fund settlement, or 0.6 percent); *Cruz v. Sky Chefs, Inc.*, 2014 WL 7247065, *3 (N.D. Cal. Dec. 19, 2014)
(approving PAGA settlement payment of \$10,000 out of a \$1.75 million common-fund settlement, or 0.57%); *Franco v.*
Ruiz Food Products, Inc., 2012 WL 5941801, *13 (E.D. Cal. Nov. 27, 2012) (approving PAGA settlement payment of
\$10,000 out of \$2.5 million common-fund settlement, or 0.4%); *Schiller v. David's Bridal, Inc.*, 2012 WL 2117001, *13
(E.D. Cal. June 11, 2012) (approving PAGA settlement payment of \$7,500 to the LWDA out of \$518,245 common-fund
settlement, or 1.45%).

1 Court of Appeal explained that where a PAGA claim is disputed, a trial court is justified in approving
2 a PAGA settlement that attributes as little as \$0 to the recovery of PAGA penalties.²⁷

3 These cases demonstrate that courts routinely approve PAGA settlements representing only
4 small percentages of the maximum potential recovery and the Court need not to apply a specific
5 percentage to approve this Settlement. This is fourth largest PAGA settlement that doubles the
6 settlement amount of the previously-approved *Price*'s PAGA settlement.

7 VII. THE SCOPE OF THE RELEASE IS APPROPRIATELY LIMITED

8 If approved, the Settlement would release Defendants from PAGA claims only and would not
9 impact any other PAGA Cohort Members' ability to pursue individual or class claims for the same
10 alleged violations. (Kuchinsky Decl., ¶ 10, Ex. 2, Sec. V(C)). Therefore, the limited scope of the
11 release also supports approval.

12 Furthermore, the release appropriately includes the PAGA claims initially brought by Plaintiff
13 and PAGA claims related to those originally alleged by Plaintiff, including those additional violations
14 alleged in Plaintiff's September 2019 Letter. *See Villacres*, 189 Cal. App. 4th at 586 (acknowledging
15 generally that a "clause providing for the release of . . . all claims, both potential and actual, that *may*
16 *have been raised* in the pending action with respect to the matter in controversy" is common and
17 permissible); *see also, Ramirez v. Ghilotti Bros.*, 941 F. Supp. 2d 1197, 1209-1210 (N.D. Cal. 2013)
18 (In "cases where plaintiffs have filed a complaint alleging all of the relevant facts and then later timely
19 exhausted administrative remedies and amended the pleadings to include PAGA claims, courts have
20 permitted the later PAGA claim to relate back to the filing of the original complaint, even where that
21 complaint predated the filing of the administrative claim.")

22 Here, all additional PAGA violations alleged in Plaintiff's September 2019 Letter are
23 derivative claims based on the same underlying claim that Defendants misclassified PAGA Cohort
24 Members as independent contractors; therefore, these additional claims relate back to the filing of the
25

26 ²⁷ *See also, In re Taco Bell Wage and Hour Actions*, 2016 US Dist. Lexis 48557 (E.D. Cal., Apr. 8, 2016) (same). In
27 *Fleming v. Covidien, Inc.*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal., Aug. 12, 2011), although plaintiff prevailed and
28 requested \$2,800,000 in PAGA penalties, the district court reduced the award to \$500,000. Similarly, in *Aguirre v. Genesis Logistics*, 2013 U.S. Dist. LEXIS 189815 (C.D. Cal., July 3, 2013), although plaintiffs prevailed and requested \$1,800,000 in PAGA penalties, the district court reduced the award to \$500,000.

1 original complaint. For example, Labor Code Sections 515, 1182.12, 1197.1, 1199 directly relate to
2 Plaintiff's original claim for failure to pay minimum wage and overtime as these additional PAGA
3 claims concern employers' duty to pay minimum wage and overtime. (Kuchinsky Decl., ¶ 11, Ex. 3.)
4 The same is true with respect to the claims based on Labor Code Sections 1174.5-1175, 1198.5, and
5 2810.5, all of which relate back to Plaintiff's causes of action for failure to provide accurate wage
6 statements and maintain accurate records. (*Id.*)

7 Therefore, the proposed release is appropriately tailored and warrants the Court's approval.

8 **VIII. CLAIMS ADMINISTRATOR AND ADMINISTRATION COSTS**

9 The Parties have agreed to utilize an experienced claims administrator, Epiq Class Action &
10 Claims Solutions, Inc. ("Epiq"), to administer this settlement. Plaintiff's Counsel estimate that the
11 settlement administration costs to be no more than \$700,000. The estimate is based on the quote
12 received from Epiq and based on Plaintiff's Counsel experience, Plaintiff's Counsel is of opinion that
13 \$700,000 is a reasonable expenditure, given the large number of PAGA Cohort Members.

14 **IX. THE REQUESTED ATTORNEYS' FEES, COSTS, AND ENHANCEMENT** 15 **AWARD ARE REASONABLE**

16 Subject to the court's approval, Defendants have agreed not to oppose Plaintiff's request of an
17 award of Class Counsel's fees and in an amount of \$3,249,450 (or up to 30% of the Settlement Sum)
18 and Enhancement Award of up to \$1,500 to Plaintiff Tabola. (Kuchinsky Decl., ¶ 10, Ex. 2, Sec.
19 III(C)(a)(1-2); ¶ 34.) Concurrently with this Motion, Plaintiff filed a motion for attorneys' fees, costs,
20 and enhancement award that will be heard at the same date and time as the Approval Hearing. (*Id.* at
21 ¶ 34.) As will be explained in detail in the application, the requested fees are reasonable considering
22 the results achieved and Plaintiff's Counsel's lodestar in this case. (*Id.*) The Motion will also explain
23 that the requested enhancement award is also reasonable and justified based on the significant time,
24 effort and risks Plaintiff Tabola incurred in bringing this case on behalf of the State of California. (*Id.*)

25 **X. CONCLUSION**

26 For the foregoing reasons, Plaintiff and Defendants requests that this Court approve this PAGA
27 Settlement Agreement.
28

1 Dated: February 10, 2020

/ s / Alexei Kuchinsky
Alexei Kuchinsky
KLEIN LAW GROUP, LLP
Attorneys for Plaintiff Tabola

2
3 Dated: February 10, 2020



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