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behalf of herself, all similarly aggrieved current and
6 former employees of Defendant and the State of
California
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SACRAMENTO
10

11 SARAH AVILARIOS, an individual on behalf
of herself and all similarly aggrieved current and
12 former employees of Defendant and the State of
California

13 Plaintiff,
14

15 v.

16 GREGORY L. MCEWEN DDS, INC., a
California corporation; GREGORY L.
MCEWEN, an individual; and DOES 1-10,
17

18 Defendants.
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Case No. 34-2020-00285631

**REPRESENTATIVE ACTION UNDER
THE PRIVATE ATTORNEYS GENERAL
ACT**

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

Action Filed: September 23, 2020
Trial Date: None

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1 Termination in Violation of Public Policy (individual only); and (10) Private Attorneys General
2 Act. Defendants filed their Answer to Plaintiff's Complaint on or about December 18, 2020.
3 **(Basham Decl., ¶4.)**

4 Plaintiff's Tenth Cause of Action under the Private Attorneys' General Act
5 ("PAGA") is based on Plaintiff's assertion that Defendants held and enforced an invalid
6 alternative workweek election. **(Basham Decl., ¶5.)**

7 Plaintiff alleges that, in or about May 2015, Defendants purported to hold an
8 "election" to establish an AWS to avoid daily overtime under 10 work hours a day. Plaintiff
9 asserts this election was unlawful, and failed to meet the requirements of Labor Code §551 and
10 IWC Wage Order No. 4. Defendants failed to conduct a lawful AWS election as Defendants: (1)
11 failed to hold an election by secret ballot, (2) failed prior to the election to provide written notice
12 to the employees of their intent to adopt an alternative work week, (3) failed to disclose in writing
13 and hold a meeting to discuss, at least 14 days prior to a vote, the effects of the alternative work
14 week on the affected employees' wages, hours and benefits, (4) failed to report to the Division of
15 Labor Standards Enforcement the approved adopted schedule within 30 days of the results, and/or
16 (5) required the employees to work the new hours within 30 days after the announcement of the
17 final election results. **(Complaint ¶10.)** Defendants deny that the AWS election was unlawful.
18 **(Basham Decl., ¶6.)**

19 **A. PLAINTIFF'S ALLEGATIONS AND DEFENDANT'S DEFENSES**

20 Plaintiff worked for Defendant Owner as a Dental Assistant for over 13 years at
21 his various Dental Practices. Defendant Owner is a cosmetic dentist. In or about May 2015,
22 Defendant Owner bought another practice and he began employing Plaintiff and other dental
23 workers at Defendant Employer. Plaintiff worked for Defendants until May 12, 2020.
24 **(Complaint ¶7.) (Basham Decl., ¶7.)**

25 Plaintiff worked as an hourly worker. Plaintiff believes all of Defendants'
26 employees who were paid on an hourly basis were denied their daily overtime, legal lunch breaks
27 and legal rest breaks in violation of the Labor Code due to the invalid AWS election and other
28 improper policies and practices. **(Complaint ¶8.) (Basham Decl., ¶8.)**

1 As a result of the above-described Labor Code violations, Defendants failed to
2 provide Plaintiff and similarly situated employees with accurate wage statements in compliance
3 with Labor Code §226. For example, Defendants' wage statements failed to accurately reflect
4 gross or net wages, overtime hours worked, or total hours worked and/or to be paid, or all
5 applicable hourly rates in effect during the pay period and the corresponding number of hours
6 worked at each hourly rate. (**Complaint ¶13.**) (**Basham Decl., ¶9.**)

7 Defendants deny Plaintiff's allegations and assert that Defendant Owner purchased
8 another dental practice in May 2015 which already had a compliant AWS for its employees as of
9 2013, which applied to Defendant Employer in May 2015. As a result, according to Defendants,
10 the 2013 AWS election applied to the employees included by Plaintiff as aggrieved employees in
11 her PAGA Cause of Action. Further, Defendants claim that the 2015 AWS election applicable to
12 Plaintiff and the other hourly workers was valid and enforceable. Defendants assert that the 2015
13 election met all but one of the requirements (Defendants failed to notify the DLSE of the
14 election), and that the oversight did not make the election null and void. Moreover, Defendants
15 assert several hourly workers were not subject to the AWS as they were either part-time
16 employees or employees exempt from overtime due to the learned exemption. Finally,
17 Defendants assert they had compliant meal period and rest break policies that were enforced and
18 followed. (**Basham Decl., ¶10.**)

19 **B. DOCUMENT EXCHANGE, INVESTIGATION AND MEDIATION**

20 Following the filing of the Complaint, the Parties agreed to discuss the potential
21 for informally resolving this matter. Thereafter, the Parties agreed to an exchange of informal
22 discovery, and exchanged data including the number of PAGA Settlement Members, applicable
23 policies, relevant evidence concerning the AWS election and Plaintiff's personnel file. Plaintiff's
24 Counsel reviewed Defendants' relevant policies and practices, Plaintiff's timesheets, wage
25 information, Plaintiff's personnel file, documents related to Defendants' AWS election and
26 relevant policies and practices pertaining to the PAGA Settlement members' employment with
27 Defendant Employer, as well as other evidence and documents concerning Defendant's defenses
28 and denials. (**Basham Decl. ¶11.**)

1 Plaintiff's Counsel has conducted a thorough investigation into the facts of the
2 Action and has diligently pursued an investigation of the PAGA Cause of Action against
3 Defendants. Based on his own independent investigation and evaluation, Plaintiff's Counsel is of
4 the opinion that the Settlement with Defendants, the terms of which are specifically set forth
5 below, for the consideration and on the terms set forth in this Agreement, is fair, reasonable, and
6 adequate and is in the best interests of the public, PAGA Settlement Members and the LWDA in
7 light of all known facts and circumstances, including the risk of significant delay, defenses
8 asserted by Defendant, and numerous potential appellate issues. The Parties further recognize
9 that the issues presented in the Action are likely only to be resolved with extensive and costly
10 pretrial proceedings and that further litigation will cause inconvenience, distraction, disruption,
11 delay, and expense disproportionate to the potential benefits of further litigation and have taken
12 into account the risk and uncertainty of the outcome inherent in any further litigation. (**Basham**
13 **Decl. ¶12.**)

14 The Parties' initial arms-length settlement negotiations, informal discovery and
15 investigation resulted in agreeing to mediate the case before noted mediator the Honorable Cecily
16 Bond (Ret.) on February 24, 2021. During the mediation with Judge Bond on February 24, 2021,
17 the Parties agreed to settle the Action (including Tenth Cause of Action under PAGA) and signed
18 a short form written agreement. During the settlement process, the Parties considered the
19 evidence, discussed the risks of benefits of continued litigation and proceeding with litigation
20 and/or trial. The settlement negotiations were at arm's length and, although conducted in a
21 professional manner, were adversarial at all times. Defendants maintained the position that their
22 policies and practices were compliant with California law. Although the Parties were willing to
23 explore the potential for a settlement, each side was also committed and prepared to litigate
24 through trial if a settlement had not been reached. The proposed Settlement was reached at the
25 end of a process that was neither fraudulent nor collusive. To the contrary, counsel for the Parties
26 advanced their respective positions throughout the settlement negotiations. The Settlement
27 Agreement that was reached with the assistance of Judge Bond takes into account the strengths
28 and weaknesses of each side's case. Each side has extensive experiencing litigating representative

1 employment actions and agrees the PAGA Settlement Agreement is fair, balanced, and
2 reasonable. Thereafter, the Parties engaged in further significant negotiations, which lead to the
3 Parties executing the PAGA Settlement Agreement, which forms the basis of this Motion.
4 (Basham Decl. ¶ 13.)

5 **III. SUMMARY OF THE SETTLEMENT AGREEMENT**

6 **A. THE PROPOSED GROUP OF AGGRIEVED EMPLOYEES AND COVERED** 7 **PERIOD**

8 The PAGA Settlement Members participating in the settlement are defined as
9 follows: “Aggrieved Employees covered by the PAGA Claim consist of all non-exempt full time
10 employees, which Company estimates to be 11 plus or minus employees during the PAGA period
11 from July 13, 2019 to August 7, 2020 (“Settlement Period”) who were subjected to Company’s
12 alleged underpayment of wages.” (PAGA Settlement Agreement at p. 1.) (Basham Decl. ¶14.)

13 **B. THE SETTLEMENT FUND AND RELEASES**

14 Under the terms of the PAGA Settlement Agreement, Defendants are required pay
15 a PAGA Gross Settlement Amount of \$10,000.00, which is divided and allocated as follows:

- 16 • Plaintiff’s Counsel’s PAGA attorneys’ fees in an amount of \$3,333.67 (which is
17 approximately one-third of the PAGA Gross Settlement Amount).
- 18 • Plaintiff’s Counsel’s PAGA costs in the amount of \$89.00 to compensate Plaintiff’s
19 Counsel for out-of- pocket costs and expenses actually incurred in connection with the
20 PAGA Action.
- 21 • The LWDA receives 75% of the PAGA Net Settlement Amount of \$6,607.33, which is
22 \$4,955.50;
- 23 • The PAGA Settlement Members receive 25% of the PAGA Net Settlement Amount of
24 \$6,607.33, which is \$1,651.83.
- 25 • All Administration Expenses will be paid by Defendants and will NOT be deducted from
26 the PAGA Gross Settlement Amount.

27 (PAGA Settlement Agreement at ¶3.) (Basham Decl., ¶15.)

28 The PAGA Settlement Members will receive a pro-rata share of the Net Settlement

1 Amount based on the number of pay periods worked during the Settlement Period. (PAGA
2 Settlement Agreement at ¶3(C).) (**Basham Decl., ¶16.**)

3 In exchange, the PAGA Settlement Members will be subject to a **very narrow**
4 **release of claims** (PAGA Released Claims): “PAGA Settlement Members, including but not
5 limited to Plaintiff, irrevocably and unconditionally waive, release and forever discharge
6 Company and each and all of Company’s officers, agents, directors, supervisors, employees,
7 representatives, insurers and their successors and assigns and all persons acting by, through, under
8 or in concert with any of them from all known and unknown claims for civil penalties under
9 PAGA that were pled in the Tenth Cause of Action in the Complaint, including without
10 limitation, all claims for or related to PAGA penalties, costs and attorneys’ fees stemming from
11 an alleged failure to pay overtime, furnish accurate wage statements, waiting time penalties,
12 failure to provide meal periods, and failure to provide rest breaks in violation of the Labor Code
13 under the Private Attorneys General Act (Labor Code Sections 2698, *et seq.*) for the period July
14 13, 2019 to August 7, 2020.” (Settlement Agreement at ¶7.) (**Basham Decl., ¶17.**)

15 **C. CLAIMS ADMINISTRATION**

16 Because there are only 11 PAGA Settlement Members, Defendants and their
17 counsel have the option of acting as the PAGA Claims Administrator, but may hire a third-party
18 claims administrator at their own expense if they choose to do so (“Administrator”). The PAGA
19 Settlement Agreement sets forth the process for calculating disbursement amounts and providing
20 the LWDA and the PAGA Settlement Members their checks. (Settlement Agreement at ¶3.)
21 Within 14 calendar days after the Court’s approval of the PAGA settlement, Defendants will
22 provide the Administrator with the the PAGA Settlement Members’ names, last known addresses,
23 social security numbers and dates of employment. (Settlement Agreement at ¶3(B).) (**Basham**
24 **Decl., ¶18.**)

25 Within 30 calendar days after the Court’s approval of the PAGA settlement, the
26 Administrator will distribute the Gross Settlement Amount in accordance with the PAGA
27 Settlement Agreement. (PAGA Settlement Agreement at ¶3(C).) The Administrator will send an
28

1 explanatory letter to each PAGA Settlement Member along with tax forms and PAGA Settlement
2 checks. (Settlement Agreement at ¶3(C).) (**Basham Decl.**, ¶19.)

3 **IV. LAW AND ARGUMENT**

4 **A. THE PRIVATE ATTORNEYS GENERAL ACT**

5 In September 2003, the Legislature enacted the Labor Code Private Attorneys
6 General Act of 2004 (Lab. Code § 2698 et seq.; Stats. 2003, ch. 906, § 2, eff. Jan. 1, 2004)
7 (“PAGA”). “The Legislature declared that adequate financing of labor law enforcement was
8 necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law
9 enforcement agencies had declined and were unlikely to keep pace with the future growth of the
10 labor market, and that it was therefore in the public interest to allow aggrieved employees, acting
11 as private attorneys general, to recover civil penalties for Labor Code violations, with the
12 understanding that labor law enforcement agencies were to retain primacy over
13 private enforcement efforts. (Stats. 2003, ch. 906, § 1.)” (*Arias v. Superior Court* (2009) 46 Cal.
14 4th 969, 980.)

15 The purpose of PAGA is to “create a means of ‘deputizing’ citizens as private
16 attorneys general to enforce the Labor Code.” (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.
17 App. 4th 489, 501.) A PAGA plaintiff is an “aggrieved employee” who brings a civil action
18 “personally and on behalf of other current or former employees to recover civil penalties for
19 Labor Code violations” as the “proxy or agent of the state’s labor law enforcement agencies.”
20 (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal. 4th 348, 380; Labor Code §
21 2699.) In other words, a PAGA dispute is “a dispute between an employer and the *state*,” rather
22 than between the employer and the aggrieved employee. (*Iskanian, supra*, at pp. 386-387.)

23 A PAGA plaintiff operates under several constraints. Because he or she sues
24 employers on behalf of the State, the “plaintiff represents the same legal right and interest as state
25 labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have
26 been assessed and collected by the [LWDA].” (*Iskanian, supra*, at p. 380.) Thus, a plaintiff suing
27 under PAGA is limited to recovery of civil penalties only, rather than damages available privately
28 through direct or class action claims. (*Arias v. Superior Court* (2009) 46 Cal. 4th 969, 980.)

1 Seventy-five percent of any civil penalties recovered through a PAGA suit are distributed to the
2 LWDA, with the remaining 25 percent going to the aggrieved employees to be shared among
3 themselves. (Labor Code § 2699(i); *Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1079, fn.
4 5.)

5 Under PAGA, an aggrieved employee may bring suit to recover civil penalties for
6 violations of the California Labor Code. (Labor Code §2699(a).) Civil penalties are specifically
7 denoted as “civil” penalties and are distinct and separate from statutory penalties. (*Villacres v.*
8 *ABM Indus. Inc.* (2010) 189 Cal.App.4th 562, 579). PAGA permits a representative Plaintiff to
9 recover civil penalties for each employee who suffers the subject Labor Code violation, for each
10 and every pay period the violation was suffered, for a 1-year limitations period. (*Id.*; *Thomas v.*
11 *Home Depot USA Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1003, 1007). PAGA is intended to
12 promote compliance with the Labor Code by expanding the rights of individual employees to
13 bring suit in the face of declining staffing and resources of California’s labor and employment law
14 enforcement agencies. The employee-plaintiff in a PAGA action sues as a proxy for state agencies
15 and does so in a representative capacity on behalf of other aggrieved employees. (*Amalgamated*
16 *Transit Union, Local 1756, AFL-CIO v. Sup. Ct.* (2009) 46 Cal. 4th 993, 1003).

17 In order to bring a PAGA action, the aggrieved employee must first exhaust
18 administrative remedies by filing a notice with the Labor Workforce Development Agency
19 (“LWDA”). (Labor Code §2699.3(a).) Under current regulations, a copy of the notice must be
20 filed with the LWDA online. A copy must also be sent to the employer by certified mail. After the
21 notice is filed and/or mailed, the employee must wait 65 days before commencing suit in
22 accordance with in Labor Code §2699.3(a)(2)(A). If the PAGA notice specifies Labor Code
23 violations other than those expressly identified in Labor Code §2699.5, the employer has a right
24 to cure the Labor Code violations before the end of the statutory waiting period. However, if the
25 notice specifies a provision identified in section 2699.5, the employer has no right to cure.
26 Defendant had no right to cure as the PAGA cause of action is based on Labor Code §2802,
27 which is listed in section 2699.5.

28 In this case, Plaintiff submitted her PAGA letter to the LWDA and served the letter

1 on Defendants by certified mail on July 13, 2020. Plaintiff filed her PAGA Complaint with the
2 Court on September 23, 2020, more than 65 days after submitting the PAGA letter. Accordingly,
3 Plaintiff has satisfied all requirements set forth in PAGA. (**Basham Decl., ¶20, Exhibit B**
4 **thereto.**)

5 If a provision specified in section 2699.5 does not expressly provide for a "civil"
6 penalty, PAGA's default civil penalty applies. (Labor Code §2699(f).) The failure to reimburse
7 for necessary business expenses is unlawful under Labor Code §2802. This provision is
8 specifically incorporated into PAGA under Labor Code §2699.5. Because Labor Code §2802
9 does not provide for an independent "civil" penalty for a violation of its provisions, the default
10 civil penalty under Labor Code section 2699(f)(2) applies. The default civil penalty for section
11 2802 violations is as follows: "[i]f, at the time of the alleged violation, the person employs one or
12 more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per
13 pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee
14 per pay period for each subsequent violation.' (Labor Code §2699(f)(2).).

15 **B. LEGAL STANDARD FOR APPROVING A PAGA SETTLEMENT**

16 In the event an aggrieved employee wishes to settle a PAGA claim, the Labor
17 Code requires the superior court to "review and approve any penalties sought as part of [the]
18 proposed settlement agreement." (Lab. Code, § 2699, subd. (l)(2).) Such review and approval
19 must "ensur[e] that any negotiated resolution is fair to those affected." (*Williams v. Superior*
20 *Court* (2017) 3 Cal.5th 531, 549.)

21 The California Supreme Court has held PAGA actions need not satisfy state law
22 class certification requirements in order to proceed on a representative basis. (*Arias v. Superior*
23 *Court* (2009) 46 Cal.4th 969, 980-987). Further, California law provides that public policy
24 generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.)
25 Nonetheless, the Court should not approve a settlement agreement contrary to law of public
26 policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003)
27 106 Cal.App.4th 1121, 1127.)

28 ""The fact that a proposed settlement may only amount to a fraction of the potential

1 recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and
2 should be disapproved.' [Citation.]" (*7-Eleven Owners for Fair Franchising v. Southland Corp.*
3 (2000) 85 Cal.App.4th 1135, 1150.) "The proposed settlement is not to be judged against a
4 hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at
5 trial." (*Wershba v. Apple Computer, Inc.* (2001) 01 Cal.App.4th 224, 246.)

6 The PAGA statute provides that a penalty amount calculated under § 2699(f) may
7 be reduced where "based on the facts and circumstances of the particular case, to do otherwise
8 would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Labor Code §
9 2699(e)(2).) Courts approve PAGA settlements when the settlement amount is reasonable. (See
10 *Gong-Chun V. Aetna Inc.* (E.D. Cal. July 11, 2012) 2012 U.S. Dist. LEXIS 96828,*45–46
11 [approving PAGA settlement so long as payment is a "reasonable amount"].)

12 **C. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT**

13 **1. The Settlement was Reached Through Arm's Length Negotiations After** 14 **Independent Investigation, Discovery and Risk Analysis**

15 This litigation settled after months of discussion and a full day of mediation with
16 the Honorable Cecily Bond (Ret.). Following the mediation, the Parties continued to engage in
17 extensive settlement negotiations regarding the terms and conditions of the proposed PAGA
18 settlement. The Parties exchanged multiple versions of the proposed PAGA Settlement
19 Agreement before finally agreeing to the terms of the Settlement Agreement. The settlement
20 negotiations were at arm's length and, although conducted in a professional manner, were
21 adversarial at all times. Defendants maintained the position that their policies and practices were
22 compliant with California law, the AWS election was valid and binding, and a PAGA trial would
23 be inappropriate. Although the Parties were willing to explore the potential for a settlement, each
24 side was also committed and prepared to litigate through trial if a settlement had not been
25 reached. The proposed Settlement was reached at the end of a process that was neither fraudulent
26 nor collusive. To the contrary, counsel for the Parties advanced their respective positions
27 throughout the settlement negotiations. (**Basham Decl., ¶21.**)

28 Plaintiff's Counsel has conducted a thorough investigation into the facts of the

1 Action and has diligently pursued an investigation of the PAGA Cause of Action against
2 Defendants. Based on his own independent investigation and evaluation, Plaintiff's Counsel is of
3 the opinion that the PAGA Settlement with Defendants is fair, reasonable, and adequate and is in
4 the best interests of the public, PAGA Members and the LWDA in light of all known facts and
5 circumstances, including the risk of significant delay, defenses asserted by Defendants, and
6 numerous potential appellate issues. The Parties further recognize that the issues presented in the
7 Action are likely only to be resolved with extensive and costly pretrial proceedings and that
8 further litigation will cause inconvenience, distraction, disruption, delay, and expense
9 disproportionate to the potential benefits of further litigation and have taken into account the risk
10 and uncertainty of the outcome inherent in any further litigation. (**Basham Decl., ¶22.**)

11 Further, Plaintiff recognizes there are serious risks concerning the PAGA claim
12 based on Defendants' defenses. For example, Defendants assert the 2013 AWS election applied to
13 the employees included by Plaintiff as aggrieved employees in her PAGA Cause of Action.
14 Further, Defendants claim that the 2015 AWS election applicable to Plaintiff and the other hourly
15 workers was valid and enforceable as the one election requirement not met (notifying the DLSE
16 of the election) did not make the election null and void. Moreover, Defendants assert several
17 hourly workers were not subject to the AWS as they were either part-time employees or
18 employees exempt from overtime due to the learned exemption. Finally, Defendants assert they
19 had compliant meal period and rest break policies that were enforced and followed. Based on
20 these defenses and factual issues, Plaintiff faced a real risk of loss on the PAGA claim given the
21 disputed facts and applicable case law. (**Basham Decl., ¶23.**)

22 **2. The Settlement Amount is Fair and Reasonable.**

23 Given the totality of circumstances in this case, the \$10,000 PAGA settlement is
24 fair and reasonable.

25 As set forth in detail, *supra*, there are a number of evidentiary and legal issues that
26 render litigating and proving the alleged PAGA claim difficult, time-consuming, contentious, and
27 uncertain. Moreover, even if Plaintiff is able to prevail on the underlying Labor Code section
28 2802 claim, the PAGA penalty may be minimal for several reasons. PAGA penalties are assessed

1 at the "initial" violation rate (\$100 or \$200 per pay period, depending on the violation). (*Patel v.*
2 *Nike Retail Servs., Inc.* (N.D. Cal. 2014) 58 F. Supp. 3d 1032, 1042–43 [“Until the employer has
3 been notified that it is violating a Labor Code provision... The employer cannot be presumed to
4 be aware that its continuing underpayment of employees is a ‘violation’ subject to penalties.”].)
5 Further, any alleged Labor Code violations were corrected by Defendants on August 7, 2020.
6 (**Basham Decl., ¶24.**)

7 Second, courts have the discretion to reduce, and often do reduce the amount of
8 PAGA penalties awarded when the employer has made a good-faith attempt to comply with the
9 law. (See Labor Code § 2699 (e)(2); *Thurman v. Bayshore Transit Mgm’t, Inc.* (2012) 203 Cal.
10 App. 4th 1112, 1135–36 (reducing PAGA penalties by thirty percent where “defendants took their
11 obligations under [the] Wage Order seriously and attempted to comply with the law” [internal
12 quotations omitted].) At trial, Defendants would have a reasonable basis to request a penalty
13 reduction based on their efforts to ensure compliance with AWS elections under Labor Code §551
14 and IWC Wage Order No. 4. (**Basham Decl., ¶25.**)

15 Third, to recover PAGA penalties, Plaintiff must “prove a labor code violation
16 with respect to each and every individual on whose behalf [they] seek to recover civil penalties.”
17 (*Molina v. Dollar Tree Stores, Inc.* (C.D. Cal. Aug. 9, 2013) 2013 U.S. Dist. LEXIS 138642,
18 *33–34 [emphasis added].) This undertaking could be significant for both the parties and the
19 Court, especially given the factual defenses Defendants would assert. Defendants’ position is no
20 civil penalties are due because both the 2013 and 2015 AWS elections were valid and
21 enforceable. If Defendants were able to prevail on the validity of either election, Plaintiff’s PAGA
22 claim would fail. And even if successful, there is certainly no guarantee that the outcome would
23 result in penalties approaching the proposed \$10,000.00 settlement. (**Basham Decl., ¶26.**)

24 Here, the proposed PAGA penalty of \$10,000.00 is reasonable given the lack of
25 any ongoing violations, and the challenge, risk, costs, and uncertainty of litigating and proving
26 PAGA violations. Further, the aggrieved employees suffered no known injury as they all wanted
27 to work an AWS and made no complaint to Defendants about the AWS schedule until Plaintiff
28 sent to Defendants and the LWDA her July 13, 2020 PAGA letter. Defendants thereafter took

1 prompt action to correct any issues concerning the 2015 AWS election by holding a new fully
2 compliant election on August 7, 2020, which was unanimously approved by the employees.
3 Under these circumstances, the PAGA settlement in this case is appropriate. (**Basham Decl.**,
4 ¶27.) (See, *Fleming v. Covidien, Inc.*, (C.D. 2011) 2011 U.S. Dist. LEXIS 154590, *8-9 [reducing
5 PAGA penalty by 82% where Defendant promptly corrected the violation]).

6 The reasonableness of the Parties' PAGA settlement is further underscored when
7 compared to other court-approved PAGA settlements in cases with significantly greater exposure.
8 (See, e.g., *Chu v. Wells Fargo Investments* (N.D. Cal. Feb. 15, 2011) 2011 U.S. Dist. LEXIS
9 15821, *4 [approving \$10,000 PAGA settlement in a case involving \$6.9 million settlement and
10 2,752 class members]; *Franco v. Ruiz Food Prods.* (E.D. Cal. Nov. 27, 2012) 2012 U.S. Dist.
11 LEXIS 169057,*14, 41 [approving \$10,000 settlement of PAGA claims in case involving 2,055
12 class members and \$2.5 million settlement]).

13 Further, Courts have approved PAGA settlements for only a fraction of the
14 potential PAGA civil penalties, particularly where counsel have presented good reasons why
15 recovery of penalties was unlikely. (See, e.g., *Viceral v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11,
16 2016, 2016 WL 5907869 at *9 [preliminarily approving class action settlement that included a
17 PAGA set-aside of just 0.15 percent of the PAGA claim's full potential value, where "Plaintiffs
18 face[d] a substantial risk of recovering nothing on either the class or PAGA claims"]; *Cotter v.*
19 *Lyft, Inc.* (N.D. Cal. 2016) 193 F.Supp.3d 1030, 1037 [preliminarily approving class action
20 settlement allocating a PAGA set-aside worth a fraction of the PAGA claim's potential value,
21 where the defendant's obligations were "genuinely unclear" and there was no evidence the
22 defendant acted deliberately or negligently failed to learn about its obligations].)

23 Based on the records and facts of this case, Plaintiff has been able to secure a gross
24 PAGA settlement of \$10,000.00 (approximately 13.6% of the total potential recovery of \$73,600
25 in PAGA penalties) and a net amount of \$6,607.33.00 (approximately 9% of the total potential
26 recovery). Plaintiff believes this settlement to be a reasonable compromise of the PAGA claim
27 given the real risk of no recovery and Defendants' factual and legal defenses. (**Basham Decl.**
28 ¶28.) See *Wershba*, 91 Cal. App. 4th at 246, 250; *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d

1 1117, 1139 (1990); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982);
2 *see also In Re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1042 (2007) (noting that
3 certainty of recovery in settlement of 6% of maximum potential recovery after reduction for
4 attorney's fees was higher than median percentage for recoveries in shareholder class action
5 settlements, averaging 2.2%–3% from 2000 through 2002).

6 Pursuant to Labor Code Section 2699(1), the Superior Court shall review and
7 approve the settlement of penalties sought under that Labor Code Section. Cal. Lab. Code §
8 2699(1). For all of the reasons stated above, the PAGA Settlement is fair, reasonable and
9 adequate, and should be approved. As part of the Settlement, Defendant has agreed to pay
10 \$4,955.50 to LWDA for its 75% portion of the claims of the Settlement Class brought pursuant to
11 PAGA, with \$1,651.83 being paid to PAGA Settlement Members for the remaining 25%. This
12 Settlement should be approved. (**Basham Decl. ¶29.**)

13 **V. CONCLUSION**

14 Based on the foregoing, Plaintiff respectfully requests the Court to grant Plaintiff's
15 Motion for Approval of PAGA Settlement in its entirety.

16
17 Date: April 15, 2021

BASHAM LAW GROUP

18
19 By: 

20 GARY R. BASHAM

21 Attorneys for Plaintiff SARAH AVILARIOS, on
22 behalf of herself, all similarly aggrieved current and
23 former employees of Defendant and the State of
24 California
25
26
27
28

1 **PROOF OF SERVICE**

2 I, the undersigned declare:

3 I am employed in the County of Sacramento, State of California. I am over the age
4 of eighteen years and not a party to the within action; my business address is 8801 Folsom Blvd,
5 Suite 280, Sacramento, California.

6 On April 19, 2021, I caused the following to be served:

7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S**
8 **MOTION FOR APPROVAL OF PAGA SETTLEMENT**

9 _____ by placing a true copy thereof enclosed in a sealed envelope with postage
10 thereon fully prepaid for deposit in the United States Post Office mail box, at
11 my business address shown above, following Basham Law Group's ordinary
business practices for the collection and processing of mail, of which I am
readily familiar, and addressed as set forth below.

12 _____ by depositing a true copy thereof enclosed in a sealed envelope with delivery
13 fees thereon fully prepaid in a box or other facility regularly maintained by
14 FedEx or delivering to an authorized courier or driver authorized by FedEx to
receive documents on the same date that it is placed at Basham Law Group for
collection, addressed as set forth below.

15 _____ by sending a copy by facsimile to the person(s) at the address(s) and facsimile
16 number(s) set forth below.

17 ✓ _____ by email to the person(s) at the email address(s) set forth below.

18 **Attorney for Defendants**

19 **Madonna A. Herman** (madonna.herman@wilsonelser.com)

20 **Peter Catalanotti** (Peter.Catalanotti@wilsonelser.com)

21 **Wilson Elser LLP**

22 **525 Market Street, 17th Floor**

23 **San Francisco, California 94105**

24 I declare under penalty of perjury under the laws of the State of California that the
25 foregoing is true and correct, and that this declaration was executed on April 19, 2021, at
26 Sacramento, California.

27 

28 Susan Basham