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Plaintiffs' Counsel continued on next page

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

VIVIAN LY, on behalf of herself and others
similarly situated,

Plaintiff,

v.

PRIME COMMS RETAIL, LLC, a Delaware
limited liability company; and DOES 1 through
50, inclusive,

Defendants.

Case No. 34-2020-00281668

**NOTICE OF PLAINTIFFS' MOTION FOR
APPROVAL OF PAGA SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: November 16, 2021
Time: 9:00 a.m.
Place: Dept. 54

Reservation No. 2591498

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15 themselves and others similarly Aggrieved Employees
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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on November 16, 2021, at 9:00 a.m., or as soon thereafter as
3 the matter can be heard, Department 54 of the Sacramento County Superior Court, located at 720 9th
4 Street, Sacramento, CA 95814, before the Honorable Christopher E. Krueger, Plaintiffs Vivian Ly,
5 Wendy Maciel, and Rene Palacios will move the Court for Approval of PAGA Settlement.

6 This motion will be based on this Notice; the Memorandum of Points and Authorities; the
7 Declarations of David Mara, Esq.; the Declarations of Plaintiffs Vivian Ly, Wendy Maciel, and Rene
8 Palacios; the Declaration on Behalf of Rust Consulting, Inc., the proposed Settlement Administrator;
9 any and all documents filed in this matter; and any argument that may be presented at the hearing; and
10 upon such other matters as this Court may consider.

11 Pursuant to Local Rule 1.06 (A), the court will make a tentative ruling on the merits of this
12 matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for
13 the department may be downloaded off the court's website. If the party does not have online access,
14 they may call the dedicated phone number for the department as referenced in the local telephone
15 directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and
16 receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the court
17 day before the hearing, no hearing will be held.

18
19 Dated: October 22, 2021

MARA LAW FIRM, PC

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21 

22 David Mara, Esq.
23 Matthew Crawford, Esq.
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I. INTRODUCTION

Plaintiffs Vivian Ly, Wendy Maciel, and Rene Palacios (“Plaintiffs”) respectfully requests that this Court approve of the PAGA Settlement Agreement and Release (“Settlement Agreement”)¹ entered into between Plaintiffs and Defendants Prime Comms Retail, LLC; Spring Communications Holding, Inc. dba SC Spring Communications Holding, Inc.; Prime Communications of California, LLC; and Spring Communications Holdings, LLC (“Defendants”) (collectively Plaintiffs and Defendants are referred to as the “Parties”) which resolves claims raised against Defendants in exchange for a non-reversionary \$1,500,000 Gross Settlement Amount (“GSA”).

This proposed settlement will settle the claims alleged in Plaintiffs’ complaint under the Private Attorney Generals Act of 2004 (“PAGA”) on behalf of the California Labor and Workforce Development Agency (“LWDA”) and all individuals employed by Defendant in a non-exempt position during the PAGA Recovery Period (“Aggrieved Employees”). The PAGA Recovery Period extends from March 12, 2018, through the date of approval of the Settlement. The relief provided for under the Settlement Agreement is solely for the payment of penalties under the PAGA.

Pursuant to California Labor Code § 2699, subsection (1)(2), a superior court shall review and approve any settlement of any civil action filed pursuant to the PAGA. *See* Cal. Lab. Code § 2699(1)(2).² In deciding whether to grant approval of the proposed settlement, the primary issue to be decided is whether the settlement is fair, adequate, and reasonable. As set forth herein, the proposed settlement embodies all of the features of a settlement that is fair, reasonable, and adequate, as it is the product of (1) arms-length negotiations, employing a neutral mediator, (2) negotiations by attorneys experienced in these issues, (3) sufficient investigation which was necessary to evaluate the relative strength and value of Plaintiff’s claims, and (4) a reasoned compromise based on the strength and value of the case, as well as, the risks, expense, complexity, and likely duration of further litigation.

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¹ The Settlement Agreement is attached to the Declaration of David Mara, Esq. (“Mara Dec.”) as **Exhibit 1**.

² Plaintiff uploaded the Settlement Agreement to the LWDA. A copy of the filing receipt from this upload is attached to the Mara Dec. as **Exhibit 3** and a confirmation that the upload was received is attached as **Exhibit 4**.

II. BACKGROUND

a. Procedural History

On March 12, 2019, Palacios provided a written notice by online filing to the Labor Workforce Development Agency (“LWDA”), with a copy by certified mail to Defendant Spring Communications Holdings, Inc., dba SC Spring Communications Holdings, Inc., notifying the LWDA that Palacios intended to pursue a claim under the Labor Code Private Attorneys General Act of 2004 (“PAGA”) based on Defendants’ alleged failure to: (1) pay straight time wages, minimum wages and overtime wages owed for off-the-clock work; (2) properly calculate the regular rate of pay during those pay periods in which aggrieved employees had worked overtime hours and had been paid bonuses, commissions, or other forms of remuneration; (3) provide written commissions plans; (4) provide all required meal periods; (5) provide all required rest breaks; (6) reimburse aggrieved employees for necessary business expenditures (mileage); (7) provide accurate wage statements, on both a derivative and an independent basis; and (8) timely pay wages owed upon separation of employment. The LWDA did not respond to this letter or otherwise indicate that it intended to investigate Palacios’ allegations.³ Declaration of Leonard Sansanowicz. (“Sansanowicz Dec.”) ¶ 15.

On June 30, 2020, Maciel provided written notice to the LWDA via online submission, with a copy by certified mail to Defendants Prime Communications, L.P., Spring Communications Holding, Inc., Spring Communications Parent, Inc., Prime Acquisition Company, LLC, Prime Communications of California, LLC, and Spring Communications Holding, LLC, notifying the LWDA that Maciel intended to pursue a PAGA claim based on Defendants’ alleged failure to: (1) pay straight time wages, minimum wages and overtime wages owed for off-the-clock work; (2) properly calculate the regular rate of pay during those pay periods in which aggrieved employees had worked overtime hours and had been paid bonuses, commissions, or other forms of remuneration s; (3) provide all required meal periods; (4) provide all required rest breaks; (5) timely pay wages owed upon separation of employment; (6) provide accurate wage statements; (7) issue semi-monthly payments of wages; (8) adopt a compliant sick pay/paid time off policy; and (9) reimburse aggrieved employees for necessary business expenditures (uniforms, cell phone usage, and electricity). The LWDA did not respond to

³ A copy of Plaintiff Palacios’ notice is attached to the Sansanowicz Declaration as **Exhibit 1**.

1 this letter or otherwise indicate that it intended to investigate Maciel's allegations.⁴ Mara Dec. ¶ 29.

2 On July 15, 2020, Ly provided written notice to the LWDA via online submission, with a copy
3 by certified mail to Prime Comms Retail, LLC, notifying the LWDA that Ly intended to pursue a
4 PAGA claim based on Defendants' alleged failure to: (1) pay straight time wages, minimum wages
5 and overtime wages owed for off-the-clock work (and auto-deduct during meal periods); (2) properly
6 calculate the regular rate of pay during those pay periods in which aggrieved employees had worked
7 overtime hours and had been paid bonuses, commissions, or other forms of remuneration; (3) provide
8 all required meal periods; (4) provide all required rest breaks; (5) unlawful collection of wages because
9 of the meal auto-deduct policy; (6) reimburse aggrieved employees for necessary business
10 expenditures (uniforms and cell phone usage); (7) provide accurate wage statements; (8) issue semi-
11 monthly payments of wages; (9) keep records showing payroll records and hours worked daily by the
12 aggrieved employees; and (10) timely pay wages owed upon separation of employment. The LWDA
13 did not respond to this letter or otherwise indicate that it intended to investigate Ly's allegations.⁵
14 Mara Dec. ¶ 30.

15 On May 21, 2019, Palacios filed a PAGA-only lawsuit in Riverside County Superior Court,
16 Case No. RIC 1902996 (the "Palacios Action") based on his PAGA notice dated March 19, 2019, and
17 filed an amended complaint on March 17, 2020, dismissing prior-named defendants GameStop Corp.
18 dba GameStop Corp and Cesar Yanez-Canton and amending claims for victim specific relief under
19 Labor Code sections 558 and 1197.1 in light of the California Supreme Court's decision in *ZB, N.A.v.*
20 *Superior Court of San Diego County* (2019) 8 Cal.5th 175. On July 10, 2020, Ly filed a class action
21 in Sacramento County Superior Court, Case No. 34-202000281668 (the "Ly Action"); on November
22 10, 2020, Ly amended her complaint to include a PAGA cause of action based on her PAGA notice
23 dated June 30, 2020. On September 9, 2020, Maciel filed a PAGA-only action in San Diego County
24 Superior Court, Case No. 37-2020-00031569-CU-OE-CTL (the "Maciel Action") based on her PAGA
25 notice dated July 15, 2020. Mara Dec. ¶ 32; Sansanowicz Dec. ¶ 15-16.

26 In conjunction with this settlement, the parties stipulated to the filing of a Second Amended
27 Complaint in the Ly Action to consolidate the matters for settlement purposes, which was filed on

28

⁴ A copy of Plaintiff Maciel's notice is attached to the Mara Declaration as **Exhibit 5**.

⁵ A copy of Plaintiff Ly's notice is attached to the Mara Declaration as **Exhibit 6**.

1 August 25, 2021. Mara Dec. ¶ 33.

2 **b. Discovery and Investigation**

3 Through discovery, Plaintiffs sought numerous documents and substantial amounts of data that
4 were needed to evaluate the case. These documents included requests for time and wage records for
5 the Aggrieved Employees, employee handbooks in place during the statutory period, any policies
6 regarding meal breaks, rest breaks, the payment of wages, and employee training in place during the
7 statutory period. Plaintiffs also requested data surrounding the number of shifts, workweeks, and pay
8 periods worked by the Aggrieved Employees during the relevant time period, to establish a potential
9 exposure model. Mara Dec. ¶ 34.

10 After the Parties had agreed to attend mediation, Defendants produced hundreds of pages of
11 documents and thousands of lines of data, including time and payroll records, employee handbooks,
12 and other employee policies. Furthermore, Plaintiffs reviewed data relating to the size and scope of
13 the Aggrieved Employees that permitted an evaluation of Plaintiffs' state-wide claims. Mara Dec. ¶
14 35.

15 **c. Mediation**

16 On April 9, 2021, the Parties attended mediation with the respected wage and hour mediator
17 Lynn Frank. The matter did not settle at this mediation. However, the Parties continued settlement
18 negotiations with the assistance of Ms. Frank. After these continued arm's-length negotiations, the
19 Parties reached an agreement in principle. Thereafter, the Parties drafted and signed a Memorandum
20 of Understanding, detailing the principal settlement terms, which were later memorialized in the
21 Settlement Agreement the Parties now ask the Court to approve. Mara Dec. ¶ 36; **Exhibit 1**.

22 **III. THE PARTIES' CONFLICTING POSITIONS**

23 **a. Minimum Wage Claims**

24 Plaintiffs allege that Defendant failed to pay all minimum wages owed to the Aggrieved
25 Employees. Employees must be paid for all "hours worked," as that phrase is defined in the Wage
26 Orders and interpreted by California courts. Hours worked is defined as "the time during which an
27 employee is subject to the control of an employer, and includes all the time the employee is suffered
28 or permitted to work, whether or not required to do so." Wage Order 4-2001, Subd. 2(K); *see also*

1 *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015). Under this standard, “it is only
2 necessary that the worker be subject to the control of the employer in order to be entitled to
3 compensation.” *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000). The *Morillion* Court
4 reasoned that an employee is under the employer’s control and entitled to compensation when the
5 employer “‘directs, commands or restrains’ an employee.” *Morillion*, 22 Cal. 4th at 583 (*quoting Bono*
6 *Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968, 975 (1995)). The California Supreme Court
7 further found that “[a]n employer that requires its employees to work minutes off the clock on a regular
8 basis or as a regular feature of the job may not evade the obligation to compensate the employee for
9 that time by invoking the de minimis doctrine.” *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 847
10 (2018). Off-the-clock claims are governed by a known or should have known standard. *See Brinker*
11 *Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1051 (“liability is contingent on proof
12 [the employer] knew or should have known off-the-clock work was occurring”) (citing *Morillion*, 22
13 Cal. 4th at 585).

14 Here, Plaintiffs contend that Defendants required Plaintiffs and the Aggrieved Employees to
15 spend many hours after they had already clocked out performing duties for their employer which
16 therefore subjected them to their employer’s control, such as answering texts, emails, and/or GroupMe
17 application chats. These mandatory work tasks were performed off the clock, and as a result, Plaintiffs
18 and the Aggrieved Employees were not compensated for this time. Mara Dec. ¶ 37.

19 Defendants argue that beyond the limited accusations of Plaintiffs, there is no evidence that
20 Aggrieved Employees performed *any* work-related tasks for which they were not compensated.
21 Defendants claim that it has strict policies prohibiting off the clock work and requiring that all work
22 time must be recorded. Defendants further contends that there is no evidence of any kind of uniform
23 practice or policy for employees to perform work off the clock, and, in fact, Defendants have uniform
24 practices and policies *forbidding* employees from working off the clock. Mara Dec. ¶ 38.

25 **b. Overtime Claims**

26 Plaintiffs further allege that Defendants failed to pay all overtime wages owed to the Aggrieved
27 Employees. California Labor Code § 510 and Section 3 of Wage Order 4 require employers to pay
28 employees overtime wages of no less than one and one-half times their respective regular rates of pay.

1 In *Alvarado v. Dart Container Corporation of California*, the California Supreme Court observed,
2 “[r]egular rate of pay, which can change from pay period to pay period, includes adjustments to the
3 straight time rate, reflecting, among other things, shift differentials and the per hour value of any
4 nonhourly compensation the employee has earned.” *Alvarado v. Dart Container Corporation of*
5 *California* (2018) 4 Cal. 5th 542, 554.

6 Plaintiffs contend Defendants paid commissions and bonus but did not factor these extra forms
7 of remuneration into the regular rate of pay for purposes of calculating overtime compensation.
8 Plaintiff alleges that it appears from the data provided that Defendants simply multiplied the
9 Aggrieved Employees’ base rates of pay by one-half to calculate the overtime rate and did not
10 recalculate the base rate as a regular rate of pay. Therefore, Plaintiffs argue that Aggrieved Employees
11 who received commissions and bonuses are owed additional overtime compensation in the pay period
12 these payments were received. Mara Dec. ¶ 39.

13 Defendants contend they properly paid the Aggrieved Employees overtime wages for all
14 overtime hours worked. More specifically, Defendants contend they properly included bonuses and
15 commissions when calculating the Aggrieved Employees’ regular rates of pay, and therefore all
16 overtime pay was properly calculated and paid. Defendants contend that although the bonuses and
17 commission payments were one lump sum on the Aggrieved Employees’ wage statements, this sum
18 includes both the commission amount **and** the additional overtime wages owed. Said differently,
19 Defendants issued one payment to employees that includes **both** the commission or bonus amount
20 being paid as well as the additional overtime wages owed based upon the regular rate of pay.
21 Defendants contend its expert’s analysis confirms this. Defendants further contends that it is unaware
22 of any case law that states overtime wages based upon the regular rate of pay must be paid separate
23 and apart from the shift differential or bonus payment. Defendants therefore contend that Plaintiffs’
24 overtime claims have no merit whatsoever because the additional overtime wages were paid to the
25 Aggrieved Employees and Plaintiffs cannot show otherwise. Mara Dec. ¶ 40.

26 c. Meal Period Claims

27 Plaintiffs also allege that Defendants fail to provide the Aggrieved Employees with lawful
28 meal periods. An employer’s obligation to provide its employees with meal periods arises under the

1 IWC Wage Orders and Labor Code. Section 11(A) of the Wage Orders and Labor Code § 512, state:
2 “[n]o employer shall employ any person for a work period of more than five (5) hours without a meal
3 period of not less than 30 minutes.” Failure to provide a lawful meal period shall result in the employer
4 paying “the employee one additional hour of pay at the employee’s regular rate of compensation for
5 each workday that the meal or rest or recovery period is not provided.” Cal. Lab. Code § 226.7(c).

6 From the data provided by Defendants, Plaintiffs’ expert was able to determine that in 50.9%
7 of all pay periods at issue at the time of mediation, Defendants’ records reflected a meal period for an
8 Aggrieved Employee that was either shorter than 30 minutes, provided late (after the end of the 5th
9 hour of work), or not at all. When an employer fails to provide time records showing a meal break was
10 taken in compliance with California law, a rebuttable presumption arises that the employee was not
11 offered such a break. *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 74–76. Plaintiffs contend
12 that Defendants have no evidence that would permit them to rebut the presumption that the Aggrieved
13 Employees were not provided with meal periods in compliance with California law during the majority
14 of the pay periods at issue, and that Plaintiffs would be successful in bringing a motion for summary
15 judgment on the issue. Mara Dec. ¶ 41.

16 Defendants state they provide Aggrieved Employees with meal periods compliant with
17 California law and *Brinker*, and that it clearly communicates to Aggrieved Employees these rights.
18 Defendants point out that under *Brinker*, they need not police the Aggrieved Employees and whether
19 they actually take compliant meal periods, and that their obligation under the law is satisfied simply
20 when they provide and make available those meal periods. Defendants further argue that they would
21 be able to produce numerous valid meal period waivers that would account for many of the
22 “violations” complained of and would also be able to provide declarations from numerous Aggrieved
23 Employees explaining that it was their individual choice to take a short or late meal period, or that
24 they decided not to take one at all. Because each employee would have to testify as to these issues,
25 individual issues would render any PAGA trial unmanageable. Mara Dec. ¶ 42.

26 **d. Rest Period Claims**

27 Plaintiffs allege that Defendants fail to provide the Aggrieved Employees with rest periods in
28 compliance with California law. Section 12(A) of the IWC Wage Orders requires: “[e]very employer

1 shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in
2 the middle of each work period. The authorized rest period time shall be based on the total hours
3 worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof.”
4 The *Brinker* Court interpreted the language in section 12(A) as meaning “[employees] are entitled to
5 10 minutes’ rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more
6 than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.”
7 *Brinker Restaurant Corp.*, 53 Cal.4th at 1029.

8 Here, Plaintiffs maintain that Defendants do not have any formal written meal or rest period
9 policies. Plaintiffs contend that Defendants’ lack of a written rest period policy authorizing breaks is
10 a de facto violation under *Brinker* and its progeny. Furthermore, Plaintiffs contend that Defendants
11 actively discourage the Aggrieved Employees from taking rest periods and tells them they shouldn’t
12 take them at all. Defendants sole concern is for the profit margins of its business, not for the well-
13 being of its employees. Even if the Aggrieved Employees are able at some point in their shift are able
14 to manage some semblance of a rest period, they certainly are not provided with, nor are they able to,
15 take a 10-minute rest period for every four hours worked or major fraction thereof. Mara Dec. ¶ 43.

16 Defendants argue that the Aggrieved Employees were unquestionably provided with legally
17 compliant rest periods. First, Defendant points out that nothing under California law requires an
18 employer to adopt a written rest period policy, only that such rest periods be provided in the manner
19 required under *Brinker* and *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257. Second,
20 Defendants argue that they *never* restrict the Aggrieved Employees from taking compliant rest periods.
21 Defendants claim that they have no policy or practice that prevents the Aggrieved Employees from
22 taking rest periods in compliance with California law, that no one is disciplined for taking rest periods,
23 and that any PAGA trial would be unmanageable because the Court would have to ask each and every
24 Aggrieved Employee whether they thought they were not permitted to take rest breaks. Mara Dec. ¶
25 44.

26 e. Wage Statement Claims

27 Plaintiffs further contend that Defendants’ wage statements fail to properly itemize the total
28 hours worked, making it impossible to promptly and easily determine the actual regular hours and

1 overtime hours each Aggrieved Employee worked during the pay period. Plaintiffs allege that
2 Defendants' wage statements list an incorrect total combined regular and overtime hours worked.
3 Actually adding an Aggrieved Employees' regular and overtime hours together yields a different result
4 than what is on the wage statement. Mara Dec. ¶ 45.

5 In *McKenzie v. Federal Express Corporation* (2011) 765 F. Supp. 2d 1222 ("McKenzie"), the
6 court granted summary judgment in favor of the plaintiff. The wage statements in McKenzie listed the
7 hours worked for overtime twice—that is, every hour of overtime was listed once at the regular rate
8 of pay and once at half the regular rate of pay which resulted in the correct amount of overtime pay
9 but resulted in an incorrect number of overtime hours because they were listed twice on the wage
10 statement. The wage statements also did not list the total hours worked. Therefore, if employees added
11 their regular hours with the overtime hours (which were listed twice) on the wage statements, the
12 employees could not arrive at the total hours worked. To compound the problem, because the total
13 hours worked were not listed on the wage statements, the employees could not perform simple math
14 to understand/cross-check what the total hours they worked were without referencing additional
15 information beyond the wage statement. The court concluded that "the total regular and overtime hours
16 listed in [the defendant's] wage statements, when added together, [did] not sum up to the total hours
17 worked by the employee during the pertinent time period. Without additional information regarding
18 the wage statement, an employee [could not] simply 'arrive at the sum of hours worked'" which was
19 deemed a violation of Cal. Lab. Code §226(a)(2). *Id.* at 1229.

20 Defendants argue that the holding in *Hernandez v. BCI Coca-Cola Bottling Co.* (9th Cir. 2014)
21 554 Fed. Appx. 661, 662 refutes this argument and is more applicable to the wage statements at issue.
22 In *Hernandez*, the court granted summary judgment in the defendant employer's favor. The *Hernandez*
23 court found that that the plaintiff employee only needed to "subtract his regular hours from total hours
24 to determine overtime hours worked during the pay period. Similarly, he can add the two component
25 overtime rates to determine his overall overtime rate." *Hernandez, supra*, 554 Fed. App. at 662. Just
26 as in *Hernandez*, the Aggrieved Employees can simply perform basic math, adding their regular hours
27 worked and their overtime hours worked together to accurately determine how many hours they
28 worked in the pay period. Mara Dec. ¶ 46.

1 Plaintiffs also allege wage statement violations derivative of their claims for unpaid wages, the
2 failure to provide meal periods, and the failure to provide rest periods. Should those claims fail, any
3 claims for wage statement violations under this theory of liability would also fail. Mara Dec. ¶ 47.

4 **f. Reimbursement Claims**

5 In addition, Plaintiffs allege that Defendants fail to reimburse the Aggrieved Employees for
6 business expenses. Under Labor Code section 2802, the employer must “indemnify its employees for
7 expenses they necessarily incur in the discharge of their duties...” *Gattuso v. Harte-Hanks Shoppers,*
8 *Inc.*, 169 P.3d 889 (2015). In *Cochran v. Schwan’s Home Service, Inc.*, it was held that 2802 requires
9 employers to always reimburse employees who are required to use personal cell phones for work-
10 related calls for a reasonable percentage of their cell phone bills. *Cochran v. Schwan’s Home Service,*
11 *Inc.* 228 Cal. App. 4th 1137, 1140 (2014).

12 Plaintiff contends that Defendant fails to reimburse the Aggrieved Employees for business
13 expenses associated with the use of their personal cell phones and maintaining their uniforms. As
14 Defendants require the Aggrieved Employees to use their personal cell phones in the discharge of their
15 duties, the Aggrieved Employees incur reimbursable electricity costs for having to charge their
16 personal cell phones at their residences and the for the payment of their monthly cell phone bill. The
17 Aggrieved Employees are also required to purchase various items as a part of their uniforms, such as
18 shirts, sweaters, and name tags, and are required to maintain uniforms and launder uniforms without
19 reimbursement. Mara Dec. ¶ 48.

20 Defendant refutes these allegations by pointing out that Defendant does, in fact, explicitly
21 authorize the reimbursement of necessary business expenses. Furthermore, Defendant claims it
22 actively discourages employees from using their personal cell phones for business purposes but
23 permits such employees to do so should they so choose for their personal convenience. Thus, any
24 employee’s use of their personal cell phone in the discharge of their duties is an individual choice, not
25 one mandated by Defendant, and would not constitute a reimbursable business expense under
26 California law. Additionally, Defendant contends that nothing the Aggrieved Employees are required
27 to purchase for their uniforms is so out of the ordinary that Defendant would bear responsibility for
28 those costs (*see Townley v. BJ’s Restaurants, Inc.* (2019) 37 Cal.App.5th 179), nor do their uniforms

1 require any special care or laundering that would prevent the Aggrieved Employees from just throwing
2 it in with the rest of their laundry. Mara Dec. ¶ 49; *see O'Connor v. Starbucks Corp.* (2008), 2008 U.S.
3 Dist. LEXIS 53877, 2008 WL 2761586 *5 (California law states employers owe duty to
4 maintain uniform if it requires special laundering or care.).

5 **g. Commission Agreement Claim**

6 Plaintiffs allege that Defendants' commission plan violates California law. Labor Code section
7 2751(a) provides, "Whenever an employer enters into a contract of employment with an employee for
8 services to be rendered within this state and the contemplated method of payment of the employee
9 involves commissions, the contract shall be in writing and shall set forth the method by which the
10 commissions shall be computed and paid." Both the employer and the employee must sign the
11 document. Cal. Lab. Code § 2751(b).

12 Defendants maintain a "Sales Incentive Plan" that provides the Aggrieved Employees with
13 commissions and/or bonuses based on sales goals and quotas reached. However, the document itself
14 does not specify "the method by which the commissions shall be computed and paid." Therefore, it
15 does not comply with § 2751. Mara Dec. ¶ 50.

16 Defendants deny these allegations and argue that the document is not silent on this point,
17 clearly points the Aggrieved Employee to where they can obtain the information concerning the
18 specific calculations of your commission and/or bonus, the products and services on which they are
19 based, and applicable sales goals and quotas, which is readily available to the Aggrieved Employees
20 at the time they are provided with the "Sales Incentive Plan." Further, Defendants point out that
21 Plaintiffs have not cited to any authority that stands for the proposition that contracts such as these
22 must explicitly state the method by which commissions are computed and paid as opposed to
23 referencing a readily obtainable outside source. Mara Dec. ¶ 51.

24 **h. Sick Pay Claims**

25 Plaintiffs further allege that Defendants maintain a sick leave policy that punishes the
26 Aggrieved Employees for using their paid sick leave. "An employer absence control policy that counts
27 sick leave taken pursuant to Section 233 as an absence that may lead to or result in discipline,
28 discharge, demotion, or suspension is a per se violation of Section 233." Cal. Lab. Code § 234;

1 *McCarther v. Pac. Telesis Grp.* (2010) 48 Cal.4th 104, 110-12.

2 Here, Defendants sick leave policy directs employees to “Follow the Dependability and
3 Attendance Policy.” This policy makes clear that Defendants expect all of its employees to be
4 dependable, and issues like excessive absenteeism will be subject to disciplinary action up to and
5 including termination of employment. Although Defendants policy provides exceptions for pre-
6 approved time off and protected leaves of absence, referencing the attendance policy with respect to
7 sick leave at the very minimum created confusion that employees could be disciplined for taking too
8 much sick leave or requesting too much sick pay (that they had earned), but at worst, was Defendants
9 intentionally discouraging the Aggrieved Employees of exercising their rights under California law.
10 Mara Dec. ¶ 52.

11 Defendants deny that their sick leave policy violates the law in any possible way. Defendants
12 policy **explicitly** exempts pre-approved time off and protected leaves of absence, like paid sick leave,
13 from its attendance policy. Defendant argues it is permitted to both have a compliant sick leave policy
14 **and** maintain an attendance policy that punishes employees for violations outside of instances
15 involving protected leaves of absence. Furthermore, Defendants contend that no employee has **ever**
16 been punished for using their earned paid sick leave, and would be able to provide numerous
17 declarations from the Aggrieved Employees stating that they did not read Defendants’ policies as
18 discouraging them from taking their paid sick leave, any PAGA trial would be unmanageable, as the
19 Court would have to ask every Aggrieved Employee how they interpreted the policies. Mara Dec. ¶
20 53.

21 **i. Manageability**

22 Defendant also argues that should litigation continue, it will bring a motion challenging the
23 manageability of trial as Defendant does not believe that this case can be tried manageably and will
24 require the testimony of every individual aggrieved employee. Furthermore, while Defendant does not
25 concede that any of its wage and hour policies are unlawful, Defendant claims that any challenges
26 Plaintiff has posed to these policies are easily refuted by how they are implemented in practice; as a
27 result, no Aggrieved Employee has suffered any damages. Mara Dec. ¶ 54.

28 Plaintiff responds by pointing out that this is a PAGA action for civil penalties on behalf of the

1 State of California, not a class action seeking redress for the individual damages suffered by class
2 members. Whereas in a class action, injury and damages must be proven, albeit on a class-wide, not
3 individualized basis - in a PAGA action, civil penalties can be assessed *even where there is no injury*
4 *suffered from an unlawful policy*. Mara Dec. ¶ 55. The California Supreme Court recently expanded
5 on this very point in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73. Relying on the
6 Court of Appeals decision in *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th
7 667, the California Supreme Court explained:

8 [D]amages and civil penalties have different purposes Damages are intended to be
9 compensatory, to make one whole. Accordingly, there must be an injury to compensate.
10 On the other hand, ‘Civil penalties, like punitive damages, are intended to punish the
11 wrongdoer and to deter future misconduct.’ **An act may be wrongful and subject to
12 civil penalties even if it does not result in injury.”**

13 *Kim*, 9 Cal.5th at 86 (citing *Raines*, 23 Cal.App.5th at 681) (emphasis added).

14 The *Kim v. Reins* Court explained its rejection of a “no injury” means “no violation” in the
15 PAGA context by contrasting PAGA and its statutory purpose with traditional suits and class actions
16 that seek damages for injuries suffered from unlawful conduct:

17 As noted, PAGA claims are different from conventional civil suits. The Legislature's
18 sole purpose in enacting PAGA was to augment the limited enforcement capability of
19 the LWDA by empowering employees to enforce the Labor Code as representatives of
20 the Agency. Accordingly, a PAGA claim is an enforcement action between the LWDA
21 and the employer, with the PAGA plaintiff acting on behalf of the government. The
22 state can deputize anyone it likes to pursue its claim, including a plaintiff who has
23 suffered no actual injury. **Moreover, civil penalties recovered on the state’s behalf
24 are intended to remediate present violations and deter future ones, *not* to redress
25 employees’ injuries.**

26 *Id.* (citations omitted) (emphasis added). Arguing, here, that Plaintiff will have to prove that
27 employees actually suffered damages consistent with Defendant’s policies is nothing different than
28 arguing that Plaintiff has to prove an unlawful policy *and* injury under it. After *Kim v. Reins*, that
position is categorically false. Whereas, in a class action, injury would have to be proven, the PAGA
action here for Defendant’s maintenance of unlawful policies is “*not to redress employees’ injuries*”
under the policy. Mara Dec. ¶ 56.

29 IV. THE PROPOSED SETTLEMENT

30 The Parties have agreed (subject to and contingent upon the Court’s approval) that this action
be settled and compromised for the non-reversionary total sum of \$1,500,000.00 (“Gross Settlement

1 Amount” or “GSA”), which includes, subject to Court approval: (a) attorneys’ fees of up to \$500,000
2 (33.33% of the GSA) to compensate PAGA Counsel for work already performed and work remaining
3 to be performed in securing Court approval and overseeing administration of the settlement; (b)
4 litigation costs not to exceed \$30,000;⁶ (c) Individual Settlement Payments to the Plaintiffs of \$10,000
5 each in consideration for Plaintiffs releasing their non-PAGA claims that could be pursued in
6 arbitration; and (d) administration fees and expenses to Rust Consulting, Inc. (“Rust”), estimated not
7 to exceed \$30,000.00.⁷

8 After all Court-approved deductions from the GSA, it is estimated that the Net Settlement
9 Amount (“NSA”) will be \$921,406.23. Any amount not used for PAGA Counsel’s litigation costs or
10 Rust’s administration fees and expenses will be added to the NSA and increase this total amount.
11 California Labor Code § 2699(i) states that “civil penalties recovered by aggrieved employees shall
12 be distributed in accordance with Labor Code § 2699 *et seq.* as follows: 75% to the LWDA for
13 enforcement of labor laws, including the administration of this part, and for education of employers
14 and employees about their rights and responsibilities under this code, to be continuously appropriated
15 to supplement and not supplant the funding to the agency for those purposes; and 25% to the aggrieved
16 employees.” Therefore, of the NSA, \$691,054.67 (75% of the NSA) will go to the LWDA and
17 \$230,351.56 (25% of the NSA) will be distributed to Aggrieved Employees.⁸

18 **a. Calculation of the Settlement Payments to the Aggrieved Employees**

19 Subject to the terms and conditions of the Settlement Agreement, the Settlement Administrator
20 will calculate and issue Individual Settlement Shares to Aggrieved Employees based on the following
21 formula:

22 The Settlement Administrator will allocate the Employee Amount⁹ to each Aggrieved
23 Employee on a pro rata basis, based on that individual’s Pay Periods divided by the
24 Total Pay Periods. See **Exhibit 1** at Paragraph 27(h).

25 One hundred percent (100%) of each Individual Share is considered to be a civil penalty. Payroll tax

26 ⁶ Actual litigation costs are currently estimated at \$20,403.77. Mara Dec. ¶ 24; Declaration of David Yeremian (“Yeremian
27 Dec.”) ¶ 14; Declaration of Kevin Barnes (“Barnes Dec.”) ¶ 12.

28 ⁷ Based upon the quote provided by Rust, Rust estimates its fees and expenses to administer this settlement will be \$28,190.
See Declaration of Andrew Meyer on behalf of Rust, at ¶ 15.

⁸ Aggrieved Employees are estimated to receive an average payment of approximately \$100.98 (\$230,351.56 25% of NSA
/ approximately 2,281 Aggrieved Employees).

⁹ “Employee Amount” means twenty-five percent (25%) of the PAGA Penalty Fund, which is to be paid to the Employees
as described herein. See **Exhibit 1** at Paragraph 8.

1 withholdings and deductions will not be withheld from these Individual Settlement Shares. Each
2 Individual Settlement Share will be reported on IRS 1099 Forms.

3 **b. Funding and Disbursement**

4 No later than ten (10) calendar days after the Effective Date¹⁰, Defendants' counsel will email
5 to the Settlement Administrator an electronic spreadsheet containing, for each Employee, his, her, or
6 their name, last-known address, last-known telephone number, social security number, dates of
7 employment, and number of Pay Periods from March 12, 2018, through April 9, 2021, and through
8 the date of approval as reflected in Defendants' personnel database. Promptly after receiving the
9 spreadsheet and prior to mailing any payments to the Aggrieved Employees, the Settlement
10 Administrator will run the Aggrieved Employees' addresses through the U.S. Postal Service's
11 National Change of Address database for information to update and correct any known or identifiable
12 address changes. *See Exhibit 1* at Paragraph 27(a).

13 Promptly thereafter, but no later than forty-five (45) calendar days after the Effective Date,
14 Defendants will wire the Initial Payment¹¹ amount to the Settlement Administrator. *See Exhibit 1* at
15 Paragraph 27(b). No later than sixty (60) calendar days after the Effective Date, the Settlement
16 Administrator will pay: (1) payments to Aggrieved Employees from the Employee Amount for civil
17 penalties; (2) the Individual Settlement Payments to Plaintiffs; (3) the awarded attorney's fees and
18 costs to Plaintiffs' Counsel; and (4) the awarded Settlement Administrator costs to the Settlement
19 Administrator. *See Exhibit 1* at Paragraph 27(c).

20 No later than three hundred fifty (350) calendar days after the Effective Date, Defendants will
21 wire the Secondary Payment¹² to the Settlement Administrator. *See Exhibit 1* at Paragraph 27(d). No
22 later than three hundred sixty-five (365) calendar days after the Effective Date, the Settlement
23 Administrator will pay the Secondary Payment to the LWDA. *See Exhibit 1* at Paragraph 27(e).

24 No later than sixty (60) days after the Effective Date, the Settlement Administrator will mail a
25 settlement check, along with a letter (a sample of which is attached to **Exhibit 1** as **Exhibit A**)
26

27 ¹⁰ "Effective Date" means the date the court approves this Settlement. *See Exhibit 1* at Paragraph 7.

28 ¹¹ "Initial Payment" means payment of PAGA penalties to the Aggrieved Employees, Individual Settlement Payments, attorney's fees and costs, and Settlement Administrator costs.

¹² "Secondary Payment" means payment of PAGA penalties to the LWDA, which shall be seventy-five percent (75%) of the PAGA Penalty Fund.

1 explaining the settlement payment, to each Aggrieved Employee. If any settlement check is returned
2 as undeliverable, the Settlement Administrator will use reasonable skip-trace methods to locate a new
3 address. *See Exhibit 1* at Paragraph 27(i).

4 **c. Uncashed or Undeliverable Checks**

5 If any Aggrieved Employees does not cash his, her, or their settlement check after 180 days
6 has lapsed after the Effective Date, those funds will be deposited with Legal Aid at Work, the agreed
7 upon cy pres beneficiary. The core of LAAW's work is providing free legal services to low-wage
8 workers with employment law claims. *See Declaration of Joan Graff on behalf of Legal Aid at Work.*
9 No residual will revert to Defendants under any circumstance. *See Exhibit 1* at Paragraph 27(i).

10 **d. Release of Claims**

11 Upon the Effective Date, Plaintiffs, the State of California, and all the Aggrieved Employees,
12 fully release and discharge Defendants, and each of their officers, directors, employees, agents,
13 shareholders, parents, subsidiaries, insurers, representatives, successors, assigns, and attorneys
14 ("Releasees") from any and all claims, rights, or causes of action for civil penalties, attorney's fees,
15 and costs under California Labor Code sections 2698, et seq. predicated on the alleged California
16 Labor Code violations (including California Labor Code §§ 201, 202, 203, 204, 210, 221, 226, 226.3,
17 226.7, 233, 234, 246, 246.5, 510, 512, 558, 558.1, 1174, 1174.5, 1182.12, 1185, 1194, 1194.2, 1197,
18 1197.1, 1198, 1199, 2751, and 2802) either: (i) asserted in the Consolidated Complaint, or (ii) arising
19 from, or derivative of, the claims or allegations asserted in the Plaintiffs' written notices to the LWDA,
20 complaints, and Consolidated Complaint ("Released Claims"). The Released Claims include all claims
21 for penalties, attorney's fees, litigation costs, interest, and any other relief available under PAGA as
22 well as claims under the Industrial Welfare Commission Wage Orders or other regulations or
23 provisions of law Plaintiffs allege in the Consolidated Complaint or alleged in their respective PAGA
24 notices. The period of this Release shall be for the PAGA Recovery Period. The res judicata effect of
25 the Judgment will be the same as that of the Release. This waiver and release will be final and binding
26 on the Effective Date and will have every preclusive effect permitted by law. *See Exhibit 1* at
27 Paragraph 28(a).

1 **V. THE COURT SHOULD APPROVE THE SETTLEMENT**

2 The PAGA allows for the private enforcement of certain California Labor Code sections
3 relating to wage and hour violations. The settlement of a PAGA action requires court approval
4 pursuant to the operative PAGA statute, which states that a superior court shall review and approve
5 the settlement of any civil action filed pursuant to the PAGA. *See* Cal. Lab. Code § 2699(1)(2).
6 However, as explained in *Arias v. Superior Court* (2009) 46 Cal.4th 969, the Parties are not obligated
7 to follow the class action procedural rules in PAGA cases and therefore need not obtain approval of
8 the PAGA settlement through a motion for preliminary or final approval. The only requirement placed
9 on settling parties under California Labor Code § 2699(1)(2) is that the proposed settlement must be
10 submitted to the LWDA at the same time it is filed with the Court. Cal. Lab. Code § 2699(1)(2). As
11 noted above, Plaintiff already provided the Parties' Settlement Agreement to the LWDA. Other than
12 this requirement, the PAGA does not set forth any standards by which the Court must conduct its
13 review of the Settlement Agreement. *See Id.*

14 In evaluating the adequacy of the settlement amount, a court is not concerned with the amount
15 the aggrieved employees are to receive, but rather, a court must focus on the total settlement amount
16 in achieving PAGA's objective. Indeed, "[t]he remedy sought in a PAGA suit consists of civil
17 penalties, not individual or class damages." *Mendez v. Tween Brands, Inc.* (E.D. Cal. July 1, 2010)
18 2010 WL 2650571 *4. "Unlike class actions, these civil penalties are not meant to compensate
19 unnamed employees because the action is fundamentally a law enforcement action." *Ochoa-*
20 *Hernandez v. Cjaders Foods, Inc.* (N.D. Cal. April 2, 2010) 2010 WL 1340777 *4. Moreover, a court
21 must not lose sight of the fact that "[u]nlike a class action seeking damages or injunctive relief for
22 injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for
23 the government that otherwise may not have been assessed and collected by overburdened state
24 enforcement agencies." *Id.*

25 As with any settlement, a court must be mindful in conducting its inquiry that "[s]ettlement is
26 a compromise, which balances the possible recovery against the risks inherent in litigating further."
27 *See In re TD Ameritrade Account Holder Litig.* (N.D. Cal. Sept. 12, 2011) 2011 U.S. Dist. LEXIS
28 103222, *24. Indeed, "the very essence of a settlement is ... 'a yielding of absolutes and an abandoning

1 of highest hopes” [*Officers for Justice v. Civil Service Com.* (9th Cir. 1982) 688 F.2d 615, 624], as
2 “it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation
3 that induce consensual settlements.” *Id.* at 625.

4 In analyzing PAGA settlements, it is important that “the relief provided for under the PAGA
5 be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the
6 public[.]” *O’Connor v. Uber Techs., Inc.* (N.D. Cal. Aug. 18, 2016) 201 F.Supp.3d 1110, 1133. The
7 court in *O’Connor* suggests that courts can look at the factors outlined in *Hanlon v. Chrysler Corp.*
8 (9th Cir. 1998) 150 F.3d 1011, in evaluating a PAGA settlement. *See O’Connor*, 201 F.Supp.3d at
9 1134.

10 Under *Hanlon*, a court must conclude that a settlement is “fundamentally fair, adequate, and
11 reasonable” before it approves of the settlement. *Hanlon*, 150 F.3d at 1026. The analysis in *Hanlon* is
12 typically used in federal district courts to evaluate proposed class action settlements. In California
13 state courts, settlements are more typically evaluated under the standards set forth in the cases *Dunk*
14 *v. Ford Motor Co.* (“*Dunk*”) (1996) 48 Cal.App.4th 1794, and *Kullar v. Foot Locker Retail, Inc.*
15 (“*Kullar*”) (2008) 168 Cal.App.4th 116. Similar to *Hanlon*, *Dunk* found that in deciding whether to
16 approve a proposed class action settlement under California Code of Civil Procedure § 382, the Court
17 must find that a proposed settlement is “fair, adequate and reasonable.” *Dunk*, 48 Cal.App.4th at 1801.

18 A proposed settlement is presumed fair under the following circumstances: (1) the parties
19 reached settlement after arms-length negotiations; (2) investigation and discovery were sufficient to
20 allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and
21 (4) the percentage of objectors is small. *Dunk*, 48 Cal.App.4th at 1802. Here, as will be shown herein,
22 all of these elements bearing on the fairness of the proposed settlement—with the exception of the
23 percentage of objectors, which is not applicable in a PAGA action¹³—are present.

24 *Kullar* instructs that an understanding of the amount in controversy is an important factor into
25 whether the settlement “of the class members’ claims is reasonable in light of the strengths and
26 weaknesses of the claims and the risks of the particular litigation.” *Kullar v. Foot Locker Retail, Inc.*

27 ¹³ The PAGA provides no notice or claim procedures. Therefore, objections, other than the potential objection of the
28 LWDA, are not contemplated in PAGA actions. *See Baumann v. Chase Inv. Servs. Corp.* (2014) 747 F.3d 1117, 1122
 (“Unlike *Rule 23(c)(2)*, PAGA has no notice requirements for unnamed aggrieved employees, nor may such employees
 opt out of a PAGA action.”).

(2008) 168 Cal.App.4th 116, 129; *see also* *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409. The most important factor in this regard is “the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.” *Id.* In weighing the strength of the plaintiff’s case, *Kullar* instructs that the court is not to “decide the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the attorneys.” *Kullar*, 168 Cal.App.4th at 133.

a. The Settlement is Fair, Reasonable, and Adequate

i. The Settlement was Reached as a Result of Arm’s Length Negotiations

The settlement was reached as a result of arm’s-length negotiations. Though cordial and professional, the settlement negotiations have been, at all times, adversarial and non-collusive in nature. At the mediation and in the discussions that followed, counsel for the Parties conducted extensive arm’s length settlement negotiations until the settlement was reached. Mara Dec. ¶ 57.

ii. The Settlement is the Result of Thorough Investigation and Discovery

The Parties thoroughly investigated and evaluated the factual strengths and weaknesses before reaching the proposed settlement, and engaged in sufficient investigation, research and discovery to support the settlement. The significant amount of discovery, the production and analysis of hundreds of documents and thousands of lines of data, and protracted settlement negotiations through the mediations and in the discussions that followed were the substantial bases upon which the Parties’ “clear view of the strengths and weaknesses of their cases” was made possible. *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 617; Mara Dec. ¶ 58.

iii. Counsel for Both Parties are Experienced in Similar Litigation

Both Plaintiffs’ Counsel and Defendants’ Counsel are particularly experienced in wage and hour actions. Plaintiffs’ counsel has significant experience in litigating unpaid wages, unprovided meal and rest periods, misclassification, overtime, and expense reimbursement class actions. Mara Dec. ¶¶ 2-17; Yeremian Dec. ¶¶ 4-9; Barnes Dec. ¶¶ 2-8; Sansanowicz Dec. ¶¶ 2-14.

Plaintiffs’ counsel has prosecuted numerous cases on behalf of employees for California Labor Code violations and PAGA violations and thus are experienced and qualified to evaluate the claims here and to evaluate settlement versus trial on a fully informed basis, and to evaluate the viability of

1 Defendants' defenses. Mara Dec. ¶¶ 2-17; Yeremian Dec. ¶¶ 4-9; Barnes Dec. ¶¶ 2-8; Sansanowicz
2 Dec. ¶¶ 2-14. This experience instructed Plaintiffs' counsel on the risks and uncertainties of further
3 litigation and guided their determination to endorse the proposed settlement. Defendants' Counsel
4 practices labor and employment law extensively and have represented numerous employers in
5 California in similar types of litigation. Accordingly, both Parties' counsel are experienced in wage
6 and hour employment law and PAGA actions.

7 **iv. The Proposed Settlement is a Reasonable Compromise of Claims**

8 An understanding of the amount in controversy is an important factor into whether the
9 settlement of the Aggrieved Employees' "claims is reasonable in light of the strengths and weaknesses
10 of the claims and the risks of the particular litigation." *Kullar*, 168 Cal.App.4th 116, 129; *see also*
11 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 409. The most
12 important factor in this regard is "the strength of the case for plaintiffs on the merits, balanced against
13 the amount offered in settlement." *Id.*

14 In weighing the strength of the plaintiff's case, *Kullar* instructs that the court is not to "decide
15 the merits of the case or to substitute its evaluation of the most appropriate settlement for that of the
16 attorneys." *Kullar*, 168 Cal.App.4th at 133. Finally, *Kullar* does not require an explicit statement of
17 the maximum amount the Aggrieved Employees could recover if it prevailed on all its claims, provided
18 there is a record which allows "an understanding of the amount that is in controversy and the realistic
19 range of outcomes of the litigation." *Munoz*, 186 Cal.App.4th at 409. Put differently, "as the court
20 does when it approves a settlement as in good faith under *Code of Civil Procedure* section 877.6, the
21 court must at least satisfy itself that the [PAGA] settlement is within the 'ballpark' of reasonableness."
22 *Kullar*, 168 Cal.App.4th at 133, citing *Tech-Bilt v. Woodward-Clyde & Associates* (1985) 38 Cal.3d
23 488, 499-500.

24 As the following subsections show, the Parties' investigation and discovery revealed a healthy
25 discount was needed in order to reach a settlement.

26 **1. The Settlement is Fair and Reasonable Based on the Strengths 27 of Plaintiff's Case and the Risks and Costs of Further Litigation**

28 Based upon the data provided by Defendants prior to mediation, Plaintiffs had determined that
there were approximately 2,281 Aggrieved Employees who worked approximately 67,751 pay periods

1 from March 12, 2018, through April 9, 2021.¹⁴ Mara Dec. ¶ 59.

2 Plaintiffs’ claims put approximately ten (10) potential violations at issue under § 2699(f)(2) –
3 failure to provide lawful meal breaks or pay a premium (California Labor Code § 512), failure to
4 provide lawful rest breaks or pay a premium (California Labor Code § 226.7), failure to pay minimum
5 wage (California Labor Code § 1194), failure to pay overtime (California Labor Code § 510), failure
6 to pay for failure to provide accurate itemized wage statements (California Labor Code § 226), failure
7 to pay wages at the time of termination (California Labor Code § 203)¹⁵, failure to reimburse business
8 expenses (California Labor Code § 2802), failure to pay all wages due each pay period (California
9 Labor Code § 204)¹⁶, failure to adopt a compliant commission agreement (California Labor Code §
10 2751), and failure to adopt a complaint sick leave policy (California Labor Code § 233) – of the Labor
11 Code sections which give rise to PAGA penalties.

12 The PAGA allows the private enforcement of certain California Labor Code sections relating
13 to wage and hour violations. PAGA Section 2699(f)(2) reads, in part, as follows:

14 [T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay
15 period for the initial violation and two hundred dollars (\$200) for each aggrieved
employee per pay period for each subsequent violation.

16 California courts have interpreted this language to require notice to the employer that an initial
17 violation occurred before penalties for subsequent violations could be assessed. *See Amaral v. Cintas*
18 *Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1210. Under *Amaral*, “subsequent” has a special meaning
19 within the California Labor Code that triggers heightened statutory penalties only after an employer
20 has learned that its conduct violates the Labor Code—that is, pursuant to *Amaral*, courts may reject a
21 purely chronological understanding of the term “subsequent” and interpret its use in California Labor
22 Code to require that “the employer has been notified that it is violated a Labor Code provision” before
23 higher penalties are triggered. *Amaral*, 163 Cal.App.4th at 1157, 1207–09. Thus, Defendant’s

24 ¹⁴ Defendants certify that the number of pay periods for all Aggrieved Employees from March 12, 2018, through April 9,
25 2021, is 67,751 (the “Certified Pay Period Amount”). If the actual number of pay periods for all Aggrieved Employees
26 from March 12, 2018, through April 9, 2021 should exceed the Certified Pay Period Amount by more than five percent
27 (5%), such that the total number of pay periods through April 9, 2021 submitted to the Claims Administrator exceeds
71,140 pay periods, Plaintiffs in their sole discretion shall be able to void this Agreement. *See Exhibit 1* at Paragraph
27(f).

28 ¹⁵ This claim is derivative of Plaintiffs’ claims for failure to pay minimum wage, failure to pay overtime, and failure to
provide meal and rest periods.

¹⁶ This claim is derivative of Plaintiffs’ claims for failure to pay minimum wage, failure to pay overtime, and failure to
provide meal and rest periods.

1 **maximum** exposure under §2699(f)(2) is \$52,201,400:

2 \$100 x 1 PAGA Violation of Labor Code § 1194 x 67,751 pay periods = \$6,775,100

3 \$100 x 1 PAGA Violation of Labor Code § 510 x 13,188¹⁷ pay periods = \$1,318,800

4 \$100 x 1 PAGA Violation of Labor Code § 512 x 34,162 pay periods¹⁸ = \$3,416,200

5 \$100 x 1 PAGA Violation of Labor Code § 226.7 x 66,603 pay periods¹⁹ = \$6,660,300

6 \$100 x 1 PAGA Violation of Labor Code § 204 x 67,751 pay periods = \$6,775,100

7 \$100 x 1 PAGA Violation of Labor Code § 226 x 67,751 pay periods = \$6,775,100

8 \$100 x 1 PAGA Violation of Labor Code § 203 x 1,555 former employees = \$155,500

9 \$100 x 1 PAGA Violation of Labor Code § 2802 x 67,751 pay periods = \$6,775,100

10 \$100 x 1 PAGA Violation of Labor Code § 2751 x 67,751 pay periods = \$6,775,100

11 \$100 x 1 PAGA Violation of Labor Code § 233 x 67,751 pay periods = \$6,775,100

12 Maximum Exposure= \$52,201,400

13 Mara Dec. ¶ 60.

14 In exploring the settlement of any PAGA action, the critical fact that the Court is permitted
15 discretion to award a “lesser amount than the maximum penalty amount” must be heavily taken into
16 consideration. *Lab. Code*. § (e)(2). Unlike the underlying violations upon which the Plaintiffs seek to
17 impose PAGA civil penalties, there is no set amount the Court must levy on an employer Defendant
18 it finds to have violated the underlying claims. Under “the facts and circumstances of the particular
19 case,” the Court is permitted wide discretion to slash civil penalty amounts. This discretion and how
20 a particular court will exercise it is always an unknown variable in predicting the dollar outcome of
21 any PAGA action when evaluating settlement. Under its wide discretion to award lesser amounts, a
22 Court could side with the PAGA Plaintiffs’ claim and proof that the underlying Labor Code rights
23 were violated but decide to substantially moderate the imposition of PAGA penalties for those
24 violations. Mara Dec. ¶ 61.

25 Courts have used this discretion to massively discount PAGA penalties imposed where it found

27 ¹⁷ Plaintiffs’ expert identified 13,188 pay periods in which the company failed to pay the proper regular rate of pay
affecting overtime premium wages.

28 ¹⁸ Plaintiffs’ expert identified 34,162 pay periods in which Defendants’ records evidenced noncompliant meal periods.

¹⁹ Plaintiffs’ expert identified 66,603 pay periods in which Defendants’ records contained shifts exceeding 3.5 hours,
triggering the requirement that a rest period be provided during that shift.

1 the Defendant employer took its Labor Code obligations seriously, even if the employer fell short of
2 complying with them. In *Thurman v. Bayshore Transit Management, Inc.* (“*Thurman*”) (2012) 203
3 Cal. App. 4th 1112, the court determined that an award of the maximum penalty allowed may be unjust
4 in circumstances outside of when a defendant cannot afford to pay the maximum amount. *Thurman v.*
5 *Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135-1136. The *Thurman* court
6 found that penalties may be reduced when a defendant has taken its obligations to comply with the
7 law seriously. *Id.* In *Kaanaana v. Barrett Business Services, Inc.* (2018) 29 Cal.App.5th 778, 788 &
8 809, the Court of Appeals took no issue with the trial court exercising its discretion in slashing PAGA
9 civil penalties for violations of Labor Code section 512 to 13% of the total recoverable penalties. In
10 *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504, the plaintiff requested penalties in excess of \$70
11 million, based on a \$25 to \$75 penalty per violation. The court reduced the award, stating that awarding
12 the maximum penalty would be unjust, arbitrary, and oppressive based on Starbuck’s good faith
13 attempts to comply with the law. The lower court’s reduced award of \$150,000 was affirmed on
14 appeal, which reflects .2% of the total recoverable penalties sought.²⁰

15 Thus, the projected value of PAGA claims is a variable value of two predictive indexes: 1) the
16 likelihood that Plaintiff will succeed in proving the underlying claims were violated, and 2) the extent
17 to which the Court will impose Civil Penalties permitted under PAGA. This is to be distinguished
18 from the projected values of class claims of Labor Code and Wage Order violations. For instance, and
19 relevant to the underlying claims in this action, class claims alleging California’s meal and rest break,
20 minimum wage, and wage statement laws were violated, the predictive value for purposes of
21 determining whether settlement values are fair and reasonable rests only on the likelihood of prevailing
22 on the merits and the exposure related thereto, as there is no judicial discretion to award lesser amounts
23 owed for adjudged violations. It is for these reasons that, in assessing and judging the reasonableness
24 of PAGA settlements, the touchstone feature is the “remedial purpose” achieved in the settlement
25 amount, which takes into account the defendant employer’s “good faith” belief that it complied with
26 the laws claimed to be violated. *Bernstein*, 365 F.Supp. 3d at 991.

27 ²⁰ These instances of judicial discretion imposing massive reductions in recoverable penalties is to be contrasted with
28 *Bernstein v. Virgin Am., Inc.* (N.D. Cal. 2019) 365 F.Supp. 3d 980, 992, where the trial court reduced the recoverable
PAGA penalties by only 25%. *Bernstein*, however, only amplifies the predictive blind spot of how a court can exercise its
wide-discretion to reduce full PAGA exposure.

1 Based on this blind spot of how the Court would exercise its discretion in addition to the
2 likelihood the Court would side with Plaintiffs on the underlying Labor Code violations, Plaintiffs
3 necessarily and substantially had to discount the settlement value off of the full PAGA penalty
4 amounts. As discussed earlier, Defendants argue its meal and rest policies and practices track the Labor
5 Code and Wage Order requirements and the standards articulated in *Brinker* and *Augustus*. Likewise,
6 Defendants argue it pays its employees for all time worked and has policies strictly prohibiting off-
7 the-clock work of any kind. Further, Defendants argue it maintains a uniform policy and practice of
8 reimbursing employees for business expenses, maintains a complaint sick leave policy, and maintains
9 a lawful commission agreement. Thus, even if Defendants were proven wrong on these fronts and
10 ultimately found to have violated the underlying Labor Code claims, the court could find a good faith
11 reliance on *Brinker*, *Augustus*, and other governing authorities justifiably instructed Defendants'
12 actions and thereby impose a massive reduction of PAGA penalties akin to the Courts in *Kaanaana*
13 and *Carrington*. Mara Dec. ¶ 62.

14 Using the recent appellate decisions in *Kaanaana* and *Carrington* as a gauge of potential
15 reduction of PAGA penalties in the event Plaintiffs were to prevail on proving violation of the
16 underlying claims for meal/rest breaks, unpaid wages, and reimbursement of business expenses,
17 Plaintiffs factored in an average of the reductions in those two cases in valuing the likely extent of
18 PAGA exposure here, or 6.6% total PAGA exposure (*Kaanaana* – 13% and *Carrington* .2% divided
19 by two equals 6.6%). Based on the 67,751 estimated pay periods involved at mediation, a realistic
20 exposure for PAGA penalties if Plaintiffs prevailed on the merits of proving underlying violations and
21 after the Court's reduction would be \$3,445,292. Mara Dec. ¶ 63.

22 Good faith settlement negotiations, after considerable discovery, investigation, and litigation,
23 necessarily had to focus on amounts far less than that realistic exposure. The proposed PAGA
24 settlement here of \$1,500,000, which takes into account the realistic exposure, the very real
25 impediments of succeeding on the merits, the risk of further litigation, and, even if Plaintiffs succeeded
26 on the merits, persuading against an even more robust discount than the average used here, reflects an
27 appropriate, balanced, and reasonable settlement value of the PAGA claims. The settlement amount is
28 43.5% of the realistic value of the claims and fits squarely within the “remedial purpose” of PAGA of

enforcing compliance with important employee protections in the Labor Code and Wage Order.²¹

b. The Court Should Approve the Requested Attorneys' Fees and Costs

The PAGA provides that any employee who prevails is entitled to an award of reasonable attorneys' fees and costs. Cal. Lab. Code § 2699(g)(1). The PAGA statute provides for approval of the settlement but does not specifically provide that the amount or reasonableness of attorneys' fees and costs is subject to court approval. Cal. Lab. Code §§ 2699(g)(1) and (l)(2). A reasonable interpretation of the PAGA is that the amount of attorneys' fees need only be addressed by a court when the LWDA objects because there is no need to provide absent employees' due process rights in a PAGA settlement since the aggrieved employees do not have their own substantive rights. *See Sakkab v. Luxottica Retail North America, Inc.* (9th Cir. 2015) 803 F.3d 425, 436. And, the LWDA, as the real party in interest and the primary beneficiary of the settlement, has an opportunity to review the settlement before it is approved. Cal. Lab. Code § 2699(l)(2). Unlike a class action, where the purpose of court approval is to protect absent class members, in a PAGA settlement the real party in interest, the LWDA, has the opportunity to review and consider the reasonableness of the fees and object before the court hears the approval motion. If a court considers the reasonableness of the attorneys' fees requested, it should be guided by the common fund doctrine typically applied in class action cases.

i. The Requested Attorneys' Fee and Cost Award is Within the Range of Fees Approved in Comparable Common Fund Cases

California state and federal courts have recognized that an appropriate method for determining an award of attorneys' fees is based on a percentage of the total value of benefits to class members by a settlement, also known as the "common fund" method. *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 (*Serrano III*); *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478; *Vincent v. Hughes Air West, Inc.* (9th Cir. 1977) 557 F.2d 759, 769. "Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27 [*"Lealao"*]; *Dunk*, 48 Cal. App. 4th at 1808 (the percentage method calculates attorney fees as a reasonable percentage of the common fund and may be used where the amount of the settlement is a certain or easily calculable sum of money). The purpose of the common fund/percentage approach is to "spread

²¹ Mara Dec. ¶ 64. In addition, it should be noted that the LWDA has been provided with a copy of the Parties' Settlement Agreement. To date, the LWDA has not expressed concern about the amount of the settlement.

1 litigation costs proportionally among all the beneficiaries so that the active beneficiary does not bear
2 the entire burden alone.” *Vincent*, 557 F.2d at 769. *In Quinn v. State of California* (1995) 15 Cal.3d
3 162, 167, the Court stated: “[O]ne who expends attorneys’ fees in winning a suit which creates a fund
4 from which others derive benefits may require those passive beneficiaries to bear a fair share of the
5 litigation costs.”

6 Similarly, in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, the
7 California Supreme Court recognized that the common fund doctrine has been applied “consistently
8 in California when an action brought by one party creates a fund in which other persons are entitled
9 to share.” The reasons for applying the common fund doctrine include: “...fairness to the successful
10 litigant, who might otherwise receive no benefit because his recovery might be consumed by the
11 expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the
12 fund and who should bear their share of the burden of its recovery; encouragement of the attorney for
13 the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation
14 for the protection or recovery of the fund if he is assured that he will be properly and directly
15 compensated should his efforts be successful.” *Id.*

16 Assessing an appropriate fee based on a percentage of the fund involves taking into account
17 “all of the circumstances of the case.” There is sparse case law addressing the evaluation of reasonable
18 attorneys’ fees in employee representative or class actions as appellate cases addressing fees arise
19 almost exclusively where awards were challenged by defendants or objectors – the only parties with
20 standing to appeal. *Wershba*, 91 Cal.App.4th at 236. Several studies of class action fee awards have
21 found that the median common fund fee award is approximately one-third of the total settlement fund.
22 *See, e.g., Chavez v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 66, n.11 (numerous studies have shown
23 that “fee awards in class actions average around one-third of the recovery.”); Reagan W. Silber and
24 Frank E. Goodrich, *Common Funds and Common Problems: Fee Objections and Class Counsel’s*
25 *Response*, 17 Rev. Litig. 525, 546 ; T. Willging, L. Hooper and R. Niemic, *Empirical Study of Class*
26 *Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 90
27 (1996) (finding that attorneys’ fees in class litigation “were generally in the traditional range of
28 approximately one-third of the total settlement”).

1 Here, PAGA Counsel applies for an award of attorneys' fees in the sum of \$500,000 (which is
2 33.33% of the GSA). The requested fee falls in the mid-range of percentage class fee awards, which
3 commonly range from 20% to 50% of a common fund, and constitutes fair compensation for
4 undertaking complex, risky, expensive, and time-consuming litigation on a contingent basis and
5 compensates PAGA Counsel for their efforts, as well as the result achieved for the benefit of the State
6 of California and the Aggrieved Employees. *Mara Dec.* ¶ 65.

7 Numerous state and federal courts in California routinely approve fee requests equal to or
8 greater than 33% of the common fund. In short, PAGA Counsel's fee request of \$500,000 is in line
9 with awards in California and nationwide and demonstrates that PAGA Counsel's fee request is
10 consistent with market rates and is reasonable.

11 **ii. A Lodestar Cross-Check with a Modest Multiplier Confirms the Reasonableness of the Requested Fee**

12 PAGA Counsel's fee request is reasonable when calculated using the lodestar method. Under
13 the lodestar method, a base fee amount is calculated from a compilation of time reasonably spent on
14 the case and the reasonable hourly compensation of the attorney. *Serrano v. Priest* (1977) 20 Cal. 3d
15 25, 48. The court then enhances this lodestar figure by a "multiplier" to account for a range of factors,
16 such as the novelty and difficulty of the case, its contingent nature, and the degree of success achieved.
17 *Id.* at 49; *see also Ketchum v. Moses* (2001) Cal.4th 1122, 1132-36; *PLCM Group, Inc. v. Drexler*
18 (2000) 22 Cal.4th 1084, 1096; *Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 834, ("[t]here
19 is no ... rule limiting the factors that may justify an exercise of judicial discretion to [adjust the]
20 lodestar").

21 Courts "routinely enhance[] the lodestar to reflect the risk of non-payment in common fund
22 cases." *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051; *Graham v. DaimlerChrysler*
23 *Corp.* (2004) 34 Cal.4th 553, 579 ("One of the most common fee enhancers [...] is for contingency
24 risk.") Such an enhancement "mirrors the established practice in the private legal market of rewarding
25 attorneys' fees for taking the risk of nonpayment by paying them a premium over their normal hourly
26 rates for winning contingency cases." *Vizcaino*, 220 F.3d at 1051. A risk multiplier also serves to bring
27 the financial incentives for enforcing important rights "into line with incentives [attorneys] have to
28 undertake claims for which they are paid on a fee-for-service basis." *Ketchum*, 24 Cal.4th at 1132. In
determining whether or not to enhance or reduce the lodestar, California courts take into account

1 multiple factors, including: the time and labor required; the skill requisite to perform the legal services
2 properly; the preclusion of other employment by the attorney due to the acceptance of the case; the
3 contingent nature of the fee; the amount involved and results obtained; the experience, reputation, and
4 ability of the attorney; and awards in similar cases. *Cates v. Chiang* (2013) 213 Cal. App. 4th 791,
5 822.

6 PAGA Counsel has worked 578.6 hours to date on this case and have calculated the lodestar
7 fee on those hours at \$398,174 at rates reflecting those currently earned in the marketplace, which
8 would require a modest 1.26 multiplier. Mara Dec. ¶¶ 18-23, 66; **Exhibit 2**, Summary of Time and
9 Costs; Yeremian Dec. ¶ 11; **Exhibit 1**, Time and Task Summary; Declaration of Roman Shkodnik
10 “Shkodnik Dec.” ¶ 5; **Exhibit 1**, Time and Task Summary; Barnes Dec. ¶ 11; **Exhibit 1** Itemization
11 of Hours; Sansanowicz Dec. ¶ 25; **Exhibit 5** Timesheet. All of the work and tasks performed by PAGA
12 Counsel were reasonable and necessary to the prosecution of this case and are reflected in the result
13 achieved. Mara Dec. ¶¶ 18-23, 67; Yeremian Dec. ¶ 12; Barnes Dec. ¶ 11; Sansanowicz Dec. ¶ 25.

14 Courts “routinely enhance[] the lodestar to reflect the risk of non-payment in common fund
15 cases.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002); *Graham v. DaimlerChrysler*
16 *Corp.*, 34 Cal.4th 553, 579 (2004) (“One of the most common fee enhancers [...] is for contingency
17 risk.”) Such an enhancement “mirrors the established practice in the private legal market of rewarding
18 attorneys’ fees for taking the risk of nonpayment by paying them a premium over their normal hourly
19 rates for winning contingency cases.” *Vizcaino*, 220 F.3d at 1051. A risk multiplier also serves to bring
20 the financial incentives for enforcing important rights “into line with incentives [attorneys] have to
21 undertake claims for which they are paid on a fee-for-service basis.” *Ketchum*, 24 Cal.4th at 1132. In
22 determining whether or not to enhance or reduce the lodestar, California courts take into account
23 multiple factors, including: the time and labor required; the skill requisite to perform the legal services
24 properly; the preclusion of other employment by the attorney due to the acceptance of the case; the
25 contingent nature of the fee; the amount involve and results obtained; the experience, reputation, and
26 ability of the attorney; and awards in similar cases. *Cates v. Chiang* (2013) 213 Cal. App. 4th 791,
27 822.

28 As discussed above, this was a highly-contested matter which required a significant amount of

1 time and labor. PAGA Counsel had to investigate and analyze hundreds of pages of documents and
2 thousands of lines of data. In addition, PAGA Counsel had to marshal the evidence in a manner in
3 which it could be adjudicated manageably on behalf of all the Aggrieved Employees, an endeavor
4 which cannot be underscored. So often, lawyers unskilled in PAGA wage and hour cases do not pay
5 attention to or put the work into how the evidence must be presented for adjudication on a
6 representative basis. Strong PAGA cases perish in the hands of inexperienced counsel because the
7 case has not been worked up to succeed in demonstrating manageability. PAGA Counsel here has
8 considerable experience in PAGA litigation and, from the beginning of the case, is marshalling the
9 evidence with a sharp focus on representative proof needed for the matter to make it to trial. This case
10 was no different. Throughout the matter, as evidence was being gathered through documents and
11 witness interviews, Plaintiff were reducing the data to a “living trial plan.” This filtering of voluminous
12 evidence into representative proof while keeping an eye on the merits of the litigation resulted in a
13 considerable amount of attorney time and skill. Mara Dec. ¶ 68.

14 Most importantly, all services were performed by PAGA Counsel on a contingent basis. Both
15 California and federal courts recognize that attorneys should be compensated for taking on such
16 contingent risks and provided with financial incentives to enforce important rights and protections like
17 those at issue in this case. See, e.g., *Vizcaino*, 290 F.3d at 1051; *Ketchum*, 24 Cal.4th at 1132-33. Here,
18 PAGA Counsel bore the risk that, in spite of all of their efforts and skill employed, there may be no
19 recovery. Thus, a risk multiplier is appropriate. Mara Dec. ¶ 69.

20 PAGA Counsel respectfully requests a fee of \$500,000, which, based on the total attorney
21 hours expended and rates, would require a modest 1.26 multiplier to raise the generated fees of
22 \$398,174 to the requested amount. Far greater multipliers have been awarded in similar cases, and the
23 total amount of fees sought by PAGA Counsel is also reasonable compared to fees awarded in like
24 cases. Courts routinely enhance lodestar amounts based on multipliers that “range from 2 to 4 or even
25 higher.”²² Thus, consideration of the lodestar method as a cross-check to the percentage figure sought

26
27 ²² *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 255 (2001); see, e.g., *Vizcaino*, 290 F.3d at
28 1051 (approving multiplier of 3.65); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d
Cir. 2005) (approving multiplier of 3.5); *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113,
1125 (C.D. Cal. 2008) (awarding multiplier of 5.2 and collecting cases with cross-check multipliers
ranging from 4.5 to 19.6); *Glendora Community Redevelopment Agency v. Demeter*, 155 Cal.App.3d

1 strongly supports the reasonableness of the requested fee award. PAGA Counsel moves for and
2 respectfully requests that the Court grant attorneys' fees in the amount of \$500,000.

3 **iii. PAGA Counsel's Hourly Rates are Reasonable**

4 PAGA Counsel's hourly rates are between \$450 and \$795 and are in line with rates typically
5 approved in wage and hour class action and PAGA litigation and which rates have been approved by
6 Courts in California in the Los Angeles, Sacramento, San Francisco, Alameda, Orange and San Diego
7 County Superior Courts. Mara Dec. ¶ 70; **Exhibit 8**, Westlaw Court Express's Legal Billing Report,
8 Volume 14, Number 3, California Region for December 2012; **Exhibit 9**, 2014 Declaration of Richard
9 M. Pearl in *Hohnbaum v. Brinker Restaurant Corp.* SDSC GIC834348; **Exhibit 10**, 2012 National
10 Law Journal Survey of Hourly Billing Rates for Partners and Associates); Yeremian Dec. ¶ 12;
11 **Exhibit 2**; Barnes Dec. ¶ 11; Sansanowicz Dec. ¶ 24; **Exhibit 4**.

12 A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and
13 experience in the relevant community. *PLCM Group, Inc* (2000) 22 Cal. 4th 1084, 1095; *Hopson v.*
14 *Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900. When determining a
15 reasonable hourly rate, courts may consider factors such as the attorney's skill and experience, the
16 nature of the work performed, the relevant area of expertise and the attorney's customary billing rates.
17 *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 632.

18 PAGA Counsel's skill and experience support their hourly rates. Their practice is limited
19 exclusively to litigation, focusing on the representation of employees in wage and hour class action
20 and PAGA matters. As prominent attorneys in the field of wage and hour employment litigation,
21 Plaintiff's counsel continually monitors the prevailing market rates charged by both defense and
22 plaintiff law firms and set the billing rates of their attorneys and paralegals/law clerks to be consistent
23 with the prevailing market rates in the private sector for attorneys and staff of comparable skill,
24 qualifications and experience. Other wage and hour attorneys working as class counsel before
25 California courts charge comparable if not higher rates. Mara Dec. ¶¶ 74; **Exhibits 8-10**; Yeremian
26 Dec. ¶ 12; **Exhibit 2**; Barnes Dec. ¶ 11; Sansanowicz Dec. ¶ 24; **Exhibit 4**.

27 In addition, the hourly rates used for PAGA Counsel are in line with market rates in San
28 Francisco and Los Angeles. The rates *do not* incorporate extra-market rates to build in a risk of

465, 479-80 (1984) (approving fee award with multiplier of 12).

nonpayment. Rather, the rates are in line with metropolitan practice areas in Southern and Northern California and are structured to align with the Adjusted Laffey Matrix. The full 2021-2022 Adjusted Laffey Matrix provides for the following hourly rates for paralegals/law clerks and attorneys falling into various ranges of years of experience:

Year	Adjustment Factor	Paralegal/Law Clerk	1-3 Years	4-7 Years	8-10 Years	11-19 Years	20+ Years
6/01/21-5/31/22	1.006053	\$208	\$381	\$468	\$676	\$764	\$919

See <http://www.laffeymatrix.com/see.html>.²³

However, these rates are derived from the Washington, D.C. area and require a cost of living correction for San Francisco and Los Angeles. Using the federal statistics for average attorney salaries, attorney pay is approximately 8.5% higher in San Francisco compared to Washington, D.C., indicating a 8.5% upward adjustment to the Laffey Matrix is appropriate. (See <https://www.bls.gov/oes/current/oes231011.htm#st>).²⁴ Using the same statistics, attorney pay is approximately 3.2% lower in Los Angeles compared to Washington, D.C., indicating a 3.2% downward adjustment to the Laffey Matrix is appropriate. (*Id.*). However, using the federal employee pay tables, federal employee wages are approximately 1.5% higher in the Los Angeles/Long Beach areas compared to Washington, D.C. indicating a 1.5% upward adjustment to the Laffey Matrix See <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2021/general-schedule/>.²⁵

Using these same tables, federal employee wages are approximately 8% higher in the San Francisco/San Jose/Oakland areas compared to Washington, D.C. indicating an 8% upward adjustment to the Laffey Matrix *Id.* Therefore, something in the range of a 3.5% locality increase to the Laffey Matrix appears appropriate here. Applying a 3.5% locality adjustment would result in the following rates:

Year	Adjustment Factor	Paralegal/Law Clerk	1-3 Years	4-7 Years	8-10 Years	11-19 Years	20+ Years
6/1/21-5/31/22	1.041264855	\$215.28	\$394.34	\$484.38	\$699.66	\$790.74	\$951.17

This locality adjusted chart is consistent with the hourly billing rates of Mr. Mara (billed at \$750 per

²³ Last visited October 14, 2021.

²⁴ Last visited October 14, 2021.

²⁵ Last visited October 14, 2021.

1 hour with 17 years of experience), Mr. Crawford (billed at \$500 per hour with 5 years of experience),
2 Mr. Yeremian (billed at \$750 per hour with 18 years of experience), Mr. Shkodnik (billed at \$575 per
3 hour with 9 years of experience), Mr. Barnes (billed at \$795 per hour with 24 years of experience),
4 and Mr. Lander (billed at \$695 per hour with 20 years of experience). Therefore, as they are in line
5 with those of the relevant community, PAGA Counsel's hourly rates are reasonable.

6 **iv. PAGA Counsel's Total Hours are Reasonable**

7 In determining a lodestar fee, reasonable hours include, in addition to time spent during
8 litigation, the time spent before the action was filed, including time spent interviewing clients,
9 investigating the facts and the law, and preparing the initial pleadings.²⁶ Further, the fee award should
10 include fees incurred to establish and defend the attorneys' fee claim. *Serrano v. Priest* (1982) 32
11 Cal.3d 621, 639 ("*Serrano IV*"). PAGA Counsel has expended a total of 578.6 hours on this case. The
12 work performed by PAGA Counsel in order to achieve a settlement that will provide valuable
13 consideration to the State of California and the Aggrieved Employees is summarized by PAGA
14 Counsel in the Mara Declaration submitted herewith. Mara Dec. ¶¶ 18, 20, 22, 75; Yeremian Dec. ¶
15 12; Barnes Dec. ¶ 11; **Exhibit 1**; Sansanowicz Dec. ¶ 25; **Exhibit 5**.

16 Counsel's many tasks, in summary form, included the following: pre-filing investigation and
17 legal research; communicating with Plaintiffs; interviewing aggrieved employees throughout the state;
18 drafting PAGA letters notifying the LWDA of Plaintiffs' claims; amending PAGA letters;
19 investigation into Defendants' pay-structures and policies; draft and file pleadings; draft and file First
20 Amended Complaints; numerous conferences with co-counsel and Defendants' Counsel regarding a
21 variety of issues throughout the litigation, mediation, and settlement; draft and revise joint case
22 management statements; attend case management conferences; propound and respond to discovery;
23 analyze records produced by Defendant relating to its policies, pay-structures, and time keeping;
24 correspond with expert to analyze data provided by Defendants in anticipation of mediation; prepare
25 for and attend mediation; draft mediation brief and mediation damage and exposure models; draft,
26 review, negotiate, and revise the memorandum of understanding and settlement agreement; draft and
27 file Second Amended Complaint; discussions with settlement administrator regarding their duties;
28

²⁶ See *New York Gaslight Club, Inc. v. Carey* (1980) 447 U.S. 54, 62.

1 draft settlement approval motion and supporting papers; review settlement administrator's declaration;
2 and appearing at the settlement approval hearing. Mara Dec. ¶¶ 18, 20, 22; Yeremian Dec. ¶ 12; Barnes
3 Dec. ¶ 11; **Exhibit 1**; Sansanowicz Dec. ¶ 25; **Exhibit 5**.

4 All of the tasks and work performed were reasonable and necessary to the prosecution of this
5 case.

6 **v. Costs of Litigation**

7 PAGA Counsel seeks reimbursement of the litigation costs and expenses of up to \$30,000.
8 Currently, PAGA Counsel's costs total \$20,403.77. It is not anticipated that these costs will increase
9 by much, if at all to complete the settlement approval process. These costs were all reasonable and
10 necessary to the prosecution of this case and the results achieved, and are fair, reasonable, and
11 unopposed by Defendant. Mara Dec. ¶ 24; **Exhibit 2**; Yeremian Dec. ¶ 14; **Exhibit 3**; Barnes Dec. ¶
12 12; **Exhibit 2**.

13 **c. The Court Should Approve the Requested Individual Settlement Payments**

14 PAGA Counsel seeks approval of Individual Settlement Payments for the named Plaintiffs in
15 the sum of \$10,000 each. In a typical class or representative action, Courts routinely approve service
16 payments, or incentive awards, to compensate named plaintiffs for the services they provide and the
17 risks they incur during class litigation. See *In re Cellphone Fee Termination Cases* (2010) 186 Cal.
18 App. 4th 1380, 1393; see also *Bell v. Farmers Ins. Exch.* (2004) 115 Cal. App. 4th 715, 725-26
19 (upholding service payments to class representatives); Manual § 21.62 n.971 (noting that service
20 payments are warranted). Plaintiffs have not only deferred any individual recovery up until this point,
21 but as a result of this settlement, will be releasing her own claims arising out of her employment with
22 Defendants, including any individual wage and hour claims. If the Court approves this settlement, the
23 aggrieved employees are still free to pursue their own individual wage and hour claims.

24 Not only are Plaintiffs giving up the right to recover for their own individual wage and hour
25 claims in addition to all other known and unknown claims against Defendant,²⁷ Plaintiffs have also
26 put a great deal of effort into pursuing this matter for the State of California and for their fellow
27 aggrieved employees, furthering the purposes of PAGA and conserving the limited resources of the

28 ²⁷ On the Effective Date, and as a condition of receiving any portion of the Individual Settlement Payments, Plaintiffs are
agreeing to an additional General Release of all claims against Defendants. See **Exhibit 1** at Paragraph 28(b).

1 Labor Commissioner. The requested service payment is reasonable in light of the benefits Plaintiffs
2 have conferred upon the State of California and the Aggrieved Employees, the significant time spent
3 assisting counsel with the investigation and prosecution of these claims, giving a general release of all
4 claims, and consenting to the proposed settlement. *See* Declarations of Vivian Ly, Wendy Maciel, and
5 Rene Palacios. Based on the foregoing, the \$10,000 Individual Settlement Payments to each of the
6 named Plaintiffs are fair, appropriate and justified as part of the overall settlement.

7 **d. The Administration Costs are Reasonable**

8 The Parties agreed to hire Rust as the Administrator.²⁸ Rust will be responsible for formatting,
9 printing, and mailing an agreed upon Notice of Settlement of PAGA Action to be sent along with the
10 Individual Settlement Shares. It will also be responsible for updating addresses and re-mailing checks
11 returned as undeliverable, responding to Aggrieved Employee inquiries, and answering questions from
12 the Parties. Rust also provided a declaration for filing with the settlement motion. Currently, Rust
13 estimates its fee will total \$28,190. *See* Declaration of Andrew Meyer ¶ 15. Plaintiffs now request that
14 the Court approve a fee of up to \$30,000 to Rust for services to be rendered. Following the grant of
15 approval, Rust will calculate and mail the Individual Settlement Share checks to the Aggrieved
16 Employees, disburse other payments as ordered by the Court, and perform such other duties as set
17 forth in the Settlement Agreement. Rust's fee of up to \$30,000 for services rendered and to be rendered
18 is fair and reasonable and should be granted.

19 **VI. CONCLUSION**

20 For the reasons stated herein, the Court should grant Plaintiffs' motion in its entirety.

21
22 Dated: October 22, 2021

MARA LAW FIRM, PC

23
24 

25 David Mara, Esq.
26 Matthew Crawford, Esq.
27 Representing Plaintiffs
28

²⁸ *See* Declaration of Andrew Meyer, which outlines Rust's qualifications and experience.