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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

FRANK QUIROGA, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

FF PROPERTIES II LP and DOES 1 through
20, inclusive,

Defendants.

Case No. RIC2002563

Assigned for all purposes to:

Hon. Craig G. Riemer

Dept. D-1

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR APPROVAL OF PRIVATE
ATTORNEYS GENERAL ACT
REPRESENTATIVE ACTION
SETTLEMENT**

Date: March 31, 2023

Time: 9:00 a.m.

Dept.: D-1

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Frank Quiroga (“Plaintiff”) seeks approval of a settlement of claims under the Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (“PAGA”) against Defendants FF Properties II LP, FF Properties L.P. and Fairfield Residential Company LLC (collectively “Defendants”) in the amount of \$250,000.00. Plaintiff alleges approximately 475 non-exempt employees who worked for Defendants were not paid at least minimum wages for all hours worked, not paid all overtime compensation, not provided with meal periods or compensation in lieu thereof, not provided with rest breaks or compensation in lieu thereof, not provided with compliant wage statements, not reimbursed for business expenses incurred, and were not paid all wages owed timely during or upon separation of employment. The proposed Settlement seeks to release claims for civil penalties for violations of Labor Code §§ 201-204, 210, 226, 226.3, 226.7, 510, 512, 558, 558.1, 1174, 1174.5, 1175, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2800, and 2802, and all applicable IWC Wage Orders as to the above claims.

Under Labor Code § 2699(1)(2), the Court must review and approve any proposed PAGA settlement. Here, the proposed Settlement is sufficient to deter and punish future violations. The Settlement is attached to the Declaration of Alexander G.L. Davies (“Davies Decl.”) as Exhibit 1, and the proposed letter to be sent to the aggrieved employees is attached thereto as Exhibit D. Plaintiff now seeks this Court's approval of the Settlement terms.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 9, 2020, Plaintiff’s counsel sent a letter to the California Labor & Workforce Development Agency (“LWDA”) via online submission and to Defendant via certified mail regarding Defendant’s alleged violations. *See* Davies Decl., ¶ 3, Exhibit 2. The LWDA did not respond to this notice within 65 days, indicating it did not intend to investigate, thus allowing Plaintiff to file the instant lawsuit pursuant to Labor Code Section 2699.3(a)(2)(A). *See* Davies Decl., ¶ 4.

Plaintiff initially filed his Complaint as a class action against Defendant FF Properties II L.P. on July 10, 2020. Davies Decl., ¶ 5. On January 22, 2021, Plaintiff filed his PAGA-only First Amended Complaint (“FAC”), following the Court’s order granting Defendant’s motion to compel arbitration of Plaintiff’s individual claims and to dismiss Plaintiff’s class action allegations. Davies Decl., ¶ 6. On

February 25, 2021, Defendant FF Properties II L.P. filed its Answer to Plaintiff's FAC. Davies Decl., ¶ 7.

After the filing of Plaintiff's PAGA-only FAC, and conducting two initial rounds of formal discovery on Defendant, the Parties began discussing a potential private mediation. Davies Decl., ¶ 8. In preparation for mediation and in response to Plaintiff's discovery requests, Defendant produced data and hundreds of pages of documents for Plaintiff to evaluate the PAGA claims and calculate the alleged exposure, including policy documents, compensation plans, pay stubs, timekeeping and payroll data for 40% of the aggrieved employees, and an employee contact list of aggrieved employees with names, phone numbers, addresses, job titles, and locations and dates of employment to calculate the pay periods worked. Davies Decl., ¶ 9. Between May and July 2022, the Parties engaged in further informal discovery exchanges regarding additional claims discovered during the discovery process, and to supplement the information produced via formal discovery methods for mediation. Davies Decl., ¶ 10. On July 21, 2022, Plaintiff submitted an amended PAGA violation notice letter to the LWDA, notifying of Plaintiff's intent to amend his complaint to add additional claims for violations of Labor Code §§ 558.1, 2800, and 2802, and adding FF Properties LP and Fairfield Residential Company LLC as additional named Defendants. Davies Decl., ¶ 11; Exhibit 3.

The Parties attended mediation on July 26, 2022, with Judge William H. Pate (Ret.), a respected class action and PAGA action mediator. Davies Decl., ¶ 12. While the Parties did not settle at mediation, they continued to engage in extensive negotiations via the mediator, and later reached an agreement to settle for \$250,000.00 on December 20, 2022. Davies Decl., ¶ 13. Separate and apart from the Parties' PAGA Settlement Agreement, the Parties also negotiated a separate individual settlement agreement concerning Plaintiff's non-PAGA claims, which includes an agreement concerning Plaintiff's resignation from his employment with Defendants, and a Section 1542 General Release. Davies Decl., ¶ 14. Plaintiff's individual agreement shall be made available to the Court for in camera review upon request. *Id.*

Around February 10, 2023, the Parties finalized the terms of the Settlement Agreement, which is now presented to this Court for approval. Davies Decl., ¶ 15. Concurrently with this Motion, the Parties also filed a Joint Stipulation and [Proposed] Order Allowing Plaintiff to File Second Amended

Complaint, to include the additional named Defendants, claims and theories of liability exhausted in Plaintiff's July 21, 2022 letter to the LWDA. Davies Decl., ¶ 16. Once the Court issues an order granting Plaintiff leave, Plaintiff intends to file his Second Amended Complaint with the Court. Davies Decl., ¶¶ 17, 46; Exhibit 4.

Plaintiff provided notice of the Settlement to the LWDA on February 24, 2023. Davies Decl., ¶ 18, Exhibit 5. Plaintiff also served a copy of the motion on the LWDA on March 10, 2023. Davies Decl., ¶ 19, Exhibit 6.

III. PAGA REQUIREMENTS

Based on the California Supreme Court's opinions in *Arias v. Superior Court*, 46 Cal. 4th 969 (2009), and *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), Plaintiff can seek appropriate civil penalties as called for under PAGA on behalf of the State of California and other similarly aggrieved employees without seeking class certification or meeting the requirements of class certification (i.e. numerosity, typicality, commonality and adequacy). As such, the class action two-step preliminary and final approval process is not required.

PAGA was enacted to allow enforcement of the Labor Code and recovery of penalties by the State and by private individuals who have been aggrieved by their employers. The statute calls for 75% of any penalties recovered to be paid to California's LWDA and the remaining 25% to the aggrieved employees (Cal. Lab. Code § 2699(i) (2016)).

In order to enforce and seek penalties under PAGA in a civil action, an aggrieved employee must first provide written notice to the LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges the employer has violated. *See* Cal. Labor Code § 2699.3(a)(1)(A) (2016). Once the LWDA notifies the aggrieved employee that it does not intend to investigate the alleged violations, or if the LWDA does not respond within a certain time period, the aggrieved employee is then allowed to proceed in a civil action against the employer on behalf of the LWDA and all other similarly aggrieved employees. *See* Cal. Labor Code § 2699.3(a)(2)(A) (2016).

In 2009, the California Supreme Court considered the issue of whether an aggrieved employee who brings a PAGA representative claim needs to meet class certification requirements. *Arias*, 46 Cal. 4th at 976. After a substantial review of the legislative history of PAGA, the Court held that an aggrieved

1 employee's representative action brought on behalf of other aggrieved employees against an employer
2 for PAGA violations does not need to meet the requirements for class certification. *Id.* at 975, 980-88.
3 As the Court held, a plaintiff bringing suit under PAGA does so as the proxy or agent of California's
4 labor law enforcement agencies. *Id.* at 986. Because the employee's PAGA action functions as a
5 substitute for an action brought by the government itself, a judgment in the PAGA action binds all those
6 who would be bound by a judgment in an action brought by the government. *Id.*

7 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the court need only
8 "review and approve" the settlement. Cal. Lab. Code § 2699(1)(2) (2016). The Parties to this current
9 PAGA action have reached such an agreement and now seek this Court's approval of the proposed
10 settlement.

11 **IV. THE SETTLEMENT TERMS AND DISTRIBUTION OF PENALTIES**

12 The Parties have agreed that Defendants will pay a total settlement amount of \$250,000.00 (the
13 "Gross Settlement Amount"). See Settlement Agreement, ¶ I(s); see also ¶ II(C)(a). From this amount,
14 up to one-third (1/3) of the Settlement Sum, or \$83,333.33, is allocated to attorneys' fees and up to
15 \$20,000.00 to actual litigation costs. Settlement Agreement, ¶ II(C)(a)(1). To date, Plaintiff's counsel
16 has spent \$9,766.93 in litigation costs. See Davies Decl., ¶ 59, 66, Exhibit 7. The Settlement allocates
17 up to \$3,500.00 to payment for Settlement Administrator Phoenix Settlement Administrators' costs
18 associated with administration of the Settlement. Settlement Agreement, ¶ II(C)(a)(2). Separate and
19 apart from Plaintiff's agreement to release all PAGA wage and hour claims alleged in the Action,
20 Plaintiff has also entered into a confidential standalone agreement to release his individually alleged
21 claims against Defendants, including non-PAGA wage and hour claims and all other claims arising out
22 of his employment, and has agreed to resign his employment with Defendants. See, Settlement
23 Agreement, ¶ IV(A); see also, Davies Decl., at ¶ 14. Plaintiff's individual Settlement Agreement
24 includes a general release of all known and unknown claims, including a waiver of Section 1542, but
25 excluding his PAGA wage and hour claims, which he is releasing in this Agreement. See, Settlement
26 Agreement, ¶ IV(A); see also, Davies Decl., at ¶ 14.

27 After deducting the attorneys' fees and costs, and Settlement Administrator's costs, the remaining
28 fund ("Net Settlement Amount") of \$153,399.74 will be paid 75% to the LWDA ("LWDA Payment")

1 and 25% to the PAGA Settlement Members (“Employee Net Settlement Amount” or “PAGA Employee
2 Fund”). Settlement Agreement, ¶ II(C)(a)(3). “PAGA Settlement Members” are “all current and former
3 employees of Defendants who were employed in a non-exempt Property Management Onsite position
4 in California at any time between July 9, 2019 and December 31, 2022.” Settlement Agreement, ¶ I(h).

5 The “PAGA Settlement Member Payment” for the PAGA Settlement Members shall be
6 determined as follows: Each PAGA Settlement Member’s pro rata share of the PAGA Employee Fund
7 (“PAGA Settlement Member Payment”) will be determined by the Settlement Administrator, by
8 converting the Employee PAGA Employee Fund into a pay period value. Settlement Agreement at ¶
9 II(C)(a)(4). The pay period value will be established by dividing the PAGA Employee Fund by the
10 number of pay periods worked by all PAGA Settlement Members in a relevant Property Management
11 Onsite position in California from July 9, 2019 to December 31, 2022 (“PAGA Period”). *Id.* The pay
12 periods worked by PAGA Settlement Members during the PAGA Period in a relevant position in
13 California will be derived by analysis of the time and payroll data in Defendants’ records. *Id.* The
14 Settlement Member Payment for each PAGA Employee will be determined by multiplying the pay
15 period value by each PAGA Employee’s individual pay periods. Settlement Agreement at ¶ II(C)(a)(3).
16 All payments are for penalties and will be reported on IRS 1099 forms, if required. *Id.* There will be no
17 reversion to Defendants and no claims process for PAGA Settlement Members to receive payment. *Id.*

18 The Settlement Administrator will disburse PAGA Settlement Member Payments to each PAGA
19 Settlement Member to the last known physical address on file with Defendants in its regularly
20 maintained records. Prior to this disbursement, the Settlement Administrator shall check the addresses
21 provided using the National Change of Address database. Settlement Agreement, ¶ II(C)(c). For any
22 returned payments without a forwarding address, the Settlement Administrator shall run a skip trace. *Id.*
23 PAGA Settlement Members will receive their PAGA Settlement Member Payments via U.S. Mail and
24 will receive a letter along with their PAGA Settlement Member Payment explaining the reason for the
25 payment, the content of which will be submitted to the Court for approval. *Id.* The proposed letter is
26 attached to the Settlement Agreement as Exhibit D. All funds not claimed within 180 days of mailing of
27 payment shall be sent to the California State Controller’s Office Unclaimed Property Fund with an
28 identification of the amount of unclaimed funds attributable to each PAGA Settlement Member. *Id.*

1 In exchange for the settlement payment, the State of California and the PAGA Settlement
2 Members will release the following claims:

3 Upon complete funding of the Gross Settlement Amount, Plaintiff, the LWDA, all
4 PAGA Settlement Members, and the State of California shall be deemed to have fully,
5 finally, and forever waived, released, relinquished, and discharged Defendants FF
6 Properties II LP, FF Properties LP, and Fairfield Residential Company LLC, and
7 its/their respective past, present, or future officers, directors, and employees (“Released
8 Parties”) from any and all PAGA claims, from July 9, 2019, through December 31,
9 2022, seeking civil penalties and any other remedies available under California Labor
10 Code Sections 2698, et seq., including attorneys’ fees and costs, that were described in
11 the notices of alleged PAGA violations sent by Plaintiff to the LWDA, and alleged in
12 the Second Amended Complaint, including PAGA claims for violations of Labor Code
13 Sections 201-204, 210, 226, 226.3, 226.7, 510, 512, 558, 558.1, 1174, 1174.5, 1175,
14 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2800, and 2802, and all applicable IWC
15 Wage Orders as to the above claims. (“Released Claims”). The release of the Released
16 Claims shall be effective from July 9, 2019 through December 31, 2022 (“PAGA
17 Period”).

18 Settlement Agreement, ¶ IV(B). Only Plaintiff signed a general release of claims. Settlement
19 Agreement, ¶ IV(A).

20 Defendants have represented that the total number of pay periods worked by the PAGA Settlement
21 Members in a relevant position in California from July 9, 2019 through the date of mediation (July 26,
22 2022) was 15,700, and this serves as the basis for Plaintiff accepting the settlement. Settlement
23 Agreement, ¶ II(C)(b). If the number of pay periods worked by PAGA Settlement Members in a relevant
24 position in California in the PAGA Period exceeds 15,700 by more than ten percent, the GSA will
25 increase by the same percentage above 10% (i.e., if the pay periods worked increase by 11%, Defendants
26 would increase the GSA by one percent). *Id.*

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1 **V. THE SETTLEMENT IS FAIR AND REASONABLE**

2 **A. Standard for Approval**

3 While there are no statutory or common law standards for approval of PAGA settlements, the
4 legislative history of the Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et. seq.*
5 (“PAGA”) sheds some light on the approval requirement as it was phrased in § 2699, subdivision (l)
6 prior to the July 1, 2016 amendments. *See* Cal. Lab. Code § 2699(l) (2015) (amended 2016) (“The
7 superior court shall review and approve any penalties sought as part of a proposed settlement...”).
8 PAGA was passed by the legislature as Senate Bill (“SB”) 796, and it was signed by the Governor and
9 filed with the Secretary of State on October 12, 2003. *See* Legislative Counsel’s Digest re Senate Bill
10 No. 796, attached as Exhibit A to the Request for Judicial Notice (“RJN”) filed herewith, p. 1. It took
11 effect on January 1, 2004.

12 The original version of the act did not contain the court approval requirement now codified in
13 § 2699(l). That subdivision was added as part of the amendments to the Act that were introduced as SB
14 1809 in February of 2004 and signed by the Governor and filed with the Secretary of State on August
15 11, 2004. *See* Legislative Counsel’s Digest re Senate Bill No. 1809, attached as Exhibit B to the RJN,
16 p. 1. Those amendments took effect immediately, and the court approval requirement of § 2699(l) was
17 one of the provisions that the legislature made retroactive to January 1, 2004. *Id.* at pp. 1-2.

18 Senator Joseph L. Dunn authored both the original PAGA bill (SB 796) and the amendments (SB 1809).
19 *See* RJN, Exs. A and B. On July 29, 2004, during the consideration of the amendments in SB 1809,
20 Senator Dunn sent a letter addressed to the President Pro Tem of the Senate, which was published in the
21 Senate Daily Journal, “to clarify the intent of subdivision (l)” of what would become § 2699. *See* 7/29/04
22 Letter from Sen. Dunn to Sen. Burton, attached as Exhibit C to the RJN. He was sending this letter “in
23 response to an issue raised by the Judicial Council of California.” *Id.* In the letter, Senator Dunn stated
24 that:

25 The purpose of court review of the penalties in subdivision (l) is to ensure that settlements
26 involving penalties arising under Labor Code Section 2699 do not undercut the dual
27 statutory purposes of punishment and deterrence, or result in unjust, arbitrary, and
oppressive, or confiscatory settlements.

28 *Id.*

1 To Plaintiff's knowledge, this is the only statement in the legislative history directly addressing
2 the purpose of the court approval requirement. While the letter does not address any specific factual
3 issues to be considered, it does provide some very broad criteria. It suggests that the courts should
4 consider whether the penalties are so small as to "undercut the dual purposes of punishment and
5 deterrence" or so large that they may result in an "unjust, arbitrary and oppressive, or confiscatory"
6 settlement.

7 These broad criteria appear to give the Court wide latitude in determining whether to approve
8 the penalties proposed as part of a PAGA settlement. Interestingly, the criteria focus on the effect the
9 penalties may have on the defendant/employer rather than the LWDA or the aggrieved employees who
10 will receive the penalties. This is different than the analysis of a class action settlement, which typically
11 focuses on the amount received by the class and compares that to the reasonable range of potential
12 outcomes in the case. *See, e.g., Kullar v. Foot Locker Retail, Inc.*, 168 Cal.App.4th 116, 130 (2008);
13 *Munoz v. BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal.App.4th 399, 407 (2010).

14 **B. The Settlement Meets the Standard for Approval**

15 The \$250,000.00 Settlement Sum is reasonable when considered in light of the principles
16 discussed in Senator Dunn's letter. Davies Decl., ¶ 20. For a group of approximately 475 employees, a
17 penalty of \$250,000.00 is large enough to punish Defendants for alleged past violations and deter future
18 violations. Davies Decl., ¶ 20. The settlement amount is equivalent to a penalty of about \$526.32 per
19 employee, which is a significant penalty for a wage and hour case. *Id.* At the same time, the penalty
20 amount is not so large as to be unjust, oppressive or confiscatory, considering the company's potential
21 exposure explained below. *Id.*

22 The Settlement Sum is also reasonable in light of the facts of the foregoing action, the real risk
23 that no PAGA penalties would be paid, and inherent risks and uncertainties associated with PAGA
24 claims. Davies Decl., ¶ 21.

25 Plaintiff calculated the potential exposure at the initial violation rate of \$100 per pay period as
26 follows: 15,700 pay periods x \$100 per pay period = \$1,570,000.00. *Id.* If the Court stacked different
27 types of penalties in each pay period, Plaintiff calculated the exposure as follows:

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1 1. Rest Break Claims:

2 Plaintiff contends that Defendants failed to provide compliant rest breaks because employees were
3 too busy to take their breaks. Davies Decl. ¶ 22. While Defendants do not track or require Aggrieved
4 Employees to record their rest breaks, Plaintiff was able to calculate Defendants' prospective liability
5 by reviewing the 40% sampling of Aggrieved Employees' timekeeping and payroll data produced
6 through formal discovery, and determining the shifts in which they worked sufficient hours to earn rest
7 breaks, and via corroborating statements from Aggrieved Employees whose contact information was
8 formally produced by Defendants following the Parties' *Belaire-West* opt-out notice. At the time of
9 mediation, and assuming 25% of pay periods had violations, Plaintiff calculated Defendants' prospective
10 liability as follows: 15,700 pay periods x \$100 x 25% violation rate (for rest breaks) = \$392,500.00 for
11 rest break violations. *Id.* at ¶21.

12 These calculations assumed the Court would find violations in each of those pay periods based on
13 Plaintiff's theories of liability. However, the rest break claim would have mainly relied on Aggrieved
14 Employee testimony, as Defendants' formal discovery productions revealed that Defendants maintain
15 facially compliant written rest break policies, making it a riskier claim. *Id.* at ¶23. Defendants could
16 have defeated Plaintiff's claims by proving its rest break policies were compliant and that it provided
17 the opportunity for employees to take compliant rest periods, or that those PAGA claims were
18 unmanageable. *Id.* Defendants also likely would have argued that only a small number of Aggrieved
19 Employees, if any, missed their rest breaks, and that this would be confirmed by Aggrieved Employee
20 testimony. *Id.* Accordingly, proving liability for the rest break claims would have required depositions
21 of Aggrieved Employees who provided declarations, and Defendants surely would have obtained
22 opposing declarations stating either rest breaks were taken or rest breaks were provided and voluntarily
23 waived. *See, e.g., Ordonez v. Radio Shack, Inc.*, 2013 WL 210223, at *11 (C.D. Cal. Jan. 17, 2013)
24 ("Because of the competing testimony before the Court, plaintiff's evidence that defendant may have an
25 illegal, written rest break policy is insufficient for this Court to find that common issues predominate.");
26 *Villa v. United Site Servs. of California, Inc.*, 2012 WL 5503550, at *8 (N.D. Cal. Nov. 13, 2012)
27 ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform
28 practices."). Accordingly, the rest break claim was heavily discounted in Plaintiff's valuation of the case.

Davies Decl., at ¶ 24. Given the evidence produced through formal discovery methods by Defendants, and as supplemented by the additional information provided in advance of mediation, Plaintiff recalculated Defendants' potential liability at the trial stage as follows: 15,700 pay periods x \$100 x 3% violation rate (for rest breaks) = \$47,100.00 for rest break violations. *Id.*

2. Meal Period Claims:

Plaintiff's theory of liability for meal period violations was based on Defendants' allegedly unlawful employment practices, which failed to provide compliant, uninterrupted 30-minute meal periods at the proper intervals. Davies Decl. ¶ 25. While Defendants maintained mostly compliant written meal period policies, Plaintiff alleged that, in practice, Defendants routinely failed to provide compliant meal periods for non-exempt employees. *Id.* Throughout the liability period, Plaintiff and other Aggrieved Employees were allegedly routinely denied their meal periods, and when they were able to take them, their meal periods were often late, cut short, or interrupted. *Id.* Through Defendant's formal document productions Plaintiff discovered that despite its facially compliant policies, the timekeeping and payroll data produced through formal discovery revealed that Defendants failed to pay premiums for all recorded non-compliant meal periods. *Id.* With the records produced prior to mediation, Plaintiff calculated that the damages for Defendants' meal period violations as follows: 15,700 pay periods x \$100 x 10.3% violation rate (alleged meal period violation rate shown in the time records) = \$161,710.00 for meal period violations. *Id.* at ¶ 21.

These calculations assumed the Court would find violations in each of those pay periods based on Plaintiff's theories of liability. However, Defendants could argue that Aggrieved Employee testimony would show that Defendants' non-exempt employees routinely received their meal periods, that Defendants maintained compliant policies throughout the relevant time period, and that, even if an employee recorded a non-compliant meal period, that does not equate to a violation if Defendants provided the opportunity for the employee to take a compliant meal period. *Id.* at ¶ 26. Further, Defendants could argue that, given its policies and the time and pay records, the meal period PAGA claims were unmanageable. *Id.* Accordingly, given the considerable uncertainty regarding these claims, the relatively low rate for alleged first meal period violations, and Defendants' meal period waiver defense for second meal period violations, the meal break claims were discounted. *Id.* at ¶ 27.

1 Plaintiff recalculated Defendants' prospective liability at the trial stage as follows: 15,700 pay periods x
2 \$100 x 3% violation rate (violation rate for first meal period violations) = \$47,100 for meal period
3 violations. Davies Decl., at ¶ 27.

4 3. Overtime and Sick Pay Claims:

5 Plaintiff's overtime wage claims were premised primarily on the theories that Defendants failed
6 to pay proper overtime as a result of its failure to include non-discretionary bonuses and commission
7 payments in the regular rate of pay. Davies Decl. ¶ 28. For the same reasons, Defendants also allegedly
8 failed to pay sick time at the correct regular rate of pay. *Id.* While Defendants' formal document
9 productions showed that Defendants began factoring commission payments into the regular rate prior to
10 the outset of the liability period, Plaintiff contends that Aggrieved Employees' payroll data showed that
11 Defendants failed to correctly factor its non-discretionary bonus payments into the regular rate for
12 purposes of calculating overtime. Plaintiff contends the overtime and sick pay regular rate violations
13 are clearly shown in the earnings records for the Aggrieved Employees produced by Defendants through
14 the Parties' formal discovery efforts, and that full valuation should be given to these claims. *Id.* At the
15 time of mediation, Plaintiff calculated Defendants' prospective liability as follows: 562 pay periods
16 (pay periods in which employees worked overtime/took sick leave and earned annual bonuses and/or
17 commissions) x \$100 = \$56,200.00 for unpaid overtime and sick pay penalties. *Id.* at ¶ 21. Defendants
18 argued that they correctly factored commissions payments into the regular rate of pay, and that they were
19 not required to include bonus payments in the regular rate, as these payments were discretionary. *Id.* at
20 ¶ 29. While Plaintiff remains confident in these claims, given the defenses raised by Defendants and
21 evidence provided in support of those defenses, Plaintiff recalculated Defendants' prospective liability
22 at trial as such: 457 pay periods (when excluding the bonuses Defendants contend were discretionary)
23 x \$100 = \$45,700.00. *Id.* at ¶ 30.

24 4. Minimum Wage Claims:

25 Plaintiff's Minimum Wage claims were largely based on Plaintiff's allegations that Defendants
26 failed to pay Aggrieved Employees for all hours worked as a result of combined rounding and time-
27 shaving practices, and for failing to pay for required pre- and post-shift duties. *Id.* at ¶ 31. Based on
28 the policy documents and timekeeping records Defendants produced through formal discovery, Plaintiff

1 alleged that Defendants rounded Aggrieved Employees time punches only when it benefited Defendants,
2 as Defendants required Aggrieved Employees to record the beginning and end of their shifts to the
3 minute, but then used a one-way rounding system that rounded Aggrieved Employees' timekeeping data
4 to the nearest quarter hour and imposed disciplinary policies to ensure it gained the benefit of the
5 rounding. Davies Decl., at ¶ 31. At the trial stage, however, Defendants could argue (as they did
6 throughout the case), that no rounding applied and/or Aggrieved Employees actually benefited from any
7 rounding, and that Aggrieved Employees' pay records would bear this out. *Id.* at ¶ 32. As Defendants'
8 assertions were seemingly confirmed through further informal discovery produced on this issue, the
9 Plaintiff could not assign great value to the combined rounding and time shaving claims. *Id.*

10 As for the alleged off-the-clock violations, Plaintiff alleged that Defendants' policies required
11 Aggrieved Employees to show up early and clock-in before the start of their scheduled shifts, in order
12 to be considered on-time. Plaintiff further contends that the timekeeping and pay data provided by
13 Defendants through formal discovery confirms that Defendants did not pay Aggrieved Employees prior
14 to the start of their scheduled shifts. *Id.* at ¶ 31. However, as Aggrieved Employees did not track their
15 pre- and post-shift duties and/or hours, and as the timekeeping records do not show any recorded hours
16 prior to the start of Aggrieved Employees' scheduled shifts, this claim would have relied almost entirely
17 on Aggrieved Employee testimony. *Id.* at ¶ 32. Moreover, Defendants also argued that the Aggrieved
18 Employees confirmed their time entered as accurate each pay period and were paid for that time, and
19 thus this claim was unmanageable and was likely to fail. *Id.*

20 Given the information produced formally by Defendants in advance of mediation, Plaintiff
21 calculated Defendants initial prospective liability as follows: 1,072 pay periods x \$100 x 100% violation
22 rate (for rounding and for failing to pay for required pre- and post-shift duties) = \$107,200.00 for
23 minimum wage violations. *Id.* at ¶21. However, this damage calculation assumed full liability.
24 However, given the serious concerns regarding the viability and manageability of the rounding and time
25 shaving claims, Plaintiff could not assign great value to these claims. *Id.* at ¶ 32. Additionally, as the
26 off-the-clock claims would have relied heavily on Aggrieved Employee testimony (like the rest break
27 claims discussed above), and as Defendants surely would obtain competing declarations from Aggrieved
28 Employees, a significant discount was warranted for the unpaid wages claim. *Id.* Accordingly, Plaintiff

1 reassessed Defendants' prospective liability at the trial stage as follows: 1,072 pay periods x \$100 x 10%
2 violation rate (for required pre- and post-shift duties, after accounting for the lack of evidence that
3 Aggrieved Employees were harmed by Defendants' rounding practices) = \$10,720.00 for minimum
4 wage violations. Davies Decl., at ¶ 33.

5 5. Failure to Reimburse Business Expenses:

6 Plaintiff also alleges that Defendants failed to reimburse Aggrieved Employees for job-required
7 expenses, including cell phone expenses. *Id.* at ¶ 34. During his employment, Plaintiff alleges that he
8 was required to use his cell phone for work related purposes, but was never issued any reimbursement
9 for these expenses. *Id.* This allegation was seemingly confirmed by the payroll data produced by
10 Defendants, which showed that Defendants only issued reimbursement payments to a select number of
11 Aggrieved Employees during the liability period and never issued any reimbursements to Plaintiff during
12 his employment. Given the statements provided to Plaintiff's counsel by Plaintiff and other Aggrieved
13 Employees, and the fact that Aggrieved Employees' pay data produced by Defendants showed that only
14 a select number of employees received any reimbursements during the liability period, Plaintiff
15 calculated Defendants' prospective liability at mediation as follows: 7,850 pay periods x \$100.00 x 90%
16 violation rate (for failure to reimburse necessary cell phone expenses) = \$706,500.00 for reimbursement
17 penalties. *Id.* at ¶¶ 21, 34.

18 However, as Defendants argued, Defendants' written policies provided for reimbursements for
19 cell phone usage, and that throughout the liability period it did issue cell phone reimbursements to
20 Aggrieved Employees, including Plaintiff, who used their personal cell phones for business purposes –
21 according to Defendants there are also Aggrieved Employees who would have no reason to use their cell
22 phones for business purposes. *Id.* at ¶ 35. The Aggrieved Employees' payroll data produced by
23 Defendants – both through formal and informal discovery - seemed to corroborate Defendants'
24 contentions. *Id.* Additionally, as this claim would be heavily reliant on individual testimony Defendants
25 raised similar arguments that this claim was unmanageable. *Id.* Considering how Defendants' records
26 did show that they issued reimbursements throughout the liability period to a group of Aggrieved
27 Employees, and that Defendants maintained its compliant written policies, factors which the Court
28 would likely look upon favorably, Plaintiff could not place great value on this claim and determined that

a discount was warranted. Davies Decl., at ¶ 36. Accordingly, Plaintiff reassessed Defendants' potential liability at trial as such: 7,850 pay period x \$100.00 x 2.5% violation rate (for failure to reimburse necessary cell phone expenses, after reviewing records evidencing that Defendants did issue cell phone reimbursements, and the select number of employees who were required to use their personal cell phones for Defendants' work purposes) = \$19,625.00 for reimbursement penalties. *Id.* at ¶ 36.

6. Wage Statement Penalty Claims:

Based on the violations above, Plaintiff also alleged that the wage statements Defendants issued to Plaintiff and the other Aggrieved Employees did not accurately report all hours worked at the regular rate and overtime rates, all minimum wages and overtime wages earned, and all applicable hourly rates. *Id.* at ¶ 37. At the time of mediation, Plaintiff calculated Defendants' prospective liability as follows: 15,700 pay periods x \$100 x 25% violation rate (same as the rest break claims) = \$392,500.00 for wage statement penalties. *Id.* at ¶21.

However, if Defendants were ultimately proven right in their contentions regarding Plaintiff's underlying wage claims, Plaintiff would be unable to demonstrate any facial wage statement violations and Plaintiff would not recover any of these derivative penalties if they failed to prove the underlying claims. *Id.* at ¶ 38. Accordingly, Plaintiff reassessed Defendants' potential liability at trial as such: 15,700 pay periods x \$100 x 3% violation rate (same as the updated rest break claim valuation) = \$47,100.00 for wage statement penalties. *Id.* at ¶ 39.

7. Waiting Time Penalty Claims:

Based on the records Defendants produced, including the number of employees who separated from their employment during the relevant time period, as follows: 235 (number of employees who separated from employment during the relevant time period) x \$100 = \$23,500.00 for wage statement penalties. *Id.* at ¶21.

However, Defendants could argue that Plaintiff could not prove the "willful" prong needed to obtain waiting time penalties under Lab. Code § 203. *Id.* at ¶ 40. Additionally, as a derivative claim, Plaintiff would not recover any of these derivative penalties if they failed to prove the underlying claims. *Id.*

///

1 8. Additional Settlement Considerations:

2 As detailed above, Defendants' maximum potential liability was significant. Davies Decl., at ¶
3 41. However, these calculations assumed the Court would find violations in every pay period based on
4 Plaintiff's theories of liability. *Id.* at ¶ 41. Defendants could have defeated Plaintiff's claims by proving
5 its rest break and meal period policies were compliant and that it provided the opportunity for employees
6 to take compliant meal and rest periods, or that those PAGA claims were unmanageable; that the
7 incentive compensation at issue should not be included in the overtime rate and/or that incentive
8 compensation, including commissions, were properly included in the regular rate of pay during the
9 relevant time period; for the minimum wage claim, the pre- and post-shift claims were heavily reliant
10 on individual employee testimony and Defendants also argued that employees confirmed their time
11 entered as accurate each pay period and were paid for that time and thus this claim was unmanageable
12 and was likely to fail, whereas with the rounding practices Defendants would likely argue that there was
13 no rounding applied and/or that PAGA Settlement Members benefitted from any rounding; for the
14 reimbursement claims, Defendants would argue that only a select few employees were required to use
15 their cell phones for work purposes - as most employees were provided with company radios - and that
16 its records show that it did issue cell phone reimbursement payments to employees, additionally, as this
17 claim would be heavily reliant on individual testimony this claim was similarly unmanageable; and the
18 wage statement and waiting time claims would thus fail as they were purely derivative of the unpaid
19 wage claims. *Id.* Defendants also argued that the maximum penalty for some of these claims is \$50.00
20 under Labor Code Section 558 rather than \$100. *Id.* The settlement negotiations took these risks into
21 account. Davies Decl., *Id.* Plaintiff felt the strongest claim was the overtime claim, which should be
22 given full value, but the other claims likely had about a 10% chance of winning, making a large reduction
23 in potential exposure justified. Davies Decl., ¶ 42.

24 Another crucial factor in evaluating the value of a PAGA-only case is that all PAGA awards are
25 discretionary and can be reduced by the Court. Davies Decl., ¶ 43. Under Labor Code § 2699(e)(2), the
26 Court can reduce the PAGA penalties "if, based on the facts and circumstances of the particular case, to
27 do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." *Id.* In
28 other words, were this matter to go to trial, any award granted would be at the discretion of the Court.

1 Davies Decl., at ¶43. Thus, if Plaintiff was not able to “stack” PAGA penalties, the maximum exposure
2 could be reduced even further. Plaintiff recognizes that, although he believes there would be no
3 persuasive grounds to reduce the penalties, he anticipates Defendants would argue that their lawful
4 policies should result in reduction. *Id.*, at ¶ 44. The Court could agree with Defendants and significantly
5 reduce the PAGA penalties. *Id.* Given the wide range of potential recovery, the potential viability of the
6 Defenses raised by Defendant, and the additional delays and risks of trial justified settling at this point
7 for a reasonable amount of recovery. *Id.*

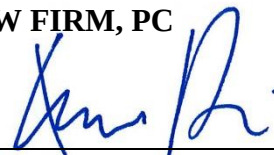
8 **VI.CONCLUSION**

9 For the foregoing reasons, Plaintiff requests the Court approve the proposed settlement pursuant
10 to PAGA in this Action.

11
12 Dated: March 10, 2023

AEGIS LAW FIRM, PC

13
14 By: _____



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