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17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

18 **COUNTY OF LOS ANGELES**

19 MARK CHEN, on behalf of himself, the
20 STATE of CALIFORNIA, and all other
21 aggrieved employees, as defined herein,

22 Plaintiff,

23 v.

24 WALMART, INC.,

25 Defendant.

Case No. 20STCV43043

(Assigned for All Purposes to the
Honorable Timothy P. Dillon, Dept. 73)

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

Date: July 27, 2022

Time: 8:30 a.m.

Date Action Filed: November 10, 2020

Trial Date: September 12, 2022

RES ID: 531721782833

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1 **I. SUMMARY**

2 This motion seeks approval of a Five Million, Nine Hundred Thousand Dollar
3 (\$5,900,000.00) settlement in an action alleging Walmart, Inc. (“Walmart” or “Defendant”)
4 violated IWC Wage Order No. 7-2001, Section 14(a), by failing to provide suitable seats for
5 certain categories of its retail store employees to use while processing customer transactions using
6 a cash register. With respect to settlements of PAGA cases such as this, the PAGA provides as
7 follows:

8 (2) The superior court shall review and approve any settlement of any civil action
9 filed pursuant to this part. The proposed settlement shall be submitted to the agency
at the same time that it is submitted to the court.

10 (3) A copy of the superior court's judgment in any civil action filed pursuant to this
11 part and any other order in that action that either provides for or denies an award of
12 civil penalties under this code shall be submitted to the agency within 10 days after
entry of the judgment or order.

13 California Lab. Code §2698(1- 3).

14 This Motion is unopposed by Defendant. The Complaint in this action was brought
15 pursuant to the Private Attorneys General Act of 2004 (“PAGA”) codified at Cal. Labor Code
16 Section 2698 *et seq* and alleges that Walmart failed to provide suitable seats for certain non-
17 exempt store employees to use while processing customer transactions using a cash register
18 located away from the front end cash registers. The allegations relate only Walmart’s California
19 stores and the time period covered by the action is August 26, 2019 to the present. Through
20 extensive discovery and investigation, Plaintiff was able to identify the job positions of employees
21 within Walmart’s California Stores who use a cash register to process customer transactions at
22 registers located away from the front end registers. The job titles of those Aggrieved Employees
23 who are covered by this settlement (referred to in the Settlement Agreement as “Covered
24 Positions”) are: Apparel Team Associate, Auto Care Center Sales Associate, Cosmetics Cashier,
25 Electronics Sales Associate, Entertainment Team Associate, Frontend Services Host Team
26 Associate, Fuel Sales Associate, Hardlines Team Associate, Home Team Associate, Jewelry Sales
27

1 Associate, Lawn and Garden Sales Associate, Money Center Cashier, Seasonal Team Associate,
2 Service Desk Associate, Smokeshop Cashier, Specialty Shop Cashier, Sporting Goods Sales
3 Associate, and Wireless Sales Associate. See, Exhibit 1, Settlement Agreement §2.8.

4 The settlement reached by the parties is intended to resolve the entirety of this matter on
5 behalf of Plaintiff and all Aggrieved Employees, as defined above. This is a settlement of only the
6 PAGA claims for civil penalties. Importantly, this is not a class settlement and it does not release
7 any claims other than the alleged seating claims. Cal. Labor Code §2699(g)(1); *Iskanian v. CLS*
8 *Transportation* (2014) 59 Cal. 4th 348, 381.

9 The terms of this PAGA settlement are set forth in the accompanying PAGA Settlement
10 Agreement (“Settlement Agreement”) which is attached to the Declaration of Charles A. Jones as
11 Exhibit 1. The California Labor and Workforce Development Agency (“LWDA”) received timely
12 notice of both this proposed Settlement and this Motion as set forth in the Jones Declaration at
13 ¶20.¹ A Proposed Order confirming review and approval of the PAGA settlement is submitted
14 herewith.

15 **A. Summary of Settlement Terms**

16 The Settlement Agreement involves the formation of a non-reversionary fund (referred to
17 in the Settlement Agreement as the “Gross Settlement Amount”) totaling Five Million, Nine
18 Hundred Thousand Dollars (\$5,900,000.00). See, Ex. 1 at §2.13. The \$5,900,000.00 fund that is
19 created will be used to make payments earmarked for: (1) LWDA penalties; (2) PAGA
20 “Aggrieved Employees” penalties; (3) Attorney’s fees and costs; (4) Plaintiff Mark Chen; and (5)
21 Settlement Administration costs. *Id.* The Settlement Agreement, calls for the following amounts
22 to be deducted from the Gross Settlement Amount to arrive at the Net Settlement Sum – the
23 portion of the settlement used to make payments to the LWDA and the PAGA group members:

- 24
 - Attorney’s fees (not to exceed \$1,966,666.65),
- 25 _____

26 ¹ Prior to the hearing date we will confirm for the Court whether or not we have received any
27 response from the LWDA.

- Litigation costs (not to exceed \$85,000)²,
- Plaintiff's General Release Payment (not to exceed \$15,000), and
- Settlement administration costs (not to exceed \$77,000) to Phoenix Settlement Administrators.

Jones Decl. ¶¶6-7; Righetti Decl ¶¶16, 24.

The Net Settlement sum is thus \$3,758,621.35. See, Ex. 1 at §§2.13, 2.16. As required by PAGA, Seventy-Five percent (75%) of the remaining Net Settlement Sum (\$2,818,966.01) will be distributed to the California LWDA and the remaining twenty-five percent (25%) (approx. \$939,655.33) will be distributed in proportional shares to all Aggrieved Employees based on the weeks worked during the relevant period. *Id.*; Jones Decl. ¶¶7-8.

The settlement was reached following both substantial formal and informal discovery and, as trial rapidly approached in September, a full-day mediation with an experienced class action and PAGA case neutral, Honorable Jay C. Gandhi (Ret.). Plaintiff submits that this settlement exceeds the results achieved in many other "suitable seating" settlements of the same nature, and respectfully requests that the Court approve it. See, Jones Decl. ¶9; Righetti Decl. ¶10.

II. THE GOALS OF PAGA HAVE BEEN ACHIEVED

The goals of PAGA, as set forth in decisions of both California's courts and the Ninth Circuit, have been achieved through this Settlement. Jones Decl. ¶¶6-9. PAGA was enacted to obtain broader compliance with the State's labor laws. While procedurally a PAGA claim may be filed as a class action, a PAGA claim is really an enforcement action pursued on behalf of the California Labor and Workforce Development Agency which is the real party in interest. *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.

The differences between a traditional class action and a PAGA suit are well summarized in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 435-436 (9th Cir. 2015) *en banc*

² Although the Settlement Agreement allowed for costs in the amount of \$85,000, the amount sought by Plaintiff's counsel for costs is \$82,712. See, §VII, below.

1 review denied (2016). The Ninth Circuit explained:

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

20 *Sakkab, supra* at 435-436.

21 Following both the statutory scheme and court decisions, the approval process is different
22 in a PAGA case as compared to a traditional class action. While the Aggrieved Employees are to
23 receive twenty five percent (25%) of the penalties collected by the State, this is not a substantive
24 right they hold. Rather it is meant to incentivize individuals into bringing of a suit on behalf of the
25 State:

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

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

Baumann v. Chase Investment Services Corp., 747 F.3d 1117, 1123-24 (9th Cir. 2014).

The appropriate focus of the Court's review in the case at bar should be on whether the

1 settlement enhances the State’s enforcement of its wage orders and whether it does so by a
2 meaningful civil penalty paid to the LWDA. Plaintiff submits that the monetary aspect of this
3 settlement clearly meets this standard. Jones Decl. ¶9. The total settlement of \$5,900,000.00 for
4 approximately 771,000 pay periods equates to \$7.65 per pay period. *Id.* After payment of
5 requested fees, costs and an enhancement, the proposed settlement will provide approximately
6 \$2,818,966 to the LWDA, which on a pay period basis is greater than many settlements involving
7 similar “suitable seating” allegations. For example, in *Enom bang v. Target*, Alameda County
8 Superior Court Case No. RG17853948, which involved the same allegations as the instant case,
9 the court approved a settlement of \$9,000,000.00 for 1,939,006 pay periods, which equates to
10 \$4.66 per pay period. Jones Decl. ¶9. Also, in *Picket v. 99c Only Stores*, Los Angeles Superior
11 Court Case No. BC473038, which also involved similar allegations, the court approved a
12 settlement of \$1,290,000 for 1,592,592.6 pay periods equating to only \$0.81 per pay period. Jones
13 Decl. at ¶9.

14 **III. HISTORY OF THE SEATING LAWS AND RELEVANT RECENT LITIGATION**

15 California’s seating laws trace back to the 1913 Sanitary Code. Following the creation of
16 the Industrial Welfare Commission (“IWC”) in 1921, the requirement that seats must be provided
17 to working employees became a part of the IWC’s Wage Orders. The Wage Orders continued with
18 minor modifications throughout the 20th Century. The current language of Section 14 has been
19 unchanged since 1976.

20 In 2003, the Legislature passed the PAGA, recognizing the historic underfunding of the
21 LWDA and its Division of Labor Standards & Enforcement (“DLSE”). In order to generate more
22 robust enforcement of Labor Code violations the PAGA provides that Aggrieved Employees may
23 bring actions to recover civil penalties. Those civil penalties are generally \$100 per employee per
24 pay period for an initial violation and \$200 per employee per pay period for subsequent violations.
25 Labor Code §2699(f)(2). Of any civil penalties collected, 75% belongs to the LWDA and 25%
26 belongs to the Aggrieved Employees. Labor Code §2699(i).

27 Following extensive litigation, including several state and federal court of appeal

1 rulings,³ on April 4, 2016, the California Supreme Court issued its decision in *Kilby* finding that
2 where work is performed at a certain location and can be reasonably performed while seated, a
3 suitable seat must be provided. The California Supreme Court also discredited the notion that the
4 nature of the work is to be determined by simply counting the number of standing tasks versus the
5 number of tasks that can be performed while seated. The California Supreme Court also outlined
6 the relevant factors to be considered in evaluating whether the nature of an employee's work
7 reasonable permits the use of a seat. See, *Kilby v. CVS Pharmacy, Inc.*, 63 Cal.4th 1,14-15 (2016).
8 Thereafter, the Ninth Circuit issued a decision in *Wal-Mart* broadly affirming the trial court's
9 grant of certification and denying *en banc* review. See *Brown v. Wal-Mart, Inc.*, No. 12-17623,
10 2016 WL 3212265 (9th Cir. 2016).

11 **IV. BECAUSE THIS IS NOT A CLASS ACTION TRADITIONAL NOTICE IS NOT**
12 **REQUIRED**

13 In class actions, except those for purely injunctive relief, due process requires that putative
14 class members be given not only notice of a proposed settlement, but the right to object and the
15 right to opt-out. Those requirements flow from the fact those putative class members hold
16 substantive claims. As discussed above, this is not the case in a PAGA action where the real party
17 in interest is the LWDA and the employees are nominal parties. See, *Viking River Cruises*, 2022
18 WL 2135491 at *4; *Urbino v. Orkin Services of California*, 726 F.3d 1118, 1122-23 (9th Cir.
19 2013).

20 The LWDA, as the real party in interest has, of course, received formal notice of the terms
21 of the settlement as required by Labor Code §2698(l). (Jones Decl. ¶20). However, the Aggrieved
22 Employees do not receive the traditional class notice:

23 Because a PAGA action is a statutory action for penalties brought as a proxy for the
24 state, rather than a procedure for resolving the claims of other employees, there is no
need to protect absent employees' due process rights in PAGA arbitrations. *Compare*

25 ³ *Bright v. 99 Cents Only Stores*, 189 Cal.App.4th 1472 (Cal. Ct. App. 2010, review denied
26 February 16, 2011); *Home Depot U.S.A., Inc. v. Superior Court*, 191 Cal.App.4th 210 (Cal. Ct. App.
27 2010, review denied March 16, 2011); *Hall v. Rite Aid*, 226 Cal.App.4th 278 (2014, review denied
August 27, 2014); *Green v. Bank of America, N.A.*, 512 Fed.Appx. 665 (9th Cir. Feb. 13, 2013).

1 *Concepcion*, 131 S.Ct. at 1751-52 (observing “it is...odd to think that an arbitrator
2 would be entrusted with ensuring that third parties’ due process rights are satisfied”),
3 with *Arias*, 46 Cal.4th at 984-87, 95 Cal.Rptr.3d 588, 209 P.3d 023. PAGA
arbitrations therefore do not require the formal procedures of class arbitrations. See
Baumann, 747 F.3d at 1123.

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

8 *Sakkab* (*supra* at 436).

9 The categories of Aggrieved Employees at issue in this settlement (referred to in the
10 Settlement Agreement as PAGA Group Members), both current and former, will learn of the
11 settlement because the settlement administrator (Phoenix Settlement Administrators) will be
12 mailing all those employees a simple notice informing them of the terms of the settlement, which
13 will accompany the money they will receive in connection with the settlement. See, Ex. 1,
14 Settlement Agreement at §§2.8, 2.17, 2.19; Ex. 2, Notice.

15 **V. INVESTIGATION AND DISCOVERY REGARDING WALMART’S**
16 **SEATING PRACTICES**

17 Both parties engaged in extensive formal and informal discovery regarding the claims and
18 defenses asserted by the parties prior to mediating this case. Jones Decl. ¶¶10-14. Specifically,
19 Plaintiff served, and Defendant responded to, multiple sets of Interrogatories and Requests for
20 Production. In turn, Defendant served Interrogatories and Document Requests on Plaintiff.
21 Walmart deposed the Plaintiff and Plaintiff conducted four separate person most knowledgeable
22 (PMK) depositions on 64 different PMK deposition topics, many of which included sub-topics.
23 Plaintiff also took four percipient witness depositions. Defendant produced over 2,500 pages of
24 documents in addition to over five terabytes of data in the Action. The categories of discovery and
25 PMK depositions conducted by Plaintiff included, but were not limited to, the following: (1)
26 Walmart’s policies for providing seats to its employees; (2) the identification of all store positions
27 that utilize a cash register to process customer transactions; (3) the amount of time spent by

1 employees processing customer transactions using a cash register and performing other specific
2 job tasks; (4) the job duties of employees who use a cash register to process customer transactions;
3 (5) the job descriptions of Walmart's California based store employees; (6) the nature of the work
4 performed by all Walmart store employees who use a cash register to process customer
5 transactions; (7) the design and configuration of all work stations containing a cash register; (8)
6 Walmart's ADA accommodation policies for its store employees; (9) the specific facts supporting
7 Walmart's contention that the nature of cashier work does not reasonably permit the use of a seat;
8 and (10) Walmart's business judgment and the specific facts supporting Walmart's affirmative
9 defenses. *Id.*

10 In addition to formal discovery, after obtaining contact information for Aggrieved
11 Employees in discovery Plaintiff's counsel conducted numerous interviews with current and
12 former Walmart employees who use a cash register to process customer transactions. Plaintiff's
13 counsel also completed numerous visits to Walmart's California stores. In addition to site visits,
14 Plaintiff's counsel also obtained and reviewed "nature of the work" evidence, including
15 photographs and video depicting the actual work performed by the categories of employees at
16 issue in this case. *Id.* Although the parties were able to work together to resolve most of their
17 discovery disputes, the parties did need the Court's assistance, through an informal discovery
18 conference, regarding several discovery related issues. *Id.* Moreover, prior to the mediation in this
19 case, Walmart filed a Motion to Strike Plaintiff's PAGA Action suggesting its view that trial
20 would be unmanageable. This Motion was supported by declarations from 34 lay witnesses and an
21 expert whose opinion was based on personal store visits as well as the review of 5.75 terabytes of
22 video depicting the Aggrieved Employees at issue in this case performing their work.

23 Although the case settled prior to expert disclosures, seating cases typically involve
24 numerous experts. In fact, Defendant's trial management motion was supported by expert
25 testimony. The expert disciplines in seating cases involve customer satisfaction experts,
26 construction experts, ergonomic experts, survey research experts, and statistics experts. It was
27 important to have a team of qualified experts retained in these fields and prepared to testify in

1 response to the various theories argued by Walmart.

2 **VI. THE REASONABLENESS OF THE SETTLEMENT**

3 **A. Walmart's Exposure To the Claim**

4 Data provided by Walmart confirmed that there were approximately 771,000 pay periods
5 involving approximately 29,000 Aggrieved Employees between August 26, 2019 and March of
6 2022. Assuming Plaintiff prevailed in demonstrating that the nature of work performed for the
7 categories of Aggrieved Employees at issue in this case reasonably permitted the use of seats,
8 Walmart faced a maximum penalty exposure of approximately \$77,100,000 assuming the Court
9 imposed the initial violation amount of \$100 per pay period (\$100 x 771,000 pay periods). The
10 \$5,900,000.00 settlement represents approximately 7.5% of Defendant's exposure to penalties at
11 the \$100/pay period initial violation amount. Jones Decl. ¶¶8-9. This result is in fact greater than
12 comparable suitable seating settlements, as explained further below. The narrow scope of the
13 release on behalf of the Aggrieved Employees also confirms the reasonableness of this settlement.
14 As set forth in the settlement agreement at §§2.8 and 2.27, the Aggrieved Employees are only
15 releasing the claims asserted in this action – claims that Walmart violated Section 14(a) of the
16 Wage Order by failing to provide seats – during the time they were employed by Walmart in any
17 of the 19 covered positions involved in this case. This means that the Aggrieved Employees retain
18 the right to sue Walmart for violations of Section 14(a) when employed by Walmart in a position
19 other than the 19 positions covered in this case.

20 **B. Basis for Discounting Penalties for Purposes of Settlement**

21 Courts have approved PAGA settlements for only a fraction of the potential PAGA civil
22 penalties, particularly where counsel have presented compelling reasons why recovery of penalties
23 was unlikely. (See, e.g., *Viceral v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016, 2016 WL 5907869
24 at *9 [approving class action settlement that included a PAGA set-aside of just 0.15 percent of the
25 PAGA claim's full potential value, where "Plaintiffs face[d] a substantial risk of recovering nothing
26 on either the class or PAGA claims"]; *Cotter v. Lyft, Inc.* (N.D. Cal. 2016) 193 F.Supp.3d 1030,
27 1037 [approving class action settlement allocating a PAGA set-aside worth a fraction of the PAGA

claim's potential value, where the defendant's obligations were "genuinely unclear" and there was no evidence the defendant acted deliberately or negligently failed to learn about its obligations[.]) As set forth in the declarations of Plaintiff's counsel, there were several factors at play in this case that potentially warranted a discount from the full amount of penalties authorized by statute for Defendant's alleged violations of Section 14(a) of Wage Order 7, and Plaintiff submits that it was prudent to consider these factors for purposes of settlement. See, Jones Decl. ¶14

1. Risk of PAGA Claims Being Dismissed

Prior to the mediation, Walmart filed a Motion to Dismiss Plaintiff's PAGA claims based on alleged trial unmanageability. See, *Wesson v. Staples the Office Superstore, LLC* (2021) 68 Cal.App.5th 746, 771-775 [affirming the striking of PAGA claims as unmanageable]. Unlike many other suitable seating cases alleging violations of Section 14(a) of Wage Order 7-2001 which are brought on behalf of employees who work in one position with one job title, *i.e.*, front end Cashier, the instant case is brought on behalf of employees working in nineteen (19) different positions. Each position has its own job title and job description and each position works in different areas of the store. As set forth in the Motion to Strike, Walmart argues that litigating this action on a representative basis would be unmanageable due to various alleged differences in the nature of the work performed by the 19 positions at issue based on their job titles, duties, the areas on the store where they worked, and difference in the configurations of their respective workstations. While Plaintiff disagrees with Walmart's arguments, in light of the holding in *Wesson*, Plaintiff's counsel considered the risk of the PAGA representative claims being struck by the Court which would have resulted in zero recovery for the State of California and the Aggrieved Employees. See, Jones Decl. ¶14.

2. Lack Of Uniform Seating Policy

Contrary to the allegations in the Complaint, Walmart's PMK designees, as well as the lay witnesses who submitted declarations in support of Walmart's Motion to Strike, testified that Walmart does provide seats under Section 14(a) of the Wage Order when the nature of the aggrieved employee's work reasonably permits the use of a seat. Thus, Walmart claimed there was

1 no uniform policy prohibiting seating. Although Plaintiff was confident that Walmart's theory
2 conflicted with Walmart's written policies and procedures, this evidence was problematic for
3 Plaintiff both with respect to proving liability on a representative basis for all Aggrieved
4 Employees as well as the assessment of penalties. In light of the alleged lack of a uniform policy
5 prohibiting seating (i.e., Walmart claimed that allowing seats was ad hoc and discretionary at the
6 store level without record keeping), Plaintiff faced a scenario where some of the Aggrieved
7 Employees may have been provided with a seat during an entire pay period by their particular
8 store manager while others were not. Jones Decl. ¶14. Not only did this pose problems for Plaintiff
9 with respect to liability (i.e., Aggrieved Employees being provided with seats during entire pay
10 periods where no penalties could be assessed), but also manageability, such as, how to determine
11 in a particular week whether an Aggrieved Employee was or was not provided with a seat. See,
12 *Estrada v. Royalty Carpet Mills, Inc.* (2022) 292 Cal. Rptr. 3d 1, 22-23 [confirming that when a
13 Plaintiff in a PAGA action cannot prove Labor Code violations on behalf of all allegedly
14 Aggrieved Employees, the Court may assess minimal penalties.] Defendant's defenses, supported
15 by the evidence set forth in its motion, formed a platform under which a court could substantially
16 discount potential penalties.

17 **3. Walmart's Liability Defenses And Penalty Reduction**

18 Walmart has always disputed that Plaintiff would prevail on liability, as it has contended
19 that the nature of the Aggrieved Employee's work does not reasonably permit the use of a
20 seat/stool and that the alleged Aggrieved Employees rarely operated a cash register to process
21 customer transactions. See, Jones Decl. ¶14. In addition, Walmart also contended that the amount
22 of any penalties assessed, assuming a Labor Code violation, should be vastly reduced due to the
23 differences in work performed by the 19 different positions of Aggrieved Employees at issue in
24 this case as well as the minimal amount of time spend working at a cash register. In light of
25 Walmart's defenses, Plaintiff faced the very real risk that this Court could exercise its discretion
26 under California Labor Code §2699(e)(2) to vastly reduce the amount of penalties sought,
27 assuming liability was established. Specifically, Labor Code §2699(e)(2) affords the Court wide

1 discretion to reduce the amount of penalties awarded in cases such as this:

2 In any action by an aggrieved employee seeking recovery of a civil penalty available
3 under subdivision (a) or (f), a court *may award a lesser amount* than the maximum
4 civil penalty amount specified by this part if, based on the facts and circumstances of
the particular case, to do otherwise would result in an award that is unjust, arbitrary
and oppressive, or confiscatory. Emphasis added.

5 Here, Walmart was prepared to argue that even if a violation had occurred, which it
6 disputes, a substantial penalty reduction was warranted in this case based on factors such as (a) the
7 lack of regulatory enforcement by the State of California during the years preceding this lawsuit;
8 (b) substantial disagreement amongst the courts prior to the litigation concerning interpretation of
9 Section 14's statutory language; (c) Walmart's policy/practice of providing seats; and (d) other
10 reported decisions where the courts exercised their discretion to vastly reduce the amount of
11 penalties in PAGA actions. See, *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal.App.4th 1112,
12 1136 (2012) [reducing the original penalty of \$512,268.88 by 30% to \$358,588.22]; *Fleming v.*
13 *Covidien Inc.* 2011 WL 7563057, at *4 (C.D. Cal. Aug. 12, 2011)[reducing the original penalty of
14 \$2.8 million by 82% to \$500,000]; *Aguirre v. Genesis Logistics*, 2013 WL 10936035 at *2-3 (C.D.
15 Cal. Dec. 30, 2013)[reducing the original penalty of \$1.8 million by 72% to \$500,000 noting
16 among other reasons that the maximum penalty would be punitive without evidence that the
17 employer intentionally violated the wage order]; *Carrington v. Starbucks Corporation*, 30
18 Cal.App.5th 504, 528 (2018)[reduction of the \$50 maximum penalty (per initial violation) to only
19 \$5 per initial violation].

20 While it is possible that a trial would result in a larger dollar award of civil penalties, it is
21 equally possible that the reverse would be true, or even that the court would award no penalties
22 whatsoever if Plaintiff did not prevail on liability. The downside risks are apparent, and any
23 judgment obtained through litigation would require not only a greater investment in attorney time
24 and litigation costs but also the risk of serious and lengthy appeals, which Plaintiff's counsel
25 weighed seriously when negotiating a resolution of this claim. Jones Decl. ¶14.

26 As noted above, Plaintiff submits that the reasonableness of this settlement, which equates
27

1 to \$7.65 per pay period, is further supported by the fact that the amount received on a pay period
2 basis is greater than many settlements other settlements involving similar “suitable seating”
3 allegations, as reflected below:

- 4 • In *Enombang v. Target*, Alameda County Superior Court Case No. RG17853948,
5 the court approved a settlement of \$9,000,000.00 for 1,939,006 pay periods, which
6 equates to only \$4.66 per pay period;
- 7 • In *Sharp v. Safeway*, Santa Clara County Superior Court Case No. 1-11-CV-202901
8 the court approved a settlement of \$12,000,000 for 2,447,000, which equates to \$4.90
9 per pay period; and
- 10 • In *Picket v. 99c Only Stores*, Los Angeles Superior Court Case No. BC473038, the
11 court approved a settlement of \$1,290,000 for 1,592,592.6 pay periods equating
12 to only \$0.81 per pay period. Jones Decl. ¶9.

13 **VII. THE ATTORNEY’S FEES AND PLAINTIFF’S RELEASE PAYMENT ARE**
14 **REASONABLE**

15 PAGA does not have any requirements for reviewing attorney’s fees. Also, this case
16 carries with it a mandatory fee shifting statute under PAGA. Cal. Lab. Code Section 2699(g). The
17 only entity that could arguably take a position with the fees requested here is the LWDA. As
18 noted, Plaintiff has provided notice to the LWDA regarding all aspects of this settlement,
19 including the amount of fees sought. Should the LWDA contact Plaintiff’s counsel regarding any
20 aspects of this settlement prior to the hearing date, we will promptly notify the court.
21 Nevertheless, Plaintiff submits that the requested fees and costs sought are reasonable. As set forth
22 above in Section V, the parties conducted substantial discovery and trial preparation prior to
23 agreeing to settle this case. The fee requested here – one third of the gross settlement amount – is
24 consistent with, and actually less than, other attorneys’ fee awards by courts in other settlements
25 involving the same claims alleged here. For example, in *Enombang v. Target* (supra), Plaintiffs’
26 counsel were awarded 40% of the settlement fund in attorney’s fees and in *Sharp v. Safeway*
27 (supra), Plaintiff’s counsel were awarded 35% of the settlement fund in attorney’s fees despite

1 achieving results less than those achieved here. See, Jones Decl. ¶9. Moreover, the 33.33% fee
2 requested is within the standard class action contingent recovery percentage of one-third that was
3 expressly approved by the California Supreme Court in *Laffitte v. Robert Half Int'l Inc.* 1 Cal.5th
4 480, 504 (2016).

5 The attorney's fees being sought here are in fact in line with those actually incurred at the
6 market rates of Plaintiff's counsel as well. As set forth in the Declarations of Charles Jones and
7 Matthew Righetti, the lodestar for Plaintiff's counsel in this case is approximately \$1,355,200 and
8 costs incurred were \$82,712. See, Jones Decl., ¶¶17-18, Righetti Decl ¶¶11-23.) Thus, the fees
9 requested equate to counsels' lodestar with a modest multiplier of approximately 1.46, which is
10 appropriate in light of the risks taken by Plaintiff's counsel to litigate in this risky and complex
11 area of wage and hour law. Generally, the Ninth Circuit and California Courts award multipliers
12 between 2 to 4 times the lodestar to reward counsel for accepting the contingent risks of the
13 litigation or obtaining good results. See, e.g., *Laffitte*, 1 Cal. 5th at 506 (approving one-third fee
14 award with multiplier between 2.03 and 2.13); *Pellegrino v. Robert Half Intern., Inc.*, 182 Cal.
15 App.4th 278 (2010)(noting reasonable multipliers of 2.0 to 4.0 are often applied); *Wershba v.*
16 *Apple Computer, Inc.*, 91 Cal.App.4th 224,254 (2001) (noting that multipliers can range from 2 to
17 4 or higher); *Vandervort v. Balboa Capital Corp.*, 8 F.Supp.3d 1200, 1210 (C.D. Cal. 2014)
18 (awarding one-third of fund, which was a 2.52 multiplier of lodestar); *Boyd v. Bank of America*,
19 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.58
20 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL
21 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented a multiplier of 2.76
22 as falling within the "majority" range for risk multipliers).

23 Finally, Plaintiff submits that it is appropriate that he receive an enhancement of
24 \$15,000.00 for both the effort and risks he undertook in prosecuting this case and for the more
25 extensive release applicable to him. First, Walmart has agreed that this amount should be paid to
26 Plaintiff. Second, this is an amount sufficient to motivate an employee to take on the onerous role
27 of whistleblower and enforcer. Third, Plaintiff Chen is agreeing to a general release of all claims

1 for himself, known and unknown, in connection with the settlement agreement. See, Exhibit 1 at
2 §§3.3, 5.2, 5.3. To provide the monetary benefit to the representative, who took the initiative and
3 assumed the not insignificant burden and risk of litigation is a fair result. Moreover, Plaintiff
4 expended numerous hours towards the prosecution of this case including: (1) providing valuable
5 information to plaintiff's counsel about the feasibility of employees using a stool at Walmart; (2)
6 the policies and procedures of Walmart; (3) reviewing and approving discovery requests; (4)
7 communicating and cooperating with his counsel; (5) sitting for a full day deposition; and (6)
8 reviewing and approving the settlement agreement and settlement terms. (See Jones Decl. ¶19)
9 Since the purpose of PAGA is to create incentives for private litigants to bring actions enforcing
10 the Labor Code, rewarding prevailing litigants with a substantial recovery promotes PAGA's
11 purpose.

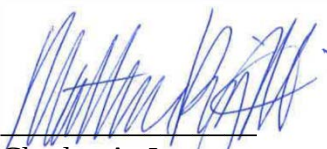
12 **VIII. CONCLUSION**

13 In light of the foregoing, Plaintiff respectfully requests that the Court approve the parties'
14 Settlement Agreement attached as Exhibit 1 so that Phoenix Settlement Administrators may begin
15 administering the settlement in accordance with the terms of the Agreement.

16
17 Dated July 15, 2022

Respectfully submitted,

JONES LAW FIRM LLC
RIGHETTI GLUGOSKI, P.C.

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Charles A. Jones
Matthew Righetti
Attorneys for Plaintiff



Make a Reservation

MARK CHEN vs WALMART, INC.

Case Number: 20STCV43043 Case Type: Civil Unlimited Category: Other Employment Complaint Case
Date Filed: 2020-11-10 Location: Stanley Mosk Courthouse - Department 73

Reservation

Case Name: MARK CHEN vs WALMART, INC.	Case Number: 20STCV43043
Type: Motion to Confirm Settlement	Status: RESERVED
Filing Party: Mark Chen, on behalf of himself, the State of California, and all other aggrieved employees, as defined herein (Plaintiff)	Location: Stanley Mosk Courthouse - Department 73
Date/Time: 08/10/2022 8:30 AM	Number of Motions: 1
Reservation ID: 531721782833	Confirmation Code: CR-HDT7KAOMH6CERSZDQ

Fees

Description	Fee	Qty	Amount
Motion to Confirm Settlement	60.00	1	60.00
Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			61.65

Payment

Chat

Amount:

\$61.65

Type:

AmericanExpress

Account Number:

XXXX1018

Authorization:

260346



Print Receipt



Reserve Another Hearing



View My Reservations

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