

1 William L. Marder, Cal Bar No. 170131
POLARIS LAW GROUP, LLP
2 501 San Benito Street, Suite 200
Hollister, California 95023
3 Telephone: 831.531.4214
Facsimile: 831.634.0333

4
5 Dennis S. Hyun (State Bar No. 224240)
HYUN LEGAL, APC
515 S. Figueroa St., Suite 1250
6 Los Angeles, CA 90071
(213) 488-6555
7 (213) 488-6554 facsimile

8 Attorneys for Plaintiffs
9
10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SACRAMENTO

13 ALLANTE MILTON and RICK LEWIS,
individually and on behalf of all others
14 similarly situated,

15 Plaintiffs,

16 v.

17 CAPITOL GUEST SERVICES, LLC, a
California limited liability company; and
18 DOES 1 through 50, inclusive,

19 Defendants.
20

CASE NO. 34-2020-00287884

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION TO APPROVE SETTLEMENT
AGREEMENT PURSUANT TO THE
PRIVATE ATTORNEYS GENERAL ACT;
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: May 6, 2021
Time: 9:00 a.m.
Department: 54

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

21 **PLEASE TAKE NOTICE** that on May 6, 2021, at 9:00 a.m., or as soon thereafter as the
22 matter may be heard, before the Honorable Christopher Krueger, judge presiding, in Department
23 54 of the above referenced Court located at Department 31 of the above referenced Court located
24 at 720 9th St., Sacramento, CA 95814, Plaintiffs Rick Lewis and Allante Milton (collectively,
25 "Plaintiffs") will seek an Order approving settlement pursuant to the Private Attorneys General
26 Act.

27 This motion will be based on this notice of motion, the attached memorandum of points
28

1 and authorities, the declarations of Plaintiffs, William L. Marder, and Dennis S. Hyun, which
2 attaches the Settlement Agreement and Release as Exhibit "A," the records and file herein, and on
3 such other evidence as may be presented at the hearing of the motion.

4 Dated: March 8, 2021

POLARIS LAW GROUP

6
7 By: William L. Marder
8 William L. Marder
9 Attorney for Plaintiff
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page(s)</u>
I. INTRODUCTION.....	5
II. FACTUAL AND PROCEDURAL BACKGROUND	6
III. THE SETTLEMENT TERMS AND ACTUAL AMOUNTS REQUESTED.....	6
IV. PAGA REQUIREMENTS.....	8
V. PLAINTIFF’S RATIONALE FOR AGREEING TO THE SETTLEMENT	9
VI. ATTORNEYS’ FEES AND COSTS ARE APPROPRIATE	10
VII. SERVICE AWARDS TO PLAINTIFFS FOR SERVING AS ATTORNEYS GENERAL ARE APPROPRIATE.....	12
VIII. NOTICE TO THE LWDA HAS BEEN PROVIDED.....	12
IX. CONCLUSION.....	12

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Arias v. Superior Court</i> , 46 Cal. 4th 969 (2009).....	6, 9
<i>Boeing Co. v. Van Gemert</i> , 444 U.S. 472, 478 (1980).....	11
<i>Carrington v. Starbucks Corp.</i> , 30 Cal. App. 5th 504 (2018).....	10
<i>City and County of San Francisco v. Sweet</i> , 12 Cal. 4th 105, 110 (1995).....	12
<i>In re Dun & Bradstreet Credit Servs. Customer Litig.</i> , 130 F.R.D. 366, 374 (S.D. Ohio 1990)...	13
<i>Iskanian v. CLS Transportation Los Angeles, LLC</i> , 59 Cal. 4th 348 (2014)	6
<i>Laffitte v. Robert Half Int’l</i> , 1 Cal. 5th 480, 503 (2016)	12
<i>Raines v. Coastal Pac. Food Distributors, Inc.</i> , 23 Cal. App. 5th 667, 681 (2018)	10
<i>Rodriguez v. W. Publ’g Corp.</i> , 563 F.3d 948, 958–59 (9th Cir. 2009)	13
<i>Serrano v. Priest</i> , 20 Cal. 3d 25, 34 (1977)	11, 12
<i>Van Vranken v. Atlantic Richfield Co.</i> , 901 F. Supp. 294, 299-300 (N.D. Cal. 1995)	13
<i>Vincent v. Hughes Air West, Inc.</i> , 557 F. 2d 759, 769 (9th Cir. 1997)	12
<i>Wershba v. Apple Computer, Inc.</i> , 91 Cal. App. 4th 224, 254 (2001)	11

Statutes

California Labor Code § 2698, <i>et seq.</i> , the Private Attorneys General Act of 2004 (“PAGA”)	6
Lab. Code § 2699(g)	11
Lab. Code § 2699(i)	9
Labor Code § 226(a)	7
Labor Code § 226(a)(9).....	10
Labor Code § 2699(f)(2)	10
Labor Code § 2699(l)	6, 10
Labor Code § 2699.3(a)(1).....	9
Labor Code § 2699.3(a)(2)(A)	9

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The current operative complaint is premised upon Defendant Capitol Guest Services,
4 LLC's ("Defendant") alleged violation of California Labor Code § 2698, *et seq.*, the Private
5 Attorneys General Act of 2004 ("PAGA") for civil penalties. Specifically, Plaintiffs Allante
6 Milton and Rick Lewis (collectively, "Plaintiffs") (Defendant and Plaintiffs collectively, the
7 "Parties") assert that Defendant failed to provide compliant wage statements by not listing the
8 accurate double time and holiday double time rates. While this action was initially pled as a class
9 and PAGA action, the Parties stipulated to dismiss the class claims, without prejudice, as
10 Defendant disclosed that the violation was limited to 55 individuals who received a total of 203
11 wage statements. As such, the Parties agreed to proceed only on a PAGA basis and have reached
12 a settlement as to only the PAGA Action as set forth herein and in the Parties' Settlement
13 Agreement and Release, which is attached to the concurrently filed Declaration of Dennis Hyun
14 ("Hyun Decl.") as Exhibit "A." To this end, the Parties also filed a Stipulation Granting Plaintiffs
15 Leave to Amend to File the First Amended Complaint, which asserts a single cause of action for
16 violation of the PAGA. The Court approved the Stipulation and on February 28, 2021, Plaintiffs
17 filed the operative First Amended Complaint.

18 As will be explained in further detail below, based on the California Supreme Court's
19 opinion in *Arias v. Superior Court*, 46 Cal. 4th 969 (2009) and *Iskanian v. CLS Transportation*
20 *Los Angeles, LLC*, 59 Cal. 4th 348 (2014), Plaintiffs can seek appropriate civil penalties as called
21 for under PAGA on behalf of the State of California and other similarly situated aggrieved
22 employees without seeking class certification or meeting any of the requirements of class
23 certification (i.e., numerosity, typicality, commonality and adequacy). As such, while the PAGA
24 penalties settlement reached herein is on behalf of the State of California and other aggrieved
25 employees, the usual two-step preliminary and final approval process is not required. Rather, as
26 called for under Labor Code § 2699(l), all that is required is an approval by this Court of the
27 PAGA penalties for which the Parties have agreed to settle.

28 The Parties have reached such an agreement, and thus, now seek this Court's approval of
the payment of the settlement civil PAGA penalties.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this putative class and representative action under the Private Attorneys General Act (the “PAGA”) on October 23, 2020, alleging a violation of Labor Code § 226(a) arising from wage statements allegedly not listing the correct overtime and double-time rates.

After filing the Action, the Parties engaged in direct settlement negotiations. As part of those discussions, Defendant’s counsel disclosed that the alleged violation was limited to 55 employees and 203 pay periods. Thus, the Parties agreed that as part of this settlement (given the low amount), the Parties would settle on a PAGA basis only. The Parties were able to reach the instant settlement after engaging in arms’ length negotiations between highly experienced counsel.

Based on the foregoing and on their own independent investigation and evaluation, Plaintiff’s Counsel is of the opinion that the settlement with Defendant for the consideration and on the terms set forth in the Settlement Agreement and Release (“Agreement,” or “Settlement Agreement”) is fair, reasonable, and adequate and is in the best interest of the Plaintiffs, the Labor Workforce Development Agency (the “LWDA”), and the Aggrieved Employees in light of all known facts and circumstances, including the risk of significant delay, the uncertainty associated with litigation, the various defenses asserted by Defendant, and the numerous potential appellate issues. Defendant and its Counsel also agree that the settlement is fair, reasonable, and adequate.

III. THE SETTLEMENT TERMS AND ACTUAL AMOUNTS REQUESTED

The current PAGA settlement calls for a total settlement amount of \$35,000.00 for resolution of this PAGA action. (*See* Agreement at § 2). The settlement contemplates that each Plaintiff is to receive up to \$2,500.00 as compensation for serving as the PAGA representatives. (Agreement at §§ 2.1, 2.2). The settlement also specifies up to 1/3 of the total settlement amount, or \$11,666.66 will be paid as attorneys’ fees and actual litigation costs up to \$5,000.00. (Agreement at § 2.3). Up to \$1,150.00 will be paid to the Settlement Administrator to administer the settlement. (Agreement at § 2.4).

Accordingly, the remaining approximate sum of Thirteen Thousand Six-Hundred and Fifty-Six Dollars and Fifty-Two Cents (\$13,656.52) will be distributed to the LWDA and the Aggrieved Employees on a 75% / 25% basis pursuant to PAGA. (Agreement at § 2.5). Assuming

1 these amounts are fully awarded, approximately Ten Thousand Two-Hundred and Forty-Two
2 Dollars and Thirty-Nine Cents (\$10,242.39) will be paid to the LWDA and approximately Three
3 Thousand Four Hundred and Fourteen Dollars and Thirteen Cents (\$3,414.13) will be distributed
4 to the Aggrieved Employees (the “Settlement Payment”). (*Id.*)

5 The Aggrieved Employees are defined as all current and former California non-exempt
6 employees who received a wage statement from Defendant containing payment of double time
7 and holiday double time wages at any time during the period from April 28, 2019 through the
8 present. (Agreement at § F). For purposes of this agreement, the term “PAGA Period” is defined
9 as the time period from April 28, 2019, through the present. (*Id.*) Based upon Defendant’s
10 records, there are 55 employees and 203 pay periods at issue. (*Id.*)

11 Each Aggrieved Employee’s share will paid on the number of alleged violative wage
12 statements the employee worked during the PAGA Period. Specifically, each Aggrieved
13 Employee shall be allocated a proportionate share of the Aggrieved Employee Amount based on
14 the number of wage statements containing payment of double time and holiday double time
15 wages each Aggrieved Employee received during the PAGA Period. (Agreement at § 2.6).
16 Defendant shall provide data to the Settlement Administrator establishing the number of wage
17 statements containing payment of double time and holiday double time wages each Aggrieved
18 Employee received during the PAGA Period. (*Id.*) The pro rata portion of the Aggrieved
19 Employee Amount shall be determined by dividing the total number of wage statements issued
20 during the PAGA Period containing payment of double time and holiday double time wages into
21 the Aggrieved Employee Amount to arrive at a value per wage statement for each Aggrieved
22 Employee. (*Id.*) The value per wage statement shall be multiplied by the number of wage
23 statements containing payment of double time and holiday double time wages issued to each
24 Aggrieved Employee during the PAGA Period to calculate each Aggrieved Employee’s pro rata
25 share of the Aggrieved Employee Amount. (*Id.*) This figure will be known as the “Aggrieved
26 Employee Settlement Award” (defined herein as “the amount of money allocated to each
27 Aggrieved Employee”). (*Id.*)

28 Based on the above, and as further detailed below, Plaintiff requests that this Court grant
approval of the current PAGA penalties settlement.

IV. PAGA REQUIREMENTS

Prior to the enactment of PAGA, many of the penalties provided against employers for violations of certain Labor Code provisions were solely within the province of the California Department of Labor to seek, enforce, and assess. *Arias v. Superior Court*, 46 Cal.4th 969, 980 (2009). However, due to the lack of financing to California's agencies and the potential number of Labor Code violations by California employers, the California Legislature found that it was in the public interest to allow aggrieved employees to act as private attorneys general and to enforce and recover penalties on behalf of other similarly situated aggrieved employees for Labor Code violations committed by their employers. *Id.* As such, PAGA was enacted to allow such enforcement and recovery by private individuals who have been aggrieved by their employers. Moreover, 75% of any penalties recovered under PAGA by an aggrieved employee is to be paid to California's LWDA and the remaining 25% is to be shared amongst the Aggrieved Employees. Lab. Code § 2699(i).

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 violation the aggrieved employee alleges the employer has violated. *See* Labor Code § 2699.3(a)(1). Once the LWDA notifies the aggrieved employee that it does not intend to investigate the alleged violations or the time for the LWDA to investigate the claims passes, the aggrieved employee is allowed to proceed in a civil action against the employer on the alleged violations on behalf of all other similarly situated employees. *See* Labor Code § 2699.3(a)(2)(A).

In 2009, the California Supreme Court considered the issue of whether an aggrieved employee who brings a PAGA claim on behalf of himself and others similarly situated needs to seek the PAGA claim as a class action and meet class certification requirements. *Arias*, 46 Cal. 4th at 976. After a substantial review of the legislative history of PAGA, the California Supreme Court held that an aggrieved employee's representative action brought on behalf of other similarly situated employees against an employer for PAGA violations do not need to meet the requirements for class certification. *Id.* at 975; 980-88. As the California Supreme Court held, a plaintiff bringing suit under PAGA does so as the proxy or agent of California's labor law enforcement agencies. *Id.* at 986. Because an employee's PAGA action functions as a substitute

1 for an action brought by the government itself, a judgment in the PAGA action binds all those
2 who would be bound by a judgment in an action brought by the government. *Id.*

3 Finally, in a settlement of a PAGA action brought by an aggrieved employee, the Superior
4 Court must “review and approve any penalties sought as part of a proposed settlement agreement”
5 relating to PAGA penalties. Labor Code § 2699(l). As the Parties to this current PAGA action
6 have reached such an agreement, the Parties now seek this Court’s approval as to the settlement
7 of the penalties amount.

8 **V. PLAINTIFF’S RATIONALE FOR AGREEING TO THE SETTLEMENT**

9 Labor Code § 226(a)(9) requires that wage statements containing payment of hourly
10 wages must specify the applicable hourly rates and number of hours worked. *See* Cal. Lab. Code
11 § 226(a)(9) (An employer must list “all applicable hourly rates in effect during the pay period and
12 the corresponding number of hours worked at each hourly rate by the employee.”).

13 Based on the pay periods at issue, the maximum amount of potential PAGA penalties was
14 \$50,750 (203 pay periods x \$250 per Labor Code § 226.3). (Declaration of Dennis S. Hyun (“Hyun
15 Decl. ¶ 9). Therefore, the \$35,000 settlement represents 68.9% of the total exposure, which is fair,
16 adequate and reasonable.

17 Indeed, even assuming Plaintiffs ultimately prevail, the Court still has discretion to reduce
18 any potential PAGA penalties. Pursuant to Labor Code § 2699(f)(2), the Court can decline to
19 award PAGA penalties where “...if, based on the facts and circumstances of the particular case,
20 to do otherwise, would result in an award that is unjust, arbitrary and oppressive, or
21 confiscatory.” Indeed, as shown in the Court of Appeal’s decision in *Carrington v. Starbucks*
22 *Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his PAGA claim upon trial,
23 the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer’s good
24 faith attempt at complying with the law. *Id.* at 517. Upon review, the Court of Appeal found such
25 reduction to be proper. *Id.* at 539. Courts have also suggested that a reduction of civil penalties
26 may be appropriate where the alleged violation is a technical one. *Raines v. Coastal Pac. Food*
27 *Distributors, Inc.*, 23 Cal. App. 5th 667, 681 (2018) (“a trial court has discretion in awarding civil
28 penalties and may reduce the award for technical violations that cause no injury”). Defendant has
suggested that any penalties awarded should be reduced under this line of reasoning.

1 Although Plaintiffs believe in the merits of the alleged claims and maintain that there does
2 not exist any reason for reducing PAGA penalties, Plaintiffs are aware that Defendant's defenses
3 could be persuasive to the Court. Such a ruling from this Court would have resulted in Aggrieved
4 Employees and the State of California receiving zero monies.

5 Additionally, even if Plaintiffs were to prove their claims at trial, there is a possibility that
6 the Court could award a small percentage of PAGA penalties, as the Court has the discretion to
7 do. Thus, while the gross settlement amount is approximately 68.9% of the potential maximum of
8 PAGA penalties, this settlement, in light of all of the attendant risks, is fair and reasonable.

9 Finally, the only claims being released are the PAGA penalties are limited to the claims
10 pled:

Upon the approval by the Court of this Agreement, Plaintiffs,
11 individually and as the representative acting as a proxy or agent of
the LWDA, a State of California Executive Branch Agency, in this
12 Action, agrees to release Defendant, its joint employers, affiliates,
subsidaries, owners, members, partners, officers, directors,
13 predecessors, successors, assigns, agents, shareholders, investors,
insurers and legal representatives ("Released Parties") for penalties
14 under the California Private Attorneys' General Act predicated on
the violation of Labor Code § 226(a) based on the facts as alleged
15 in the Complaint that accrued at any time during the PAGA Period
("Released Claims").

16 (Agreement at § 6 (emphasis added)). The Aggrieved Employees are not releasing their
17 individual claims under such Labor Codes – only their PAGA claims/penalties. For all of the
18 foregoing reasons, this Settlement should be approved.

19 VI. ATTORNEYS' FEES AND COSTS ARE APPROPRIATE

20 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. Cal. Lab. Code §
21 2699(g). Although this is not a class action, in representative class actions California state and
22 federal courts have recognized that an appropriate method for determining award of attorneys'
23 fees is based on a percentage of the total value of benefits to class members by the settlement.
24 *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d
25 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West,*
26 *Inc.*, 557 F. 2d 759, 769 (9th Cir. 1997). The purpose of this equitable doctrine is to avoid unjust
27 enrichment of counsel and to "spread litigation costs proportionally among all the beneficiaries so
28 that the active beneficiary does not bear the entire burden alone." *Vincent*, 557 F. 2d at 769.

1 The Common Fund doctrine is predicated on the principle of preventing unjust
2 enrichment. When a litigant's efforts create or preserve a fund from which others derive benefits,
3 he may require the passive beneficiaries to compensate those who created the fund. Both
4 California state and federal courts have embraced this doctrine. *Serrano*, 20 Cal. 3d at 35;
5 *Vincent*, 557 F.2d at 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th
6 105, 110 (1995), the California Supreme Court recognized that the common fund doctrine has
7 been applied "consistently in California when an action brought by one party creates a fund in
8 which other persons are entitled to share." The reasons for applying the common fund doctrine
9 include: "...fairness to the successful litigant, who might otherwise receive no benefit because his
10 recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the
11 others who are entitled to share in the fund and who should bear their share of the burden of its
12 recovery; encouragement of the attorney for the successful litigant who will be more willing to
13 undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he
14 is assured that he will be properly and directly compensated should his efforts be successful." *Id.*

15 Indeed, most recently, the California Supreme Court has also held that the award of
16 attorneys' fees in common fund wage and hour class action settlements should start with the
17 percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the
18 overwhelming majority of federal and state courts in holding that when class action litigation
19 establishes a monetary fund for the benefit of the class members, and the trial court in its
20 equitable powers awards class counsel a fee out of that fund, the court may determine the amount
21 of a reasonable fee by choosing an appropriate percentage of the fund created.").

22 The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent
23 of the fund. *Laffitte*, 1 Cal. 5th at 506. And this was based on a lodestar amount that required a
24 multiplier of 2.13. (*Id.* at 487). As the Court held, only when the multiplier is "extraordinarily
25 high or low [should] the trial court [] consider whether the percentage method should be adjusted
26 so as to bring the imputed multiplier within a justifiable range." *Id.* at 505.

27 Here, Plaintiffs' counsel seeks 1/3 of the Maximum Settlement Amount in attorneys' fees,
28 or \$11,666.67. Plaintiffs' counsel has incurred far more than the requested fee, including

1 reviewing the data and calculating damages and preparing the settlement papers. (Hyun Decl. ¶
2 10, Exh. A; Declaration of William Marder (“Marder Decl.”) ¶ 11, Exh. A). Specifically, through
3 administration of this settlement, Plaintiff’s counsel would have incurred a total of 106.6 hours
4 for a lodestar of \$79,950. (*Id.*)

5 Plaintiffs’ counsel’s cost reimbursement request in the amount of \$3,526.81 is also
6 reasonable, especially in light of the fact that the Parties agreed that Plaintiffs’ counsel may seek
7 up to \$5,000.00 in costs under the Settlement Agreement. As set forth in their declarations, the
8 costs were all directly incurred in the prosecution of this action, including, but not limited to,
9 filing/service fees and deposition costs. (Marder Decl. ¶ 12, Exh. B; Hyun Decl. ¶ 11). As such,
10 the requested costs should be awarded as fair and reasonable.

11 **VII. SERVICE AWARDS TO PLAINTIFFS FOR SERVING AS ATTORNEYS** 12 **GENERAL ARE APPROPRIATE**

13 Courts have held that named plaintiffs in class, or private attorney general actions can
14 receive service awards. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009)
15 (explaining that service awards “are intended to compensate class representatives for work done
16 on behalf of the class, to make up for financial or reputational risk undertaken in bringing the
17 action, and, sometimes, to recognize their willingness to act as a private attorney general”)
(emphasis added).

18 Here, Plaintiffs each seek \$2,500 for their service award, which is intended to compensate
19 Plaintiffs for the time spent on this case and the potential for retaliation. (Declaration of Allante
20 Milton ¶¶ 3-4; Declaration of Rick Lewis ¶¶ 3-4). These requested enhancements are consistent
21 with awards approved in other common fund cases. *See Van Vranken v. Atlantic Richfield Co.*,
22 901 F. Supp. 294, 299-300 (N.D. Cal. 1995) (incentive award of \$50,000); *In re Dun &*
23 *Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (two incentive
24 awards of \$ 55,000, and three incentive awards of \$35,000).

25 **VIII. NOTICE TO THE LWDA HAS BEEN PROVIDED**

26 On March 8, 2021, Plaintiffs uploaded the instant motion, Settlement Agreement, and
27 proposed order to the LWDA’s website. (Hyun Decl. ¶ 12, Exh. C).

28 **IX. CONCLUSION**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Based on the above, Plaintiffs request the Court approve the current PAGA settlement.

DATED: March 8, 2021

POLARIS LAW GROUP, LLP

By: William L. Marder
William L. Marder
Attorneys for PLAINTIFFS