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JESUS GIL MALDONADO, FRANCISCO MORA, HOMERO OCHOA,
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JESUS GIL MALDONADO,
FRANCISCO MORA, HOMERO
OCHOA, ISMAEL MORALES, and
JESUS PRIETO;

Plaintiffs,

v.

EXCEL HOTEL SERVICES, INC;
LANDMARK RESTORATION LTD;
CONSTELLATION REHAB SERVICES,
LLC; ABEL SIMON CURIALES; DAVID
REGY WESTBROOK; STEPHEN
DAVID PAYONE.

Defendants.

No. 20-CV-07512-LB

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR ORDER APPROVING
SETTLEMENT OF FLSA AND PAGA
CLAIMS; MEMORANDUM OF POINTS AND
AUTHORITIES**

[Filed Concurrently with Declarations of Alexander
S. Rusnak and Tomas E. Margain and Proposed
Order]

Date: January 20, 2022
Time: 9:30 a.m.
Courtroom: B -15th Floor
Judge: Honorable Laurel Beeler

TO THE COURT AND DEFENDANTS EXCEL HOTEL SERVICES, INC; LANDMARK
RESTORATION LTD; CONSTELLATION REHAB SERVICES, LLC; ABEL SIMON CURIALES;
DAVID REGY WESTBROOK; STEPHEN DAVID PAYONE and their attorneys of record:

This Motion is based upon this notice, the attached memorandum of points and authorities, the declarations of Tomas E. Margain and Alexander S. Rusnak and attached exhibits and the Court's file and such oral and documentary evidence as may be presented at the hearing on this Motion.

Dated: December 16, 2021

Alexander S. Rusnak
Tomas E. Margain
Attorney for Plaintiffs

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3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **INTRODUCTION**

5 Plaintiffs JESUS GIL MALDONADO, FRANCISCO MORA, HOMERO OCHOA, ISMAEL
6 MORALES, and JESUS PRIETO, (collectively “Plaintiffs”) seek approval of a settlement reached with
7 four of the six Defendants in the case under both PAGA¹ and the FLSA². Plaintiffs are five construction
8 workers who traveled to California to work for an unlicensed construction contractor who in turn had
9 been hired by a construction contractor licensed by California. The settlement is reached with only four
10 of the six Defendants in this action. The settling Defendants, EXCEL HOTEL SERVICES, INC;
11 LANDMARK RESTORATION LTD; DAVID REGY WESTBROOK and STEPHEN DAVID
12 PAYONE (collectively “Settling Defendants”), have agreed to pay One Hundred Ninety Thousand
13 Dollars (\$190,000.00) in installments over 18-months. Of this amount Forty-Six Thousand Six Hundred
14 Seventy-Three Dollars (\$46,673.00) or 24.56% would be earmarked as the PAGA settlement payment to
15 the State of California’s Labor and Workforce Development Agency. Plaintiffs’ counsel is also seeking
16 to be paid Sixty-Eight Thousand Three Hundred Twenty-Seven Dollars (\$68,327.00) to reimburse their
17 costs and pay them a one third contingency which is less than half of their fees incurred based on a
18 loadstar calculation. Further, Seventy-Five Thousand Dollars (\$75,000.00) is allocated to Plaintiffs
19 individual FLSA and *Cal. Labor Code* claims.

20 This settlement does not include Defendants CONSTELLATION REHAB SERVICES, LLC and
21 ABEL SIMON CURIALES (collectively “Non-Settling Defendants”) who directly hired Plaintiffs. As
22 to the Non-Settling Defendants, their counsel on December 9, 2021, filed a Status Report (Docket No.
23 53) indicating his intent to withdraw based on his client’s failure to communicate with him.

24 As will be seen herein, the settlement agreement and distribution will almost make Plaintiffs
25 whole, does not shift any funds to Plaintiffs greater than their claims, and is fair based on factors used to
26 evaluate the remedial purpose of California’s PAGA and the FLSA. In support of the motion, Plaintiffs’

27 ¹PAGA approval under *California Labor Code* § 2699(l) of a settlement under *Labor Code* § 2698 *et seq.*, California’s
28 Private Attorneys General Act (“PAGA”).

² FLSA approval under 29 *U.S.C.* §§ 207, 216(B), and 255(A) of, the Fair Labor Standards Act.

1 counsel Tomas E. Margain is supplying a declaration which goes into greater detail on the negotiations
2 in this case and reasons for settling.

3 Finally, Plaintiffs want to flag two important issues.

4 First, on December 16, 2021, the State of California was put on Notice of the Settlement and the
5 hearing as counsel e-filed the Agreement and the papers through the LWDA's portal to file documents
6 on pending LWDA PAGA cases. (*Declaration of Tomas E. Margain in Support of Plaintiff's Motion*
7 *for Order Approving Settlement of Labor Code § 2698 et seq. (PAGA) Claims.* ("Margain Decl.") ¶ 2.)

8 Second, twenty-five percent of the \$46,673.00 PAGA recovery must be distributed to aggrieved
9 workers or PAGA Pool works. Defendants Curiales and Constellation, who have the records, disclosed
10 ten such workers. Plaintiffs believe that there are as many as twenty-seven workers. As the settlement
11 contemplates an 18-month payment plan, Plaintiffs would want to set a follow up Status hearing to
12 provide the Court with Plaintiffs efforts to find other workers. The worker PAGA payment distribution
13 is scheduled to be made nine months after approval so Plaintiffs would request a September Status
14 Hearing date to provide a report to the Court prior to the distribution which would be made in October
15 of 2022.

16 ALLEGATIONS AND FACTS

17 Plaintiffs were recruited to travel to San Francisco to work as construction workers on a
18 largescale remodel which was the rebranding of the San Francisco Fisherman's Wharf Holiday Inn to a
19 Kimpton branded boutique hotel. *Margain Decl.* ¶ 3. They were recruited by Defendant Abel Curiales,
20 an Illinois based construction contractor, who is not licensed by the California State Contractors Board
21 ("CSLB") to perform construction work in California. *Id.* Curiales in turn had been hired by
22 LANDMARK RESTORATION LTD. a Georgia based corporation which is licensed by the CSLB to
23 perform construction work in this state. Curiales did this through an Illinois Limited Liability
24 corporation called CONSTELLATION REHAB SERVICES, LLC which never registered with the
25 California Secretary of State and which is currently suspended by the state of Illinois. *Id.* at ¶ 4; Request
26 for Judicial Notice at Exhibit A. The construction work at issue occurred from late February 2020
27 through November 2020. *Id.* at ¶ 5. However, Plaintiffs' individual claims and work occurred from
28

1 roughly March 2020 to August 4, 2020. *Id.*

2 The Direct employees of Curiales and Constellation, including Plaintiffs, worked 9-hour days,
3 from 7:00 am to 5:00 pm with a one-hour lunch, six days a week without overtime premium pay. They
4 also did not receive payment for all hours worked. Workers were paid by non-payroll “personal”
5 checks, without any payroll tax withholdings, and filled out W-9 paperwork characterizing them as
6 Independent Contractors as opposed to W-4 Employees. *Id.* at ¶ 6.

7 While employed, Plaintiffs and other workers hired by Curiales allege that they were directed by
8 a superintendent hired by Landmark Restoration Ltd named Randal Altamirano to do everything from
9 removing furniture, carpets and wallpaper from rooms, demolition of the walls as needed, miscellaneous
10 carpentry framing work and installing sheetrock. Altamirano allegedly would: (1) direct these workers
11 as to their general duties, (2) coordinate their work with other trades hired by different contractors such
12 as plumbers, electricians and painters, and (3) would have them do specific tasks such as moving
13 furnishings that were delivered or to take care of a plumbing water emergency in the lobby. Altamirano
14 was not a lead worker or working foreman who would work alongside workers with tools. Altamirano
15 was a project manager whose job it was to oversee and manage the flow of construction. *Id.* at ¶ 7.

16 As the construction project progressed, Curiales fell behind on payment to his employees.
17 Because these workers were being housed, at first at the Holiday Inn they were working on, then in a
18 short term Air BnB rental house, and finally at the Triton Hotel in the Union Square Area, workers put
19 up with the pay gaps as they did not have to pay rent and only needed to feed themselves and remit
20 money to their families. This, however, came to a head at the end of July 2020 as workers had gone
21 most of the month without pay for the work they performed. Plaintiffs walked off the job on
22 Wednesday August 4, 2020, demanding their pay. Curiales agreed to pay them for the hours he believed
23 he owed them but told them the check had to be dated Friday August 7, 2020, as he needed a few days to
24 deposit money into his checking account. However, on August 7, 2020, Plaintiffs went to Chase, the
25 bank from which the checks were drawn, and were told that there was not sufficient money in the
26 account to cash the checks. Plaintiffs then called one of their counsel Tomas E. Margain, as they had
27 talked to him when they walked off the job, and he drove to San Francisco, met the workers, and went to
28

1 the construction site to talk to Curiales and Altamirano. (*Margain Decl.* ¶ 8) During this meeting,
2 Altamirano was polite and professional but informed everyone that the issue was between Constellation
3 and the workers and not Landmark. (*Margain Decl.* ¶ 9-12) Curiales was much more aggressive and
4 bothered but he stated that the funds would be available on Monday and agreed to pay for a hotel for
5 workers in Oakland so they would have a place to sleep. The following Monday, Plaintiffs were able to
6 cash their checks and get enough money to leave California. *Id.*

7 While employed, Plaintiffs did not receive all wages including overtime. Three Plaintiffs
8 received pay less than the San Francisco minimum wage. Moreover, as Plaintiffs were not paid at least
9 two times a month, they were not paid minimum wages for their labor even if they were subsequently
10 paid some wages. Finally, Plaintiffs did not receive wage stubs and their wage were not timely paid at
11 the end of their employment. Plaintiffs' claims total \$79,749.83 and were disclosed to all Defendants as
12 part of the Discovery process.

13 14 **PROCEDURAL HISTORY INCLUDING SETTLEMENT**

15 On August 19, 2020, Plaintiffs filed a notice with the Labor & Workforce Development Agency
16 ("LWDA") asserting that Defendants violated several provisions of California's *Labor Code*. (*Margain*
17 *Decl.* ¶ 4 Exhibit A to Complaint.) The LWDA did not respond to Plaintiffs' notice. (*Id.*) On October
18 26, 2021, Plaintiffs filed a civil complaint with this Court, alleging individual violations of 29 U.S.C. §§
19 207, 216(B), and 255(A) of the Fair Labor Standards Act and analogues violations California's *Labor*
20 *Code*.

21 During this case, the parties exchanged initial disclosures and Plaintiffs produced subsequent
22 disclosures. (*Margain Decl.* ¶ 15) After the parties exchanged disclosures, Plaintiffs propounded
23 written discovery on all Defendants. (*Margain Decl.* ¶ 16) Defendants Excel and Landmark also
24 propounded discovery on each of the five Plaintiffs. (*Margain Decl.* ¶) In total, Landmark produced
25 571 documents primarily contracts with Constellation, Excel and email communications with
26 Constellation. (*Margain Decl.* ¶ 17) Excel produced 704 documents primarily contracts with Excel and
27 the property Developer. Constellation produced 126 documents being the Landmark contract as well as
28

1 purported time and pay records for a total of ten workers including the five Plaintiffs. (*Id.*)

2 Plaintiffs attempted to meet and confer with Constellation’s counsel over the issue of the other
3 workers as they only produced information for ten workers and it was Plaintiffs contention that
4 Constellation hired a least twenty-nine workers. (*Margain Decl.* ¶ 18) The names of these workers had
5 been disclosed in their response to Interrogatories propounded by Defendant Landmark. On August 20,
6 2021, Plaintiffs also took the deposition of Non-Settling Defendants, with Mr. Curiales designated as the
7 Person Most Qualified. Curiales was examined on the documents produced and the pay claims of
8 Plaintiffs. The deposition was kept open and Plaintiffs have met and conferred with Non-Settling
9 defendants regarding perceived deficiencies in preparation of the deposition and production of
10 documents and will be seeking intervention by the Court on these issues. (*Margain Decl.* ¶ 19-22)

11 The parties then stipulated to have the Court appoint a panel mediator and the Court
12 subsequently appointed Arthur Eidelhoch. (*Margain Decl.* ¶ 23) Once Mr. Eidlehoch was appointed
13 and after holding a pre-mediation conference, counsel for Plaintiffs and counsel for the Settling
14 Defendants began to engage in pre-mediation settlement talks. This was prompted by the impending
15 close of discovery, the review of discovery responses and disclosures with firm numbers by Plaintiffs,
16 the expense of the mediation to Defendants, and the testimony at the deposition of Constellation.
17 (*Margain Decl.* ¶ 24) After three rounds of offers and counter offers, in non-collusive arms-length
18 negotiations, the settling Defendants agreed to pay \$190,000.00 payable over 18-months. (*Margain*
19 *Decl.* ¶ 25; *Declaration of Alexander S. Rusnak in Support of Motion For Order Approving Settlement*
20 *of FLSA and PAGA Claims* (“*Rusnak Decl.*” ¶ 19.) This was based on the following exposure:

- 21 1. \$79,749.83 owed to Plaintiffs;
- 22 2. \$1,103,000 owed on the PAGA claim based on a workforce of 15 workers from March 2020
23 through October 2020³.
- 24 3. \$155,346.35 in attorneys’ fees and \$5,000 in costs including the deposition taken of
25 Constellation with a Federally certified Spanish interpreter.

26 The audit is attached as Exhibit A to the Margain Declaration.

27
28 ³ During the mediation process, Plaintiffs revised their PAGA totals downwards which will be discussed in in the Argument section.

THE SETTLEMENT TERMS

The settlement Agreement is attached as Exhibit B to the Margain Declaration. The key provisions of the settlement are as follows:

Settling Defendants will pay One Hundred and Ninety Thousand Dollars (\$190,000.00) to settle the claims inclusive of attorneys' fees and costs.

The settlement amounts would be allocated as follows:

1. Seventy-Five Thousand Dollars (\$75,000.00) would be paid to Plaintiffs to settle their individual claims for unpaid wages, liquidated damages under the FLSA and California law, and penalties based on an exposure of \$79,749.83 or a recovery of 94% of their claim.
2. Forty-Six Thousand Six Hundred Seventy-Three Dollars (\$46,673.00) is allocated penalties under PAGA, with 75% of the penalties, going to the LWDA and 25% of the penalties going to the aggrieved workers, which include the Plaintiffs and the PAGA pool workers, divided by the number of weeks worked.⁴
3. Sixty-Eight Thousand Three Hundred and Twenty-Seven Dollars (\$68,327.00) of the above amounts is allocated to attorneys- fees and costs based on a load star of over \$148,740 in attorneys' fees and \$5,000 in costs.

The settlement payments shall be made over eighteen (18) months. Upon approval, Settling Defendants will pay \$75,000.00. This amount would go to Plaintiffs and their counsel. Settling Defendants will then make five payments of \$20,000 every three months and then make a seventh payment of \$15,000 projected to be 18 months after the approval. These payments would be split among Plaintiffs, their counsel, and for the PAGA settlement. The PAGA payment of \$46,673.00 would be made over three of the foregoing installment payments. As part of the fourth payment, nine months after approval, \$15,000 of the \$20,000 would be transmitted to a Third-Party Administrator earmarked for the PAGA distribution. A second payment of \$16,0673.00 would be transmitted to the

⁴ On the issue of the number of workers, Constellation disclosed 10 workers. However, Plaintiffs believe that there are at least 27 workers. Plaintiffs intend to compel further information from Constellation on this issue. The settlement contemplates the administrator sending PAGA funds to workers nine months after approval which would allow Plaintiffs to submit to the Court who they believe are the PAGA Pool workers who should get these funds.

1 Administrator with the sixth payment. The final \$15,000 payment would be transmitted in its totality to
2 the Administrator making the three payments total \$46,673.00. From these amounts, it is contemplated
3 that the first payment would pay the worker distribution, the administrator's fees, and the residual would
4 be paid to the State. The final two payments would also be paid to the State. As a PAGA payment, any
5 unclaimed funds would be remitted to the State of California Controller's Office through the Unclaimed
6 Property Program.

7 Finally, the settlement agreement also makes the three individual Defendants as well as a non-
8 party corporate officer liable for the \$190,000.00 in payments.

9 10 **ARGUMENTS TO SUPPORT APPROVAL OF THE SETTLEMENT AGREEMENT**

11 **1. THE COURT SHOULD APPROVE THE SETTLEMENT OF PLAINTIFFS' PAGA** 12 **CLAIMS.**

13
14 "An employee bringing a PAGA action does so as the proxy or agent of the state's labor law
15 enforcement agencies, ... who are the real parties in interest." *Sakkab v. Luxottica Retail N. Am. Inc.*, 803
16 *F.3d* 425, 435 (9th Cir. 2015) (internal citations omitted). Thus, "[a]n action brought under the PAGA is
17 a type of *qui tam action*." *Id.* at 429. As a PAGA action is brought as a proxy for law enforcement
18 agencies, the Court is not required to certify a PAGA claim as it would under F.R.C.P. Rule 23.
19 *Villalobos v. Calandri Sunrise Farm LP*, 2015 WL 12732709, at *5 (C.D. Cal. July 22, 2015). A
20 settlement of PAGA claims compromises a claim that could otherwise be brought by the state, and as
21 such the "court[s] shall review and approve any settlement of any civil action filed pursuant to
22 [PAGA]." *Cal. Labor Code* § 2699(1)(2).

23 *Cal. Labor Code* § 2699(e)(2) requires any party seeking approval of a PAGA settlement the
24 proposed settlement to the LWDA to permit the LWDA to comment, should it choose to. PAGA does
25 not establish a standard for evaluating PAGA settlements. The LWDA has stated that "[t]he LWDA is
26 not aware of any existing case law establishing a specific benchmark for PAGA settlements, either on
27 their own terms or in relation to the recovery on other claims in the action." *Ramirez v. Benito Valley*
28

1 Farms, LLC, 2017 WL 3670794, at *3 (N.D. Cal. Aug. 25, 2017) (quoting LWDA Response at 3,
2 *O'Connor v. Uber Techs.*, No. 13-CV-03826-EMC, Docket No. 736 (N.D. Cal. July 29, 2016)).
3 Ultimately, “neither the California Supreme Court, nor the California Courts of Appeal, nor the
4 [LWDA] has provided any definitive answer as to what the appropriate standard is for approval of a
5 PAGA settlement.” *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 971 (N.D. Cal. 2019)
6 (quoting *Jordan v. NCI Grp., Inc.*, 2018 WL 1409590, at *2 (C.D. Cal. Jan. 5, 2018)).

7 Given the lack of express standards in approving the settlement of PAGA claims, courts often
8 utilize several of the factors set forth in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998),
9 notably (1) strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of
10 further litigation; (3) the extent of completed discovery; and (4) the expertise and views of counsel.
11 *O'Connor v. Uber Techs.*, 201 F. Supp. 3d 1110, 1134 (N.D. Cal. 2016).

12 13 **A. The Strength of Plaintiffs’ Claims**

14 Plaintiffs believe that their theories of liability are and were strong. The Settling Defendants did
15 not hire Plaintiffs or the workers of Constellation. However, Plaintiffs asserted two separate theories of
16 liability as to them as to the California law claims. First, that they “suffered and permitted” and
17 “controlled” the workers of Constellation. (See *Martinez v. Combs* (2010) 49 Cal.4th 35, 64 “a
18 corporate officer or employee may be held liable as a joint employer if they (a) exercises direct or
19 indirect control over the wages, hours, or working conditions of any person; or (b) suffers or permits
20 persons to work”).

21 Second, as a CSLB licensed contractor who hired an unlicensed contractor, Settling Defendants
22 faced liability under *Cal. Labor Code* § 2750.5. Under *Cal. Labor Code* § 2750.5, the workers of an
23 unlicensed sub-contractor can become the employees of the licensed contractor that hired the
24 subcontractor. (See *Sanders Construction Co., Inc. v. Cerda* (2009) 175 Cal.App.4th 430, 434–436.)

25 On balance, the strength of the case warranted a PAGA settlement of \$46,673.00.

26 ///

27 ///

1 **B. The Risk, Expense, Complexity and Likely Duration of Further Litigation Favor**
2 **Settlement.**

3 The risk further litigation against the Settling Defendants viewed with respect to the
4 consideration paid was the primary factor in resolving the matter for \$190,000 with a \$46,673.00 PAGA
5 assessment. Neither corporate Defendant is a large company. Moreover, there was an argument that the
6 *Sanders Construction Co., Inc. v. Cerda* argument for attaching liability applies only to corporations and
7 not individuals. Moreover, the preliminary PAGA penalty accounting was based on the Court assessing
8 a \$25,000.00 penalty for 30 workers for a total of 750,000.00 for misclassifying those workers as
9 independent contractors rather than employees. *Cal. Labor Code* § 226.8 provides for two sets of
10 penalties for misclassifying employees and independent contractors. The first is for a penalty of not less
11 than \$5,000 and not more than \$15,000 for mischaracterizing a person as an independent contractor.
12 The second is for a penalty of not less than \$10,000 and not more than \$25,000 if there is a “pattern and
13 practice” of these violations. Based on the discovery, Settling Defendants had few recent California
14 projects, and frankly, have a small presence in California. As such the PAGA claim regarding
15 misclassification of employees as independent contractors, calculated at \$750,000 for thirty workers at
16 the maximum penalty of \$25,000.00 per worker could reasonably be reduced to \$5,000 penalties over a
17 projected 30⁵ workers for a total of \$150,000. When calculated based upon the short list of 10 workers
18 disclosed by Constellation in the discovery process Discovery, which again is a dubious assertion, the
19 \$750,000 penalty may only be worth \$50,000.00. (*Rusnak Decl.* ¶¶ 23-26)

20 Further, the range of possible aggrieved employees, ranging from ten to thirty creates debatable
21 range of penalties that could be assessed.

22
23 **C. The Extent of Completed Discovery**

24 Plaintiff’s counsel engaged in informal discovery, performed various informal investigations,
25 and took the deposition of Constellation. Sufficient discovery was taken to properly assess the PAGA
26

27 ⁵ While Plaintiffs are informed and believe that there were approximately thirty workers who worked on the construction
28 projects relevant to this matter, there was a lot of worker turnover, and as such, Plaintiffs estimate that there were
approximately fifteen workers on site at any given time. As such the PAGA penalty calculations are based on fifteen workers
per pay period. (*Margain Decl.* Ex A)

1 exposure and to settle the matter.

2
3 **D. The Opinion of Plaintiff's Counsel**

4 Plaintiffs' counsel are experienced in wage-and-hour claims and PAGA claims, has acted in
5 good faith and represented their clients' best interest in reaching the Settlement Agreement. The
6 compromises made, based upon Plaintiffs' counsels' experience are proportional to the likelihood of
7 succeeding weighted against the anticipated costs of continued litigation with value of a prompt
8 resolution for all parties.

9 Plaintiffs' counsel has a combined thirty years of experience litigating wage and hour claims,
10 including PAGA claims. It is Plaintiffs' counsels opinion, based upon past experience, that the
11 resolution reached, as to both individual and representative claims under PAGA represent a normal
12 compromise based upon the risks of success at trial, including the amount of any judgement awarded;
13 the anticipated costs of continued litigation; and the value of an immediate resolution. In fact, Counsel
14 feels that the \$46,673.00 represents a real and cognizable recovery as opposed to a token recovery such
15 as \$500, \$5,000 of \$10,000 which in their experience they have seen as PAGA recoveries in other six
16 figure cases.

17
18 **1. PLAINTIFFS INDIVIDUAL FLSA SETTLEMENT SHOULD BE APPROVED.**

19 Under the FLSA, Plaintiffs may recover liquidated damages over three years for overtime or
20 minimum wage violations. *See* 29 U.S.C. § 216(b) ("An employer who violates the provisions of
21 section 206 or section 207 shall be liable to the employee or employees affected in the amount of their
22 unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional
23 equal amount as liquidated damages.") The liquidated damages are mandatory unless the employer
24 establishes both subjective and objective good faith in its violation. *See* 29 U.S.C. § 260; *Local 246*
25 *Utility Workers Union of America v. Southern California Edison*, 83 F.3d 292 (9th Cir. 1996). The
26 employer must establish that it had "an honest intention to ascertain and follow the dictates of the Act
27 and that it had reasonable grounds for believing that [its] conduct complie[d] with the Act." *Id.* at 298
28

(internal quotation omitted). Even if the employer meets its burden, the court may still award some liquidated damages. *Id.* “These liquidated damages represent compensation, and not a penalty. Double damages are the norm, single damages the exception.” *Id.* at 297.

Further, liquidated damages are still owed should an employer eventually pay an employee the minimum wage or overtime owed. *See Briggs v. Wilson*, 1 F.3rd 1537 (9th Cir 1993). Essentially, an employer cannot decide to pay wages months down the road and escape liability under the FLSA for liquidated damages. In the case at hand, the only FLSA that remained was for liquidated damages.

Because an employee cannot waive claims under the FLSA, those claims may not be settled without supervision of either the Secretary of Labor or a district court. *See Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981). “The FLSA places strict limits on an employee’s ability to waive claims for unpaid wages or overtime ... for fear that employers may coerce employees into settlement and waiver.” *Trout v. Meggitt-USA Servs., Inc.*, No. 216CV07520ODWAJW, 2018 WL 1870388, at *3 (C.D. Cal. Apr. 17, 2018) (internal quotation marks and citation omitted); see *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707, (1945) (finding that the FLSA prohibits waiver of the statutory minimum wage and right to liquidated damages as a check against the superior bargaining power employers generally enjoy vis-à-vis employees). Accordingly, claims for unpaid wages under the FLSA may only be waived or otherwise settled if settlement is supervised by the Secretary of Labor or approved by a district court. *See Lynn’s Food Stores, Inc. v. United States ex rel. U.S. Dept. of Labor, Emp’t Standards Admin., Wage & Hour Div.*, 679 F.2d 1350, 1352-53 (11th Cir.1982).

Lynn’s Food Stores indicates that, in reviewing a FLSA settlement, a district court must determine whether the settlement represents a “fair and reasonable resolution of a bona fide dispute.” *Lynn’s Food Stores* 679 F.2d at 1353-55. A bona fide dispute exists when there are legitimate questions about the existence and extent of the defendant’s FLSA liability as there must be “some doubt ... that the plaintiffs would succeed on the merits through litigation of their [FLSA] claims.” *Selk v. Pioneers Mem’l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1172 (S.D. Cal. 2016).

Plaintiffs individual claims total approximately \$79,749.83. (*Rusnak Decl.* ¶ 20) This settlement provides for \$75,000.00 to go to Plaintiffs directly, 94% of the full value of their claim, which will be

distributed at proportionately amongst the individual Plaintiffs. (*Id.*). Given the discrepancies between Defendants records, or at times, lack of records and Plaintiffs records, the settlement represents a reasonable compromise as to the disputed claims. (*Id.*)

For the reason above the Court should approve the parties settlement of Plaintiffs' FLSA claims.

2. Attorneys Fees and Costs

29 U.S.C. § 216(b) of the FLSA and California Labor Code §§ 2802, 218.5, 226(e), 1194, and 2699(g) provide for the recovery of reasonable attorneys fees and costs for a prevailing employee. Plaintiffs have made a net monetary recovery in both their individual claims against Defendants and in their representative capacity on behalf of the State of California in their PAGA claim. Plaintiffs' counsel represented Plaintiffs on a contingent basis and advanced all costs associated with litigation.

Counsel's contemporaneous time records report the following hours worked and total in expenses. While the amounts allocated to attorneys fees and costs in the proposed settlement is below the reported Loadstar, for transparency, the amount equates to 33 1/3% of the gross settlement amounts even though it only pays for 40% of the fees incurred

ATTORNEY	RATE	HOURS	Total
Alexander S. Rusnak	\$350.00 per hour	93.8	\$ 32,830.00
Tomas E. Margain	\$661.00 per hour	185.35	\$ 101,942.50
TOTAL			\$155,346.35

The hours and rates are addressed in the declarations of counsel. (*Margain Decl.* ¶¶ 45-49; *Rusnak Decl.* ¶¶ 9-18)

The Loadstar for Plaintiffs' counsel, as indicated above is \$155,346.35. However, as stated above \$63,270.00 is 1/3% of the gross settlement is allocated to attorneys' fees.

Further Plaintiff seeks to recover the following costs:

Cost	Amount
Plaintiffs First Appearance Fee.	\$402.00

PAGA LWDA filing fee.	\$75.00
Service of Process.	\$239.00
Photo Copies	\$179.78
Court Reporter and Room for Constellation/Simon Deposition.	\$2,807.05
Spanish Interpreter for Constellation/Simon Deposition	\$1,180.00
Postage for Service PAGA Notice	\$16.98
Total	\$4,882.83

(Rusnak Decl. ¶ 18)

CONCLUSION

For the reasons stated above, Plaintiffs request that the Court approve the settlement of Plaintiffs individual FLSA claims and the PAGA settlement as outlined in the Settlement Agreement.

Again, Counsel wants to keep attempting to get records from Defendants Curiales and Constellation to determine the identity and location of other workers. However, the settling Defendants can be dismissed if the settlement is approved as this is an issue Plaintiffs will keep litigating with the non-settling defendants.

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Respectfully Submitted,

Dated: December 16, 2021

Tomas Margain

Alexander S. Rusnak
Tomas E. Margain
Attorney for Plaintiffs