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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF VENTURA

Atlas Vargas, an individual, on behalf of
himself and on behalf of all persons similarly
situated,

Plaintiff,

v.

SKYSKOPES, INC., a Delaware Corporation;
and DOES 1 through 50, inclusive,

Defendants.

Case No. 56-2020-00544196-CU-OE-VTA

Assigned for all Purposes to the Hon. Judge
Mark Borrell (Dept. 40)

Motion Reservation #: 2562304

**MOTION FOR APPROVAL OF PRIVATE
ATTORNEYS GENERAL ACT (PAGA)
SETTLEMENT AND DISMISSAL OF
CLASS CLAIMS WITHOUT PREJUDICE**

Hearing Date: May 27, 2021

Hearing Time: 8:30 a.m.

Location: Dept. 40

Complaint Filed: August 11, 2020

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Trial Date: None Set

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TABLE OF AUTHORITIES

Cases:

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Arias v. Superior Court

(2009) 46 Cal.4th 969.....6, 8

Brown v. Ralphs Grocery Co.

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Cabardo v. Patacsil

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1 **I. INTRODUCTION:**

2 Plaintiff Atlas Vargas (“Plaintiff” or “Vargas”) submits this Memorandum of Points and
3 Authorities in support of Plaintiff’s Motion for Approval of the Private Attorneys General Act of
4 2004, (hereinafter the “PAGA”) settlement reached in this Action and for Dismissal *without*
5 *Prejudice* of all causes of action brought by Plaintiff on behalf of all persons similarly situated (the
6 “Class Claims”). Plaintiff and Defendant SkySkopes, Inc. (hereinafter “Defendant” or
7 “SkySkopes”) (collectively the “Parties”) have documented the proposed Settlement in the
8 Settlement Agreement (referred to hereafter as "Settlement" or "SA") (*see* Declaration of
9 Alexander I. Dychter (hereinafter the “Dychter Decl.”), **Exhibit 1**).

10 Pursuant to the terms of this Settlement, Defendant will pay a non-reversionary
11 Settlement Payment of \$166,000. (Dychter Decl. ¶4). Subject to Court approval, from this sum,
12 the following amounts shall be deducted: 1) a Service Payment not to exceed \$5,000 to Plaintiff
13 Atlas Vargas, for initiation of the Action and all efforts and risks undertaken to do so; 2)
14 Settlement Administration expenses of \$2,000 to Atticus Administration, LLC, 3) PAGA
15 Counsel’s attorneys’ fees not to exceed \$55,333.33 (33.33% of the Settlement Payment), and 4)
16 reimbursement of litigation costs of \$5,915.66.

17 The sum remaining – approximately \$97,750 – will be disbursed as directed by the
18 PAGA, Cal. Labor Code § 2698, *et seq.*, with approximately \$73,313 (75% of the Settlement)
19 paid to the State of California Labor and Workforce Development Agency (hereinafter the
20 “LWDA”); and the remainder of approximately \$24,437 (25%) distributed proportionately to all
21 PAGA Members based upon their respective number of pay periods worked during the “Covered
22 Period,” which is defined as that period from August 11, 2019 *through* April 8, 2021. (*Id.*; SA
23 Sect. II, ¶ 7; Sect. III, ¶¶ 21-27).

24 The Settlement was reached through extensive, arms’-length, informed negotiations, with
25 the help of an experienced mediator following an informal exchange of information, documents,
26 and data. Plaintiff contends that the result is fair, adequate, reasonable, and fulfils PAGA’s
27 purposes of enforcing California’s laws protecting employees and collecting civil penalties for the
28 State. The amount is consistent with Court-approved amounts in other PAGA cases, and the

1 requests for PAGA Counsel's attorneys' fees and costs and Plaintiff's service payment are
2 reasonable. (Dychter Decl. ¶5).

3 The LWDA has been provided a copy the instant Motion papers (including a copy of the
4 fully-executed Settlement Agreement) via the LWDA's online filing portal in compliance with
5 Labor Code § 2699(1)(2). (Dychter Decl. ¶5; *see Exhibit 2*, e-mail confirmation from the LWDA).

6 The superior court "shall review and approve any settlement of any civil action filed
7 pursuant to" Labor Code § 2699(1)(2). Plaintiff requests the Court approve this PAGA Settlement
8 and order it be implemented according to the terms of the Agreement. Defendant has reviewed the
9 instant Motion and **will not** be opposing. (Dychter Decl. ¶6).

10 **II. THE PARTIES AND AGGRIEVED EMPLOYEES:**

11 Plaintiff Atlas Vargas was employed by Defendant as a Drone Pilot flying Unmanned
12 Aerial Vehicles ("UAV") in California from approximately August 2019 to approximately April
13 24, 2020. Drone Pilots, including Mr. Vargas, primarily navigated UAVs to inspect power lines
14 and electrical transmission poles. The Drone Pilots were also required to perform work tasks
15 beyond the actual flying, including removing and charging the UAV batteries, uploading flight
16 logs into the "SkyWard" software program, removing the SD card with photo data to provide to
17 their supervisors, and attending daily morning meetings. (Dychter Decl. ¶7).

18 PAGA Members are defined as all Drone pilots flying Unmanned Aerial Vehicles
19 ("UAV") and/or similarly titled job positions employed by SkySkopes, Inc. in California at any
20 time between August 11, 2019 through April 8, 2021 (the "Covered Period"). (Dychter Decl. ¶8;
21 SA Sect. II, ¶9).

22 During the Covered Period, Defendant employed **82 PAGA Members** that worked an aggregate of
23 approximately **1,480 Pay Periods**. (Dychter Decl. ¶9; SA Sect. II, ¶9).

24 **III. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY:**

25 Plaintiff submitted both his PAGA Notice Letter to the LWDA and filed the Complaint in
26 this action on August 11, 2020 in the above-entitled Court.¹ (Dychter Decl. ¶10, *see Exhibit 2*).

27 _____
28 ¹ Plaintiff's Complaint alleged that Defendant failed to: (i) pay straight-time wages and overtime
wages at the lawful regular rate of pay for all work performed; (ii) provide all required, compliant
uninterrupted, duty-free meal periods; (iii) reimburse required expenses; (iv) pay all owed wages each and

1 In the requisite 65 days following the service of the PAGA Notice, no notice was received
2 from the LWDA of its intention to investigate the violations stated in the PAGA Notice. Pursuant
3 to PAGA (Labor Code § 2699.3), Plaintiff satisfied the procedural notice requirement allowing
4 him to proceed with a civil action in the Superior Court of California, and he filed the First
5 Amended Complaint ("FAC") in the lawsuit on October 15, 2020, adding an additional cause of
6 action under the PAGA for himself and all other allegedly aggrieved employees who were
7 employed by Defendant as drone pilots. (Dychter Decl. ¶11).

8 On or about December 4, 2020, the Parties executed a Joint Stipulation to submit Plaintiff's
9 individual claims to arbitration and to "stay" the PAGA cause of action before the Superior Court
10 of California – County of Ventura, which the Court granted on December 22, 2020. Over the
11 course of the next several months, to allow for a meaningful effort at mediation, the Parties
12 informally exchanged information and documentation to allow PAGA Counsel to assess the claims
13 alleged and penalties sought for PAGA Members during the Covered Period. Relevant
14 information and documentation provided included Plaintiff's personnel file (including handbooks,
15 policies and procedures, etc.), an Excel spreadsheet with each PAGA Member's dates of
16 employment, and a sampling of wage statements, time records, and reimbursement documentation
17 for PAGA Members. PAGA Counsel and their consultants² reviewed and analyzed the data and
18 information and then extrapolated PAGA penalties for the Covered Period using standard
19 statistical methodologies. (Dychter Decl. ¶12).

20 On April 8, 2021, the Parties engaged in good faith, arms'-length negotiations and
21 completed a full-day mediation with the Kristin Rizzo, Esq., an experienced and well-regarded
22 wage and hour mediator. Although the mediation session concluded without a resolution, the
23 mediator did make a written "Mediator's Proposal" in writing on April 8, 2021, which was
24 accepted by the Parties the next day. (Dychter Decl. ¶13).

25
26
27 every pay period; (v) provide accurate, compliant, itemized wage statements; and, (vi) pay all wages owed
upon separation of employment, as mandated under the California Labor Code.

28 ² PAGA Counsel retained the services of Berger Consulting Group in Los Angeles to assist with an
analysis of the electronic data produced by Defendant for mediation preparation.

1 **IV. PAGA’S PURPOSE AND PROCEDURE:**

2 **A. PAGA Actions Are Brought on Behalf of the State of California**

3 “The California legislature enacted PAGA after a 2004 budget shortfall that led to
4 understaffing in the Labor and Workforce Development Agency (“LWDA”) and insufficient
5 resources to enforce the Labor Code. PAGA was intended to address these problems and ensure
6 more vigorous enforcement of the labor and employment laws.” (citations omitted). (*Tseng v.*
7 *Nordstrom, Inc.*, 2016 U.S. Dist. LEXIS 176790, *13-14).

8 “[T]he purpose of PAGA is to incentivize private parties to recover civil penalties for the
9 government that otherwise may not have been assessed and collected by overburdened state
10 enforcement agencies.... Unlike class actions, these civil penalties are not meant to compensate
11 unnamed employees because the action is fundamentally a law enforcement action.” (*Id.*).

12 “The Legislature has made clear that an action under the PAGA is in the nature of an
13 enforcement action, with the aggrieved employee acting as a private attorney general to collect
14 penalties from employers who violate labor laws. Such an action is fundamentally a law
15 enforcement action designed to protect the public and penalize the employer for past illegal
16 conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions. The
17 primary purpose of PAGA is to ensure compliance with the law; restitution is not the object of a
18 PAGA action.” (*Franco v. Athens Disposal Co., Inc.*, 171 Cal.App.4th 1277, 1300 (2009)).

19 PAGA “deputizes” citizens as private attorneys general to enforce the Labor Code on
20 behalf of the State of California. (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489). “By
21 deputizing aggrieved employees, the California Legislature intended to create incentives for non-
22 governmental actors to enforce the law in a growing labor market that could not be effectively
23 controlled by public agents.” (*Tseng, supra*, at *13).

24 A plaintiff does not bring a PAGA claim on his or her own behalf as an individual claim,
25 but “as the proxy or agent of the state’s labor law enforcement agencies.” (*Id.*, at 986; *see also*
26 *Reyes v. Macy’s, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124; *Iskanian v. CLS Transp. Los*
27 *Angeles, LLC* (2015) 59 Cal.4th 348, 380). When an aggrieved employee brings a PAGA claim,
28 “the government is always the real party in interest.” (*Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of*

1 *San Diego County* (2015) 234 Cal.App.4th 1109, 1119; *Montano v. The Wet Seal Retail, Inc.*
2 (2015) 232 Cal.App.4th 1214, 1222 (“[A] PAGA action is a dispute between an employer and the
3 State agency.”).

4 A PAGA plaintiff represents “the same legal right and interest as state labor law
5 enforcement agencies,” and seeks the same civil penalties that could have been collected by the
6 LWDA. (*Securitas, supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D. Cal.
7 2015) 523 B.R. 820, 825 (“PAGA plaintiffs do not have property rights in their cases.”)).

8 **B. Exhausting PAGA’s Administrative Remedies**

9 A PAGA action is commenced by “The aggrieved employee or representative [giving]
10 written notice by certified mail to the LWDA and the employer of the specific provisions of this
11 code alleged to have been violated, including the facts and theories to support the alleged
12 violation.” (Labor Code § 2699.3 (c)(1)).

13 After service of the aggrieved employee’s notice, the LWDA has 60 days to notify an
14 aggrieved employee it intends to investigate the alleged PAGA violation. If no notice of cure by
15 the employer or investigation is provided, the aggrieved employee may commence a civil action 65
16 days after providing notice of the violations. (Labor Code § 2699.3(c)(2)). Plaintiff has complied
17 with the requisite notice, and the Defendant did not provide notice of a cure, and the LWDA did
18 not provide notice it intended to investigate the charges. (Dychter Decl. ¶14).

19 **V. SUMMARY OF PROPOSED SETTLEMENT:**

20 **A. Monetary Relief**

21 Defendant shall pay the \$166,000 PAGA Settlement Payment from which \$97,751.01, (the
22 "PAGA Penalty Fund"), will be paid pursuant to PAGA, *i.e.*, \$73,313.25 (75%) to the LWDA and
23 \$24,437.75 (25%) to all PAGA Members. Any amount of the requested Service Payment to
24 Plaintiff, and PAGA Counsel’s fees and litigation expenses not awarded by the Court, will remain
25 with the PAGA Penalty Fund. Subject to Court approval, Plaintiff proposes the PAGA Settlement
26 Payment be distributed in the following manner:
27
28

1	1.	<u>SETTLEMENT PAYMENT:</u>	<u>\$ 166,000.00</u>
2		Plaintiff's Service Payment:	- \$ 5,000.00
3		PAGA Counsel's Fees:	- \$ 55,333.33
4		PAGA Counsel's Litigation Costs:	- \$ 5,915.66
5		Administration Payment:	- \$ 2,000.00
6	2.	<u>PAGA PENALTY FUND:</u>	<u>\$ 97,751.01</u>
7		LWDA: (75% of \$97,751.01)	\$ 73,313.25
8		PAGA Members: (25% of \$97,751.01)	\$ 24,437.75

Pursuant to statute, at least \$24,437.75 (25% of the PAGA Penalty Fund) will be distributed proportionately to the **82 PAGA Members** based on their respective number of pay periods in the applicable statutory time period. On average, each PAGA Member will receive approximately **\$300**. (Dychter Decl. ¶15; SA Sect. III, ¶27).

B. Scope of Release

The operative Complaint alleges Defendant failed to pay all straight-time and overtime wages for all time actually worked, failed to reimburse all business expenditures, failed to pay all owed wages upon separation of employment, and failed to provide accurate wage statements. The PAGA Settlement releases claims asserting PAGA violations, as alleged in the August 11, 2020 Notice to Defendant and the LWDA and asserted in the First Amended Complaint ("FAC") or that could have been asserted based on the facts alleged in the FAC, including the specifically alleged violations of California Labor Code sections 201, 202, 203, 204, 226, 226.7, 510, 512, 1194, 1197, and 2802, and Industrial Welfare Commission Wage Order(s), that accrued during the Covered Period. (Dychter Decl. ¶16; SA Sect. II, ¶11).

Because a PAGA action is brought on behalf of the government, a "judgment [] is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding." (*Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009)). As non-party aggrieved employees are not given notice or an opportunity to opt-out or to object, they are not bound by the judgment except as to civil penalties; their potential underlying claims survive the outcome of the PAGA case. (*Id.*, at 987; *see also*, Lab. Code § 2699(g)(l) (non-party aggrieved employees retain all rights "to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.")).

1 **C. Settlement Administration**

2 Following Court approval, Defendant will provide all PAGA Members' contact
3 information, social security numbers, and the respective number of pay periods worked during the
4 covered period to Atticus, which will search the National Change of Address ("NCOA") database
5 to update stale addresses and will mail the Court-approved Cover Letter to each PAGA Member to
6 explain the settlement, the basis for the amount of the payment, and will include a check for the
7 number of pay periods worked by the PAGA Member. (*see* Dychter Decl., **Exhibit 3**; SA, Sect.
8 III, ¶27). If the Cover Letter and check are returned as undeliverable, Atticus will perform a skip-
9 trace using the PAGA Member's social security number to locate a current mailing address, and
10 re-mail the Cover Letter and check to the updated address. (Dychter Decl. ¶17).

11 Atticus will perform all services reasonably necessary to locate updated mailing addresses,
12 calculate, issue and mail Settlement Payments to PAGA Members and the LWDA, with the
13 appropriate tax forms, and, 120 days after mailing, will void or cause to expire any uncashed
14 checks, and transmit the value of the uncashed checks, as provided in the Settlement Agreement, to
15 Ventura County Legal Aid, Inc., a 501(c)(3) IRS tax-exempt entity, providing free civil legal
16 services to the underserved and impoverished population in the Ventura County Area,
17 *www.vclegalaid.org*. (SA, Sect. III, ¶27c; *see* Dychter Decl., **Exhibit 4**, Atticus estimate).

18 **VI. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED:**

19 **A. Class Action Standards Do Not Govern Approval of PAGA Settlements**

20 A proposed PAGA settlement must be submitted simultaneously to the Court and LWDA
21 to allow comment on the settlement, if the Agency desires. Courts "review and approve any
22 penalties sought" and may exercise their discretion to lower the amount of penalties awarded "if,
23 based on the facts and circumstances of the particular case, to do otherwise would result in an
24 award that is unjust, arbitrary and oppressive, or confiscatory.'" (*Ramirez v. Benito Valley Farms,*
25 *LLC*, 2017 U.S. Dist. LEXIS 137272, *6-8). "Because state law enforcement agencies are the 'real
26 parties in interest' for PAGA claims, the Court's task in reviewing the settlement is to ensure that
27 the state's interest in enforcing the law is upheld." "Other than the provisions discussed above,
28 however, the PAGA does not establish a standard for evaluating PAGA settlements." (*Id.*).

1 A trial court has discretion to approve a proposed class action settlement based on
2 established factors used to evaluate reasonableness, including “the strength of plaintiffs’ case, the
3 risk, expense, complexity and likely duration of further litigation, the risk of maintaining class
4 action status through trial, the amount offered in settlement, the extent of discovery completed and
5 the stage of the proceedings, the experience and views of counsel, the presence of a governmental
6 participant, and the reaction of the class members to the proposed settlement.” (*Kullar v. Foot
7 Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
8 1026 (9th Cir. 1998)). When a court is satisfied that a settlement meets this standard, it orders
9 notice to the class, and conducts a second approval hearing to finally decide the fairness of the
10 proposed settlement. (CRC 3.769(c)(e)-(f)).

11 In contrast to a class action settlement, the Parties here are not obliged to “satisfy class
12 action requirements,” when seeking approval of a PAGA settlement. (*Arias, supra*, at 980-988;
13 *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1121 (9th Cir. 2014). (PAGA actions are not
14 class actions under state law)).

15 Unlike class actions, there is no requirement, and no mechanism, for a court to conduct a
16 two-step settlement approval review. “Unnamed employees need not be given notice of the PAGA
17 claim, nor do they have the ability to ‘opt-out’ or ‘contest a settlement.’” (*Ochoa-Hernandez v.
18 Cjaders Foods, Inc.* 2010 U.S. Dist. LEXIS 32774, *13 (N.D. Cal. April 2, 2010)).

19 One approach in this still emerging area, which courts have found consistent with the
20 LWDA’s approach, is simply to “approve a settlement of PAGA claims upon a showing that the
21 settlement terms (1) meet the statutory requirements set forth by PAGA, and (2) are fundamentally
22 fair, reasonable, and adequate in view of PAGA’s public policy goals.” (*Salazar v. Sysco Cent.
23 Cal., Inc.*, 2017 U.S. Dist. LEXIS 14971, *6 (E.D. Cal. February 2, 2017)).

24 **B. The Settlement Satisfies PAGA’s Purpose and the State’s Interest**

25 “A PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit
26 of the state, not a claim for class relief.” *Baumann, supra*, at 1124. The Court’s focus is not the
27 amount aggrieved employees ultimately receive as a result of a settlement, but on whether the total
28 settlement achieves PAGA’s objectives.

1 Here, Plaintiff contends that the proposed Settlement fulfils PAGA’s purpose by (1)
2 enforcing the law, (2) collecting penalties from an employer and recovering in excess of \$70,000
3 (75% of the penalties) on behalf of the State of California for purposes of enforcement and
4 education; and (3) distributing 25% of the penalties to the PAGA Members, Labor Code § 2699(i).
5 The Settlement provides an excellent recovery for the State and significant relief for PAGA
6 Members. (Dychter Decl. ¶18).

7 Plaintiff also contends that the Settlement also accomplishes PAGA’s objective of
8 “detering noncompliance” with the Labor Code, by protecting workers from “unlawful
9 conditions,” and protecting employers ““who comply with the law from those who attempt to gain
10 a competitive advantage at the expense of their workers by failing to comply with minimum labor
11 standards.”” *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1133 (2016).

12 **C. The Settlement Is a Reasonable Compromise of PAGA Claims**

13 PAGA penalties are subject to review and reduction at the Court’s discretion. (*Carrington*
14 *v. Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (affirming trial court’s 90% reduction of
15 maximum penalty); *Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th 1112,
16 1136 (2012) (affirming trial court’s 30% reduction of maximum penalty).) In this matter, the
17 PAGA penalties were significantly discounted in light of the defenses available to Defendant and
18 the evidence presented related to certain payments having been made to PAGA Members related to
19 the alleged claims, including policy changes made by Defendant after receiving the PAGA Notice
20 to offer their pilots reimbursement for incurred internet and mobile device usage, as well as its
21 tracking and compensation of overtime, and its policies and procedures for providing and tracking
22 meal periods. (Dychter Decl. ¶19). The penalties, when considering every employee for every pay
23 period during the covered period (*i.e.* August 11, 2019 through April 8, 2021) – approximately
24 1,480 pay periods – were estimated at an outside exposure of approximately \$475,000 based on the
25 assumption of a violation of each type (meal period violation, expense reimbursement violation,
26 unpaid wages, inadequate overtime compensation,³ Labor Code Sect. 204, and deficient/inaccurate

27 _____
28 ³ The overtime compensation claim focused specifically on the failure to incorporate bonus
payments into the regular rate of pay when calculating overtime compensation. As such bonus payments
occurred infrequently – fewer than 100 total aggregate pay periods during the Covered Period were affected

1 wage statements) occurring in each pay period during the covered period for each applicable
2 employee, and that the maximum amount of any penalty would be assessed at only an “initial
3 violation” amount. (*Id.*) (*Sanchez v. McDonald’s Rests. of Cal.*, 2017 Cal. Super. LEXIS 8963, at
4 *13 (Super. Ct. L.A., July 6, 2017, No. BC499888) (“Plaintiffs have provided the Court with no
5 evidence that, as required in *Amaral*, any Court or the Labor Commissioner has notified
6 McDonald’s that its overtime practice of allocating shift hours to the day on which the shift began
7 is a violation of California Labor laws. Accordingly, the only penalties that can be imposed in this
8 case are initial penalties”); *Cabardo v. Patacsil* (E.D. Cal. May 13, 2020) 2020 WL 2468197,
9 at *5 (“Based on the language of the statute, an initial violation is not merely the first time an
10 employer fails to pay minimum wage, but rather a failure to pay minimum wage after the employer
11 is cited or given notice. . . . Based on the evidence and testimony at trial, the time frame in
12 question qualifies as an ‘initial violation’ because no citation was issued to Defendants before the
13 filing of this suit, and therefore, Defendants did not have notice of the violation.”); *Vieyara-Flores*
14 *v. Sika Corp.*, 2019 U.S. Dist. LEXIS 98081, at *13 (C.D. Cal. June 10, 2019) (“Sika has not
15 offered evidence that the Labor Commission or a court has notified them of PAGA violations.
16 Accordingly, without evidence of prior knowledge of such violations, PAGA’s heightened penalty
17 of \$200 for subsequent violations will not be calculated to determine the amount in controversy.”);
18 *Hernandez v. Best Buy Stores*, 2017 U.S. Dist. LEXIS 86859, at *5–6 (S.D. Cal. June 6, 2017)
19 (agreeing with the defendant that because “‘no court, commissioner, or any other authority’” had
20 found that defendant violated the law, the \$100 penalty applies).) Significantly, without any
21 ‘stacking’ of penalties, if the Court issued one (1) PAGA penalty per eligible aggregate pay period
22 during the Covered Period, then the PAGA penalties would have been calculated as follows: \$100
23 x 1,480 aggregate pay periods totals **\$148,000**.⁴ (Dychter Decl. ¶20).

24
25
26 – the total PAGA penalty exposure for this category of violation was less than \$10,000. (Dychter Decl. ¶20).

27 ⁴ There are also potential PAGA penalties attributable to the temporary misclassification of some
28 of the aggrieved employees, which added some exposure to Defendant and increased the amount of the
settlement. These penalties were estimated to contribute less than \$10,000 more in penalties. (Dychter
Decl. ¶20).

1 PAGA actions are also subject to manageability requirements. (*Dailey v. Sears Roebuck*
2 *and Co.*, 214 Cal. App. 4th 974, 1002 n.13 (2013) (finding that where individualized issues
3 precluded class treatment of overtime claims, they also rendered the PAGA claims unsuitable for
4 representative treatment); *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 526 (2018) (on
5 appeal, analyzing whether the evidence at trial was overly individualized so as to preclude
6 representative treatment); *Litty v. Merrill Lynch & Co.*, 2014 U.S. Dist. LEXIS 160448, at *6
7 (C.D. Cal. Nov. 10, 2014) (striking PAGA claims where the “circumstances of this case make the
8 PAGA claim unmanageable because a multitude of individualized assessments would be
9 necessary.”); *Bowers v. First Student, Inc.*, 2015 U.S. Dist. LEXIS 54238, at *12 (C.D. Cal. Apr.
10 23, 2015) (striking PAGA claims where “a multitude of individualized assessments would be
11 necessary.”). In this matter, the PAGA penalties were significantly discounted in light of the
12 defenses available to Defendant and the evidence presented related to maintaining representative
13 status as well as asserted variation across the aggrieved employees.

14 **VII. THE ATTORNEYS’ FEES ARE REASONABLE AND SHOULD BE AWARDED:**

15 PAGA Counsel requests \$55,333.33 for their attorneys’ fees, (33.33% of the Settlement
16 Payment), and \$5,915.66 in litigation costs. (*see* Dychter Decl., ¶21, **Exhibit 5**).

17 PAGA provides for reasonable attorney's fees and costs,⁵ but “does not provide a specific
18 standard for evaluating attorney’s fees in connection with a settlement of PAGA claims.” “Under
19 Ninth Circuit [and California] law, the district court has discretion in common fund cases to
20 choose either the percentage-of-the-fund or the lodestar method" to determine a reasonable
21 attorney’s fee.” *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Laffitte v.*
22 *Robert Half International, Inc.*, 1 Cal.5th 480, 503 (2016) *Ramirez, supra*, at *18.⁶ “Despite its
23 primacy, the lodestar method is not necessarily utilized in common fund cases.” *Lealao v.*
24 *Beneficial California, Inc.*, 82 Cal.App.4th 19, 27 (2000).

25 The California Supreme Court routinely has affirmed that trial courts properly grant
26 attorneys’ fees in common fund cases based on a percentage of the recovery. (*Cf Laffitte, supra*, at

27 _____
28 ⁵ See Labor Code § 2699(g)(1).

⁶ California trial courts may use cases applying Federal Rule 23 for guidance in class issues.
Vasquez v. Sup. Court (1971) 4 Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146.

503). As in *Laffitte*, a fee award based on a percentage of the common fund recovery here is proper as it spreads the attorneys' fees among all beneficiaries of the fund, aligns the incentives between plaintiffs' counsel, the State, and the aggrieved employees, is a better approximation of the market conditions in a contingency case, and encourages counsel to seek early settlement and avoid unnecessarily prolonging the litigation. (*Id.*). The *Laffitte* Court also approved an optional lodestar cross-check. (*Id.* at 504).

A. The Results Achieved Support the Fee Request

The most important factor to consider in granting a fee award is the success obtained. *In re Heritage Bond Litig. v. U.S. Trust Co. of Tex., N.A.*, No. 02-ML-1475 (RCx), 2005 U.S. Dist. LEXIS 13627, at *27 (C.D. Cal. June 10, 2005) (*citing Hensley v. Eckerhart*, 461 U.S. 424 (1983)). In the face of the uncertainties associated with continued litigation of Plaintiff's claims, Defendant's vigorous denials and affirmative defenses, there is no question the results achieved are excellent. Counsel fulfilled the purpose of PAGA by obtaining \$166,000 in penalties to distribute to the State, the LWDA for enforcement and education, and to the PAGA Members, as well as to compensate the PAGA Counsel representing the interest of the State, and Plaintiff for having initiated and prosecuted the Action.

B. Attorneys' Fees of One Third (33.33%) of the Settlement Payment is Reasonable

Several studies of class action fee awards have found the median common fund fee award is approximately one-third of the total settlement fund. (*See, e.g., Chavez v. Netflix, Inc.*, (2008) 162 Cal. App. 4th 43, 66, n.11 (numerous studies have shown that "fee awards in class actions average around one-third of the recovery."); Reagan W. Silber and Frank E. Goodrich, Common Funds and Common Problems: Fee Objections and Class Counsel's Response, 17 Rev. Litig. 525, 546 (1998); T. Willging, L. Hooper and R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules, 90 (1996) (finding attorneys' fees in class litigation "were generally in the traditional range of approximately one-third of the total settlement"))).

PAGA Counsel's request for 33.33% of the common fund created falls well within the normal range of fee percentage awards which commonly range from 20% to 50% of a common

1 fund. The requested sum constitutes fair compensation for undertaking complex, risky, expensive,
2 and time-consuming litigation, strictly on a contingent basis, and for the results achieved for the
3 State, and the PAGA Members, as well as Defendant's current and future employees. Numerous
4 state and federal courts in California routinely approve fee requests equal to or more than the
5 amount sought here. (Dychter Decl. ¶22).

6 Indeed, some courts have found an award of 33% of the common fund represents the
7 "benchmark" in California. (*Smith v. CRST Van Expedited, Inc.*, 10-CV-1116- IEG WMC, 2013
8 WL 163293, *5 (S.D. Cal. Jan. 14, 2013) ("These percentages compare favorably with" the
9 California (33%) benchmark.); *Dennis v. Kellogg Co.*, 09-CV-1786-L WMC, 2013 WL 6055326,
10 at *7 (S.D. Cal. Nov. 14, 2013)). PAGA Counsel's fee request is in line with awards in similar
11 cases in California and nationwide and demonstrates PAGA Counsel's fee request is consistent
12 with market rates and is highly reasonable. (Dychter Decl. ¶23).

13 **C. Although Not Required, a Lodestar Cross-Check Shows the Fee is Reasonable**

14 PAGA Counsel seeks approval of attorneys' fees based on a percentage of the recovery, not
15 a lodestar. While a percentage fee may be cross-checked against a lodestar increased by a risk
16 multiplier, courts are not required to engage in this exercise, and many California courts decline to
17 do so. (*See, e.g. Glass v. UBS Financial Services, Inc.*, No. 06-4066-MMC, 2007 WL 221862
18 (N.D. Cal. Jan. 26, 2007) (finding "no need to conduct a lodestar cross-check [as] [c]lass counsel's
19 prompt action in negotiating a settlement while the state of the law remained uncertain should be
20 fully rewarded"); *Lopez v. Youngblood*, No. 07-0474-DLB, 2011 WL 10483569 (E.D. Cal. Sept. 2,
21 2011) ("A lodestar cross-check is not required in this circuit, and in a case such as this, is not a
22 useful reference.")).

23 Where the cross-check is used, the "calculation need entail neither mathematical precision
24 nor bean-counting" and is not intended to be a "full-blown lodestar inquiry." "Where the use of the
25 lodestar method is used as a cross-check, it can be performed with a less exhaustive cataloguing
26 and review of counsel's hours." (*Barbosa v. Cargill Meat Solutions Corp*, 297 F.R.D. 431, 451
27 (E.D. Cal. July 2, 2013)).

28 The lodestar method is calculated by multiplying the number of hours reasonably expended

1 on the litigation by a reasonable hourly rate. *Staton*, 327 F.3d at 965. A reasonable hourly rate is
2 the prevailing rate charged by attorneys of similar skill and experience in the relevant community.
3 (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095; *Hopson v. Hanesbrands Inc.* (N.D.
4 Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900).

5 PAGA Counsel have worked a combined total of more than 141 hours to date prosecuting
6 this Action and calculate the resulting lodestar fee on those hours at \$87,505 with a calculated
7 combined lodestar multiplier of 0.63. The hours expended were reasonable in light of the
8 complexity and duration of the litigation. (Dychter Decl. ¶¶ 24-25; *see* Declaration of S. Adam
9 Spiewak (“Spiewak Decl.”), ¶10; *see* Declaration of Walter L. Haines (“Haines Decl.”), ¶7).

10 **D. PAGA Counsel’s Hourly Rates Are Reasonable**

11 Counsel is entitled to hourly rates charged by attorneys of comparable experience,
12 reputation, and ability for similar litigation. (*Ketchum v. Moses*, 24 Cal.4th 1122, 1133 (2001);
13 *Children’s Hospital and Med. Center v. Bonta*, 97 Cal. App. 4th 740, 783 (2002)). When
14 determining reasonable hourly rates, Courts may consider the attorney’s skill and experience,
15 nature of the work performed, relevant area of expertise, and customary billing rates. *Flannery v.*
16 *California Highway Patrol*, 61 Cal. App. 4th 629, 632 (1998). Prior awards of counsel’s rates are
17 strong evidence of reasonableness. *Margolin v. Regional Planning Commission*, 134 Cal.App.3d
18 999, 1005 (1982).

19 PAGA Counsel’s skill and experience support their hourly rates and are in line with rates
20 typically approved in wage and hour class action litigation in California and have been specifically
21 approved by numerous state and federal courts in California.⁷ Dychter Law Offices’ practice is
22 limited almost exclusively to litigating employment class actions on behalf of employees and
23 consumers. Dychter Law Offices has settled over 50 wage and hour class action lawsuits since its
24 founding in 2009, and, prior to 2009, its principal worked on numerous wage and hour class action
25 matters for the law firm of Cohelan Khoury & Singer as an associate. (Dychter Decl. ¶¶ 25-26).

26 **VIII. THE SERVICE AWARD IS REASONABLE AND SHOULD BE AWARDED:**

27 The \$5,000 Service Payment requested will compensate Plaintiff, Atlas Vargas for his

28 ⁷ *See* Dychter Decl., ¶25. for a listing of cases with fee awards to PAGA Counsel.

1 assistance in documenting the alleged violations, initiating this Action, and participating in its
2 prosecution. (Dychter Decl. ¶27; *see* Declaration of Atlas Vargas, ¶ 5). Service payments are
3 routinely approved. (Dychter Decl. ¶27). “Such awards are...intended to compensate class
4 representatives for work done on behalf of the class, to make up for financial or reputational risk
5 undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private
6 attorney general.” (*Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009)).
7 Here, Plaintiff Vargas is requesting approximately three percent of the total settlement sum.
8 (Dychter Decl. ¶27).

9 **IX. CONCURRENTLY, THE COURT SHOULD APPROVE DISMISSAL OF THE**
10 **CLASS CLAIMS WITHOUT PREJUDICE:**

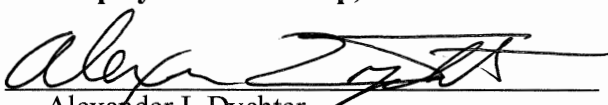
11 As part of the PAGA Settlement, Plaintiff has agreed to dismissal of the Class Claims
12 *without prejudice*. Pursuant to an October 30, 2019 Arbitration Agreement signed by Plaintiff,
13 Plaintiff waived “any substantive or procedural rights that [he] may have to bring an action on a
14 class, collective, or other similar basis against” Defendant. (Dychter Decl. ¶28). Having waived
15 his right to bring a class or collective action against Defendant, Plaintiff is unable to proceed with
16 his Class Claims and, accordingly, has agreed to dismiss them in their entirety *without prejudice*.
17 A dismissal of the Class Claims without consideration or remuneration is reasonable given the
18 explicit waiver agreed to by Plaintiff. The Court should, therefore, approve dismissal of the Class
19 Claims *without prejudice*.

20 **X. CONCLUSION:**

21 Based on the foregoing, Plaintiff respectfully requests the Court approve the PAGA
22 Settlement and dismiss the Class Claims without prejudice.

23 Dated: May 5, 2021

DYCHTER LAW OFFICES, APC
United Employees Law Group, PC

24
25 By: 
26 Alexander I. Dychter
27 Attorney for Plaintiff Atlas Vargas,
28 individually and on behalf of all other
similarly aggrieved employees