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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

EMILY FERRER, ELIJAH WESTCOTT,
MANUEAL BANUELOS MACIAS and on
behalf of themselves and other aggrieved
employees,

Plaintiffs,

v.

FITNESS INTERNATIONAL, LLC, a
California Limited Liability Company;
and DOES 1 through 100, inclusive,

Defendants.

CASE NO. 37-2020-00044088-CU-OE-CTL
ASSIGNED FOR ALL PURPOSES TO:
The Honorable Joel R. Wohlfeil
Department C-73

REPRESENTATIVE ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR APPROVAL OF PRIVATE
ATTORNEYS GENERAL ACT (“PAGA”)
SETTLEMENT**

Date: July 21, 2023
Time: 9:00 a.m.
Dept: C-73
Judge: Honorable Joel R. Wohlfeil
Reservation: 2974855

Complaint filed: December 2, 2020
Trial date: Not set

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Other Authorities

17	Reagan W. Silber and Frank E. Goodrich, Common Funds and Common Problems: Fee Objections and Class Counsel’s Response (1998) 17 Rev. Litig.	18
18	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)	18

I. INTRODUCTION

Plaintiffs Emily Ferrer, Elijah Westcott, and Manuel Banuelos Macias (“Plaintiffs”) submit this Memorandum of Points and Authorities in support of Plaintiffs’ Motion for Approval of the Private Attorneys General Act of 2004 (“PAGA”) Settlement reached in the civil actions filed in the Superior Court of the State of California for the County of San Diego entitled *Ferrer v. Fitness International, LLC* et al., San Diego County, Superior Court Case No. 27-2020-00044088-CU-OE-CTL, and the claims asserted in *Elijah Westcott v. Fitness International, LLC*, Los Angeles County Superior Court Case No. 20GDCV01113; and *Manuel Banuelos Macias v. Fitness International, LLC*, Los Angeles County Superior Court Case No. 21STCV03796, which subject to the terms of this settlement, were consolidated into *Ferrer v. Fitness International, LLC* by way of an amended complaint filed on April 4, 2023. Plaintiffs and Defendant Fitness International LLC have documented the proposed Private Attorneys General Act Settlement and Release (“Settlement” or “Agreement” or “SA”), attached as Exhibit 1 to the accompanying Declaration of Michael D. Singer, (“Singer Decl.”), ¶¶12, 13.

Pursuant to the terms of this Settlement, Defendant will pay a maximum non-reversionary Settlement Payment of \$334,530.00 Singer Decl. ¶14. Subject to Court approval, from the Settlement Payment, the following shall be deducted: 1) administration expenses of \$16,250.00 to CPT Group, 2) PAGA Counsel’s attorneys’ fees up to \$131,666.67¹ (33.33% of the Gross PAGA Amount), and litigation costs of \$21,366.76 (Settlement Agreement provided for up to \$30,000). The remaining sum estimated at \$165,246.57 will be disbursed as directed by the PAGA (Labor Code § 2699(i)) with \$123,934.93 (75%) paid to the Labor and Workforce Development Agency (“LWDA”); and, \$41,311.64 (25%) distributed proportionately to allegedly aggrieved employees based on the number of Pay Periods each worked during the period from December 1, 2019 through March 15, 2020 (“Covered Period”). *Id.*

The Settlement was reached through extensive, arms’-length, informed negotiations,

¹ Plaintiffs each consented to apportionment of attorneys’ fees: [25%] to Cohelan Khoury & Singer, [50%] to Capstone Law APC, and [25%] to Haig B. Kazandjian Lawyers, APC. Singer Decl. ¶15.

1 with the help of an experienced mediator following an informal exchange of information and
2 data. Singer Decl. ¶¶24-26. The result is fair, adequate, reasonable, and fulfills PAGA's
3 purposes of enforcing California's laws which collect civil penalties on behalf of the State. The
4 amount is consistent with Court-approved amounts in other PAGA cases, and the requests for
5 PAGA Counsel's attorneys' fees and costs are reasonable.

6 The superior court "shall review and approve any settlement of any civil action filed
7 pursuant to" the Private Attorneys General Act of 2004. Labor Code § 2699(1)(2). Plaintiffs
8 request that the Court approve this PAGA Settlement, order it implemented according to the
9 terms of the Agreement, and enter Final Judgment.

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

11 Defendant Fitness International LLC ("LA Fitness") is a nationwide company with
12 approximately 109 fitness centers in California. Singer Decl. ¶16.

13 Plaintiff Emily Ferrer worked for LA Fitness at the Eastlake, California and Sorrento
14 Valley, California locations as a non-exempt front desk attendant from approximately February
15 2019 until July 2020. Singer Decl. ¶17. Plaintiff Elijah Wescott worked for LA Fitness in
16 Glendale, California as a non-exempt sales agent from December 2019 to March 10, 2020. *Id.*
17 Plaintiff Manuel Macias worked for LA Fitness in Monterey Park, California as a janitor from
18 June 2019 to March 2020. *Id.*

19 PAGA Members are all current and former non-exempt employees of LA Fitness who
20 worked in the following positions during the Covered Period in California: Babysitter,
21 Maintenance Detail Crew, Equipment Tech, Facility Manager, Club Pride Supervisor, Janitor,
22 Facility Supervisor, Front Desk Staff, Security, and Membership Sales Counselor. SA ¶18.
23 There are approximately 3,419 PAGA Members who worked 16,726 pay periods during the
24 Covered Period. Singer Decl. ¶18; SA ¶54.

25 **III. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY**

26 On September 22, 2020, Plaintiff Ferrer gave written notice to the Labor Workforce and
27 Development Agency ("LWDA") and to Defendant of her intent to pursue PAGA civil
28 penalties pursuant to Labor Code sections 2698, *et seq.* for failure to pay all wages, including

1 minimum, regular, and overtime wages; failure to provide meal and rest periods; failure to
2 provide accurate itemized wage statements; failure to provide paid sick leave; and the failure to
3 pay all wages due during and upon termination of employment. Singer Decl. ¶19, Exh. 2 –
4 PAGA Notice.

5 On October 16, 2020, Plaintiff Elijah Westcott gave written notice to the LWDA and to
6 Defendant of his intent to pursue PAGA civil penalties pursuant to Labor Code sections 2698,
7 *et seq.* for failure to provide employment records, failure to provide overtime and double time,
8 failure to provide rest and meal breaks, failure to provide minimum wage, failure to provide
9 accurate employment records, failure to pay all wages on time, failure to timely pay upon
10 discharge or resignation, violation of the Wage Theft Prevention Act, failure to reimburse
11 necessary expenditures, and failure to provide notice of paid sick time and accrual. Singer Decl.
12 ¶20, Exh. 3 – PAGA Notice.

13 On November 24, 2020, Plaintiff Manuel Macias gave written notice to the LWDA and
14 to Defendant of his intent to pursue PAGA civil penalties pursuant to Labor Code sections
15 2698, *et seq.* for failure to pay all wages, including minimum, regular, and overtime wages;
16 failure to provide meal and rest periods; failure to provide accurate itemized wage statements;
17 failure to reimburse for necessary business expenses; and the failure to pay all wages due
18 during and upon termination of employment. Singer Decl. ¶21, Exh. 4 – PAGA Notice.

19 At no time did the LWDA notify Plaintiffs of an intention to investigate the allegations
20 contained in the three PAGA Notices and Defendant did not serve notice it intended to cure any
21 alleged defect, pursuant to the PAGA (Labor Code § 2699.3). Singer Decl. ¶22.

22 On December 4, 2020, Plaintiff Ferrer filed a representative PAGA representative
23 action complaint on behalf of herself and all other aggrieved employees. On December 21,
24 2020, Plaintiff Elijah Westcott filed a PAGA representative action complaint on behalf of
25 himself and all other aggrieved employees. On January 29, 2021, Plaintiff Manuel Macias filed
26 a PAGA representative action complaint on behalf of himself and all other aggrieved
27 employees. Singer Decl. ¶23. Subsequently, Plaintiffs in the three related cases agreed to
28 consolidate their cases into *Ferrer v. Fitness International, LLC* by way of an amended

1 complaint filed on April 4, 2023. *Id.*

2 The Parties engaged in litigation, including exchanging written discovery. Subsequent
3 to the initial exchange of formal discovery, the Parties agreed to attend mediation. In
4 preparation for mediation, Defendant provided Plaintiffs with information and relevant
5 documentation to assist Plaintiffs in formulating a reasonable mediation settlement demand.
6 Singer Decl. ¶24.

7 PAGA counsel reviewed and analyzed the data and all information obtained and
8 extrapolated civil penalties for the 3,419 PAGA Members who worked 16,726 pay periods
9 during the Covered Period. Singer Decl. ¶25.

10 **IV. PAGA’S PURPOSE AND PROCEDURE**

11 **A. PAGA Actions are Brought on Behalf of the State of California**

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

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

21 “The Legislature has made clear that an action under the PAGA is in the nature of an
22 enforcement action, with the aggrieved employee acting as a private attorney general to collect
23 penalties from employers who violate labor laws. Such an action is fundamentally a law
24 enforcement action designed to protect the public and penalize the employer for past illegal
25 conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions.
26 The primary purpose of PAGA is to ensure compliance with the law; restitution is not the
27 object of a PAGA action.” *Franco v. Athens Disposal Co., Inc.*, 171 Cal.App.4th 1277, 1300
28 (2009).

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

6 A plaintiff does not bring a PAGA claim on his or her own behalf as an individual
7 claim, but “as the proxy or agent of the state’s labor law enforcement agencies.” *Id.*, at 986; *see*
8 *also Reyes v. Macy’s, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124; *Iskanian v. CLS Transp.*
9 *Los Angeles, LLC* (2015) 59 Cal.4th 348, 380. When an aggrieved employee brings a PAGA
10 claim, “the government is always the real party in interest.” *Securitas Sec. Servs. USA, Inc. v.*
11 *Sup. Ct. of San Diego County* (2015) 234 Cal.App.4th 1109, 1119; *Montano v. The Wet Seal*
12 *Retail, Inc.* (2015) 232 Cal.App.4th 1214, 1222 (“[A] PAGA action is a dispute between an
13 employer and the State agency.”).

14 A PAGA plaintiff represents “the same legal right and interest as state labor law
15 enforcement agencies,” and seeks the same civil penalties that could have been collected by the
16 LWDA. *Securitas, supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D. Cal.
17 2015) 523 B.R. 820, 825 (“PAGA plaintiffs do not have property rights in their cases.”).

18 **B. Plaintiffs Exhausted the PAGA’s Administrative Prerequisite**

19 A PAGA action is commenced by the aggrieved employee or representative giving
20 written notice to the LWDA and employer of the specific provisions of the Labor Code alleged
21 to have been violated (“PAGA Notice”). Labor Code § 2699.3(c)(1). The LWDA has 60 days
22 to inform the aggrieved employee whether it intends to investigate the violations alleged. If the
23 LWDA does not serve notice, and the employer does not cure the defect(s), a civil action may
24 be initiated 65 days after service of the PAGA Notice. Labor Code § 2699.3(c)(2). Here, notice
25 of a cure was not provided by Defendant, and the LWDA did not provide notice it intended to
26 investigate the charges. Singer Decl. ¶¶19, 22, Exhs. 2-4; Declaration of Haig B. Kazandjian,
27 (“Kazandjian Decl.”), ¶4, Exh. 1 – PAGA Notice.

28 ///

V. SUMMARY OF PROPOSED SETTLEMENT

A. Mediation

On August 2, 2021, the Parties met for mediation and engaged in good faith, arms'-length and informed negotiations facilitated by David A. Rotman, a highly experienced and well-regarded wage and hour mediator. After a full day of mediation, the Parties reached agreement on the principal terms of the proposed Settlement, and later informed the Court the Parties attended mediation and reached a settlement subject to Court approval. The Parties worked diligently thereafter to negotiate the remaining terms of the PAGA Settlement presented for approval. Singer Decl. ¶26.

B. Monetary Relief

Pursuant to the terms of the PAGA Settlement, Defendant will pay \$334,530.00 from which \$165,246.57 will be disbursed pursuant to the PAGA, i.e. \$123,934.93 (75%) will be paid to the LWDA, and \$41,311.64 (25%) will be paid to PAGA Members. Labor Code § 2699(i). Accordingly, subject to Court approval, Plaintiffs propose the \$334,530.00 Settlement Payment be distributed as follows:

<u>GROSS PAGA SETTLEMENT:</u>	\$ 334,530.00
PAGA Counsel's Fees:	-\$ 131,666.67
PAGA Counsel's Litigation Costs:	-\$ 21,366.76
Administration Payment:	<u>-\$ 16,250.00</u>

<u>PAGA FUND:</u>	\$ 165,246.57
Labor Workforce & Development Agency: 75%	-\$ 123,934.93
Aggrieved Employees: 25%	-\$ 41,311.64

Pursuant to the PAGA, 25% of PAGA penalties estimated at \$41,311.64 will be distributed proportionately to the 3,419 PAGA Members who worked during the Covered Period (December 1, 2019 through March 15, 2020) based on the number Pay Periods each worked during the Covered Period. With an aggregate 16,726 Pay Periods worked by all PAGA Members, each will receive an estimated \$2.47 per pay period. Singer Decl. ¶¶27, 28; SA ¶¶13, 42(b), 54.

C. Scope of Release

The PAGA Settlement provides for a release of only claims alleged in the operative

complaint. Specifically, the Released Claims means the following:

“any and all claims, demands, rights, liabilities and/or causes of action for PAGA penalties under the PAGA that were alleged or could have reasonably been alleged based on the facts alleged in the Lawsuit by Plaintiffs, on behalf of the State of California and the PAGA Members and based on the facts alleged in the operative complaints and/or first amended complaints including but not limited to: (a) PAGA civil penalties for violations of Labor Code sections 201, 202, 203, 204, 218.6, 226, 226.3, 226.7, 246, 248.5, 256, 510, 512, 558, 558.1, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2800, 2802, 2810.5, and CCR 11050 claims for the attorney’s fees and costs pursuant to the PAGA incurred in the prosecution of this Lawsuit on behalf of the PAGA Members; and (c) any other remedies, penalties, or interest available under the PAGA based on the facts alleged in the complaints and/or first amended complaints. This release applies only to labor code violations allegedly suffered by PAGA Members for work performed while employed in the following positions: Babysitter, Maintenance Detail Crew, Equipment Tech, Facility Manager, Club Pride Supervisor, Janitor, Facility Supervisor, Front Desk Staff, Security, and Membership Sales Counselor. This Release in this agreement does not extend to any individual or class claims and is only applicable to the Covered Period.”

Singer Decl. ¶29; SA ¶21.

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). Because non-party aggrieved employees are not given notice, or an opportunity to opt-out or object, they are not bound by the judgment except as to civil penalties. *Id.*, at 987; see also, Labor 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.”).

D. Settlement Administration

Within five (5) business days after the Effective Date (the first court date after both of the following have occurred: (i) final approval of this settlement is granted by the Court, and (ii) judgment approving this settlement becomes final), Defendant shall provide the Administrator, CPT Group with an Excel Spreadsheet containing the following PAGA Members’ information containing the full name of each of individual; the individual’s last known home mailing address; the individual’s social security number; and the number of pay periods that the individual worked during the Covered Period (“PAGA Members’ Information”). Singer Decl. ¶30; SA, ¶¶20, 43(a). Within ten (10) business days after

Defendant provides the Administrator with the PAGA Members' Information and prior to mailing, the Administrator shall run all the addresses provided in the PAGA Members' Information through the United States Postal Service NCOA database (which provides updated addresses for any individual who has moved in the previous four years who has notified the U.S. Postal Service of a forwarding address) to obtain current address information. Singer Decl. ¶31; SA ¶43(b).

Any envelopes containing checks returned as non-deliverable on or before the Void Date shall be re-mailed via First-Class U.S. Mail to the forwarding address affixed thereto within five (5) business days of receipt by the Administrator. If no forwarding address is provided, the Administrator will, within five (5) business days, promptly attempt to determine the correct address using a skip trace, or other search using the name, address or Social Security number of the PAGA Employee involved, and will then perform a single re-mailing. Re-mailings of envelopes containing Individual Settlement Payments will not extend beyond the Void Date (Individual Settlement Checks shall remain valid and negotiable for one hundred eighty (180) calendar days after the date of their issuance). Singer Decl. ¶32; SA ¶¶44, 50.

In the event that the Administrator mails a check to a PAGA Member that remains uncashed after one hundred twenty (180) days, such payment shall be sent to the State of California, Controller's Office, Unclaimed Property Division, for further handling on behalf of the PAGA Member(s). Singer Decl. ¶33; SA ¶50.

VI. THE PAGA SETTLEMENT IS REASONABLE AND SHOULD BE APPROVED

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

A proposed PAGA settlement must be submitted simultaneously to the Court and to the LWDA to allow comment if the Agency desires². Courts "review and approve any penalties sought" and may exercise their discretion to lower the amount of penalties awarded "if, based on the facts and circumstances of the particular case, to do otherwise would result in an award

² On the same date the instant motion is filed with the Court, it will be served upon Defendant and provided to the Labor and Workforce Development Agency ("LWDA") electronically through the LWDA's website using the appropriate intake form. Singer Decl. ¶60, Exh. 8 - LWDA Confirmation of Receipt.

1 that is unjust, arbitrary and oppressive, or confiscatory.” *Ramirez v. Benito Valley Farms,*
2 *LLC*, 2017 U.S. Dist. LEXIS 137272, *6-8 (N.D.Cal. Aug. 25, 2017). “Because state law
3 enforcement agencies are the ‘real parties in interest’ for PAGA claims, the Court’s task in
4 reviewing the settlement is to ensure that the state’s interest in enforcing the law is upheld.”
5 “Other than the provisions discussed above, however, the PAGA does not establish a standard
6 for evaluating PAGA settlements.” *Id.*

7 In contrast to a class action settlement, the Parties are not obliged to “satisfy class action
8 requirements,” when seeking approval of a PAGA settlement. *Arias, supra*, at 980-988;
9 *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1121 (9th Cir. 2014) (PAGA actions are
10 not class actions under state law). Unlike class actions, there is no requirement in a PAGA
11 settlement, and no mechanism, for a court to conduct a two-step settlement approval review.
12 “Unnamed employees need not be given notice of the PAGA claim, nor do they have the ability
13 to ‘opt-out’ or ‘contest a settlement.’” *Ochoa-Hernandez v. CJADERS Foods, Inc.* 2010 U.S.
14 Dist. LEXIS 32774, *13 (N.D. Cal. April 2, 2010).

15 There is no binding authority identifying the proper standard of review of PAGA
16 settlements to be employed by the court. *Tenorio v. Gallardo*, 2019 U.S. Dist. LEXIS 169313,
17 at *6 (E.D. Cal. Sept. 30, 2019). One approach in this still emerging area, which courts have
18 found consistent with the LWDA’s approach, is simply to “approve a settlement of PAGA
19 claims upon a showing that the settlement terms (1) meet the statutory requirements set forth by
20 PAGA, and (2) are fundamentally fair, reasonable, and adequate in view of PAGA’s public
21 policy goals.” *Salazar v. Sysco Cent. Cal., Inc.*, 2017 U.S. Dist. LEXIS 14971, *6 (E.D. Cal.
22 February 2, 2017).

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

24 “A PAGA action is at the heart of a civil enforcement action filed on behalf of and for
25 the benefit of the state, not a claim for class relief.” *Baumann, supra*, at 1124. The Court’s
26 focus is not the amount aggrieved employees ultimately receive as a result of a settlement, but
27 on whether the total settlement achieves PAGA’s objectives. Here, the proposed Settlement
28 fulfills PAGA’s purpose by (1) enforcing the law, (2) collecting penalties from an employer

1 and recovering \$123,934.93 (75% of the penalties) on behalf of the State of California for
2 purposes of enforcement and education; and (3) distributing \$41,311.64 (25% of the penalties)
3 to the PAGA Members. Labor Code § 2699(i); Singer Decl. ¶34.

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

9 **C. The Settlement is a Reasonable Compromise of PAGA Claims**

10 The PAGA allows aggrieved employees to recover any civil penalties provided by the
11 Labor Code that are recoverable by the LWDA. Labor Code § 2699(a). “Under PAGA, a
12 plaintiff may bring a representative action as an aggrieved employee on behalf of herself and
13 other current or former employees and may seek civil penalties for Labor Code violations.”
14 *Willner v. Manpower, Inc.*, 35 F. Supp. 3d 1116 (N.D. Cal. 2014). When the Labor Code
15 section violated “provides for a civil penalty to be assessed and collected by the LWDA,” the
16 PAGA allows an employee to recover that penalty. Labor Code § 2699(a). When the violated
17 section does not specifically provide a “civil penalty,” an employee may recover \$100 for each
18 aggrieved employee per pay period for the initial violation and \$200 for each employee per pay
19 period for each subsequent violation. Labor Code § 2699(f)(2).

20 Liability under the PAGA is triggered for each pay period Defendant failed to provide a
21 meal or rest period, failed to pay all wages due, failed to timely pay final wages, failed to
22 reimburse business-related expenses, failed to provide paid sick leave, and failed to issue
23 accurate and itemized wage statements. The actual amount of expenses or unpaid wages is
24 immaterial to liability under the PAGA. Under the PAGA, Plaintiffs can only recover civil
25 penalties and cannot seek the actual amount of expenses allegedly not reimbursed or the actual
26 amount of allegedly unpaid wage. *ZB, N.A. v. Super. Ct.* (2019) 8 Cal. 5th 175; *Franco v.*
27 *Athens Disposal Co., Inc.*, 171 Cal.App.4th 1277, 1300 (2009). Defendant need only to have
28 violated the Labor Code at least once during a pay period to impose liability for civil penalties.

1 Labor Code § 2669(a) and (f)(2).

2 Here, Plaintiffs seek penalties for violation of Labor Code sections 201, 202, 203, 204,
3 218.6, 226, 226.3, 226.7, 246, 248.5, 256, 510, 512, 558, 558.1, 1174, 1174.5, 1182.12, 1194,
4 1194.2, 1197, 1197.1, 1198, 2800, 2802, and 2810.5, of which 75% will be paid to the State of
5 California's Labor Workforce and Development Agency and 25% will be paid to the PAGA
6 Employees pursuant to Labor Code section 2699(i). Singer Decl. ¶35. Plaintiffs are also entitled
7 to recovery of attorney's fees and costs pursuant to the PAGA. Labor Code § 2699(g)(1).

8 **D. PAGA Penalties**

9 At mediation, PAGA penalties were calculated using the initial violation rate of \$100
10 per pay period for each claim rather than the subsequent violation rate of \$200 because no
11 'notice' had been issued by the LWDA to advise Defendant that they had previously violated
12 the law. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209 (noting that the
13 'initial violation' rate is assessed per pay period, and the 'subsequent violation rate' rate
14 cannot be assessed until the defendant has been put on notice of the violation); *See also,*
15 *Bernstein v. Virgin Am., Inc.* (9th Cir. Mar. 8, 2021, Nos. 19-15382, 20-15186) 2021 U.S.
16 App. LEXIS 6641, at *35.) (citing *Amaral*). Singer Decl. ¶36.

17 PAGA Counsel calculated civil penalties for each pay period in which PAGA Members
18 worked during the Covered Period for each of the following violations: (1) failure to pay
19 minimum wages (Lab. Code § 1197); (2) failure to pay overtime wages (Lab. Code § 510); (3)
20 failure to provide meal periods (Lab. Code §§ 226.7 and 512); (4) failure to provide rest periods
21 (Lab. Code § 226.7); (5) failure to provide expense reimbursement (Lab. Code § 2802); (6)
22 failure to provide split-shift premiums and abide by the IWC wage order (Lab. Code § 1198);
23 (7) failure to keep accurate records, including meal period records (Lab. Code § 1174); (8)
24 failure to provide notice of sick leave and notice of terms of employment (Lab. Code § 246 and
25 2810.5); (9) failure to time pay wages during employment (Lab. Code § 204); and (10) failure
26 to timely pay wages upon separation of employment (Lab. Code § 201-203). Singer Decl. ¶37.

27 As explained in detail below, PAGA Members could claim a maximum reasonable
28 penalty of \$6,339,175 after considering all risks associated with litigation and potential

1 defenses. The maximum civil penalty was discounted by 50% for risks which included not
2 proving the underlying Labor Code violations. Singer Decl. ¶38. In light of a maximum penalty
3 of \$3,167,587.50, a settlement of \$334,530, equates to approximately 10.5% of the maximum
4 reasonable recovery, which is a fair and reasonable amount of penalties warranting approval.
5 Singer Decl. ¶39. The maximum realistic total exposure for PAGA civil penalties was
6 calculated as follows:

7 **1. Failure to Pay Wages for all Hours Worked**

8 Plaintiffs allege Defendant had an unlawful time rounding policy that resulted in
9 underpayment of all minimum, regular, and overtime wages owed. Plaintiffs also allege due to
10 understaffing, inadequate coverage, unreasonably high workload and expectations, and/or other
11 actions, inactions, or decisions made by and within the sole control and discretion of Defendant,
12 they regularly had to work off-the-clock. This caused a violation of Labor Code section 1197
13 for the failure to pay minimum and regular wages and a violation of Labor Code section 510 for
14 the failure to pay overtime wages. (Labor Code sections 1197.1 and 558 provide for civil
15 penalties for violations of Labor Code sections 1197 and 510 respectively.) These civil penalties
16 are recoverable by Plaintiffs pursuant to Labor Code section 2699(a).

17 However, at mediation it was argued that liability should be zero because the rounding
18 on its face was not unfair and any time lost, in the aggregate, was *di minimus* and that off-the-
19 clock work was prohibited. Defendant argued Plaintiffs would be unable to prove that work was
20 performed during time allegedly lost to rounding and off-the-clock. Singer Decl. ¶40.

21 Plaintiffs estimated off-the-clock work occurred at least once for at least one-half of the
22 pay periods. Because daily shifts averaged close to 8 hours, Plaintiffs assumed all hours worked
23 should have been paid at overtime rates, thereby causing a failure to pay minimum and overtime
24 wages. This means there was a violation of the Labor Codes requiring minimum and overtime
25 wages. For 16,729 pay periods, and a 90% violation rate per pay period, Plaintiff assessed civil
26 penalties of \$83,650 for alleged Labor Code section 510 violations.³ The potential liability for

27
28 ³ Calculated as follows: 16,729 * 90% = 1,673 Pay Periods (x) \$50 for the initial violation rate
for each pay period (pursuant to Labor Code § 558) = \$83,650.

labor code violations of 510 was discounted by 90% to account for the fact that it would be unlikely to recover violations for both sections 1197 and 510 based on the same underlying violation. *Id. Slate v. Blackwood* (1975) 15 Cal.3d 791, 795 (“Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.”); *Sanchez v. Martinez* (2020) 54 Cal.App.5th 535, 546. Singer Decl. ¶41. Plaintiffs assessed civil penalties of \$836,450 for alleged Labor Code section 1197 violations. *Id.*⁴

2. Failure to Provide Compliant Meal Periods and Rest Breaks

Plaintiffs allege that due to the demands of the job, employees were not provided off-duty, uninterrupted, timely meal periods before the end of their fifth hour of work. Labor Code sections 226.7 and 512 require employers to provide off-duty meal periods and rest breaks on eligible workdays. Employers must provide “an uninterrupted 30-minute period during which the employee is relieved of all duty.” “[F]irst meal periods must start after no more than five hours,” and a second, “after no more than 10 hours of work.” *Brinker Restaurant Corp., v. Superior Court*, 53 Cal. 4th 1004, 1035 (2012). The meal period requirement is satisfied if the employee ... is relieved of all duty for the entire period.” *Id.* at 1036. California employers must also authorize a first rest period in “shifts from three and one-half to six hours in length...” *Id.* at 1029.

With respect to Labor Code section 512 meal period violations, Plaintiffs assumed a 50% violation rate and at least one meal period per pay period, and a \$50 per pay period penalty (pursuant to Labor Code § 558), for which Plaintiffs estimated Defendant’s exposure of \$418,225 (8,364.5 Pay Periods * \$50 per Pay Period). Singer Decl. ¶42. However, at mediation Defendant pointed out that a large number of the shifts worked by PAGA Members did not require a pay period. Specifically, the Babysitter and Front Desk Staff positions are typically scheduled for four hours. Because their shifts are shorter, there are more of them than of the other positions on a daily basis.

Because Labor Code section 226.7 rest periods are not subject to the same clock-in and

⁴ Calculated as follows: 16,729 * 50% = 8,364.5 Pay Periods (x) \$100 for the initial violation rate for each pay period = \$836,450.

1 clock-out requirements as meal periods, violation rates and proof of a non-compliant or waived
2 rest break would require reliance on potentially competing testimony and declarations from
3 Aggrieved Employees. Accordingly, Plaintiffs assumed 25% of the 16,729 Pay Periods had a
4 least one violation resulting in a maximum civil penalty of \$418,225 (4,182 Pay Periods * \$100
5 Per Pay Period). Singer Decl. ¶43.

6 **3. Failure to Reimburse Business Expenses**

7 Plaintiffs sought recovery of civil penalties for Defendant's failure to reimburse
8 business expenses as required by Labor Code section 2802 for use of their personal cell phone
9 and use of their personal vehicles, wherein they incurred mileage expenses. Assuming a 100%
10 violation rate in each of the 16,729 pay periods during the PAGA Period, the maximum
11 exposure was estimated at \$1,672,900 (16,729 Pay Periods * \$100). Plaintiffs then applied a
12 50% discount to account for the potential argument that a violation of § 2802 could not be
13 applied for each and every affected pay period, as well as the argument that proof of this claim
14 would be impossible due to the lack of phone records. Therefore, the maximum exposure for
15 this claim is \$836,450. Singer Decl. ¶44. However, at mediation Defendant argued that most of
16 the employee positions in question do not actually have any business expenses. In fact,
17 Defendant, argued that none of them did, but allowed that it was possible one-off situations
18 might arise across such a large population.

19 **4. Failure to Provide Notice**

20 Plaintiff sought recovery of civil penalties for Defendant's failure to provide notice of
21 sick leave in violation of Labor Code section 246, and failure to provide notice of the terms of
22 employment in violation of Labor Code section 2810.5. Assuming a 100% violation rate in
23 each of the 16,729 pay periods during the Covered Period, the maximum exposure for failure to
24 provide notice of sick leave in violation of Labor Code section 246 was estimated at
25 \$1,672,900 (16,729 Pay Periods * \$100 for initial violation).

26 Defendant argued that it satisfied its obligation under Labor Code section 246 by
27 providing the requisite information via its online employee portal, the same way it satisfies its
28 obligation to make wage statements available. Arguably, notice of the terms of employment

would only have to be provided once to each aggrieved employee. Therefore, the maximum exposure for failure to provide notice of the terms of employment in violation of Labor Code section 2810.5 was estimated at \$314,900 (3,149 EEs * \$100 for initial violation). Singer Decl. ¶45.

5. Derivative Claims

Plaintiffs also alleged derivative violations of Labor Code § 226 relating to the failure to pay all wages due, and meal period and rest period claims. Singer Decl. ¶46. Pursuant to Labor Code section 226, accurate and itemized wage statements must be provided to all employees. If Plaintiffs were to prevail on their underlying claims, Plaintiffs would be entitled to recover civil penalties pursuant to Labor Code section 226. For this derivative claim, Plaintiffs assumed since 50% of the pay periods unpaid wages and non-compliant meal and rest periods, 50% of the wage statements would necessarily be inaccurate. Defendant's realistic exposure for civil penalties was estimated at \$836,450 (8,364.5 Pay Periods * 50% violation rate * \$100 Per Pay Period). Singer Decl. ¶47.

The potential exposure for violation of Labor Code sections 201-203 would be dependent upon proving wages were owed on the underlying claims at the time of separation and not paid. Singer Decl. ¶48. The number of former aggrieved employees was not provided. Therefore, civil penalties were estimated for 25% of the aggrieved employees and estimated at \$85,475 (3,419 * .25 x \$100). Singer Decl. ¶49.

The potential exposure for violation of Labor Code section 204 would be dependent upon proving wages were owed on the underlying claims during employment and not paid. Again, this claim is dependent on proving the underlying claims for failure to pay wall wages. As such, the potential exposure was reduced by 50%. Civil penalties were estimated at \$836,450 (8,364.5 Pay Periods * \$100 for initial violation). Singer Decl. ¶50.

6. Discounts for Risks at Trial and Judicial Discretion in Reducing Penalties

In considering whether to accept the settlement, Plaintiffs had to consider additional risks associated with pursuing these claims to final judgment, including avoiding summary adjudication, adverse evidentiary rulings, prosecuting the claims at trial, winning a judgement,

1 proving liability, and avoiding any reversals at the trial and appellate court levels. Indeed,
2 Plaintiffs had to consider the real risk that a court would find these claims were not manageable
3 in light of the fact that “courts have inherent authority to ensure that PAGA claims can be fairly
4 and efficiently tried and, if necessary, may strike a claim that cannot be rendered manageable.”
5 *Wesson v. Staples the Office Superstore, LLC*, 2021 Cal. App. LEXIS 743, *18 (September 9,
6 2021). Even if they were allowed to proceed, Plaintiffs also had to consider Defendant’s well-
7 reasoned arguments in defense. In light of all of these risks, Plaintiffs applied a 50% discount to
8 the maximum damage exposure to account for these general and realistic trial-related risks.

9 Courts routinely award far less than the statutory maximum amount of penalties, even
10 where an underlying violation of the Labor Code is found. For example, in *Fleming v. Covidien*,
11 the court calculated the civil penalties for an employer providing 8,000 non-compliant wage
12 statements to be \$2.8 million (\$100 per violation). *Fleming v. Covidien, Inc.*, 2011 U.S. Dist.
13 Lexis 154590, *3-4 (C. D. Cal. August 12, 2011), vacated and remanded in part on other
14 grounds, 546 Fed. Appx. 616 (9th Cir. 2013). Although the court found that the employer had
15 violated Labor Code section 226, it noted that none of the employees suffered any injury
16 because of this non-compliance (and none complained of the issues prior to filing suit.) *Id.*
17 Pursuant to Labor Code section 2699(e)(2), the court reduced PAGA civil penalties from \$2.8
18 million to \$500,000. *Id.*

19 Defendant’s PAGA exposure on the alleged claims was discounted for risks which
20 included not proving the underlying Labor Code violations, as well as the Court’s authority to
21 completely reduce penalties, as long as not to “zero.” *Thurman v. Bayshore Transit*
22 *Management, Inc.*, 203 Cal. App. 4th 1112, 1135 (2012); *Carrington v. Starbucks Corp.*, 30
23 Cal. App. 5th 504 (2018) (the penalty rate was dropped to \$5.00 per pay period.)

24 Based on these risks, Defendant’s exposure for PAGA penalties was reduced by
25 approximately 50% resulting in a maximum exposure of \$3,167,587.50 (\$6,339,175⁵ x 50%).

26 _____
27 ⁵ Calculated as follows: \$83,650 (Lab. Code § 510) + \$836,450 (Lab. Code § 1197) + \$418,225 (Lab.
28 Code § 512) + \$418,225 (Lab. Code § 226.7) + \$836,450 (Lab. Code § 2802) + \$1,672,900 (Lab. Code
§ 246) + \$314,900 (Lab. Code § 2810.5) + \$836,450 (Lab. Code § 226) + \$836,450 (Lab. Code § 204) +
\$85,475 (Lab. Code § 203) = \$6,339,175 * 50% = \$3,169,587.50.

Singer Decl. ¶¶50, 51. The amount allocated to PAGA is within the range, or higher, than other settlements. See *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d 1058, 1101 (N.D.Cal. 2019), citing, among others, *Ceja-Corona v. CVS Pharm., Inc.*, 2015 U.S. Dist. LEXIS 5118 (E.D. Cal. Jan. 14, 2015) (\$10,000 PAGA penalties in settlement of \$900,000), recommendation adopted, 2015 U.S. Dist. LEXIS 25730 (E.D. Cal. Mar. 3, 2015); *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1330 (N.D. Cal. 2014) (\$10,000 PAGA penalties, \$1.25m settlement); *Franco v. Ruiz Food Prods.*, 2012 U.S. Dist. LEXIS 169057, *5-6 (E.D. Cal. Nov. 27, 2012) (\$10,000 PAGA penalties, \$2.5m settlement); *Garcia v. Gordon Trucking, Inc.*, 2012 U.S. Dist. LEXIS 160052 (E.D. Cal. Oct. 31, 2012) (\$10,000 PAGA, \$3.7m settlement).

VII. THE ATTORNEYS' FEES ARE REASONABLE AND SHOULD BE AWARDED

PAGA Counsel requests \$131,666.67 for their attorneys' fees, (33.33% of the Gross PAGA Amount), and \$21,366.76 in litigation costs. As of the date of the filing of this Motion and to bring this settlement to a final closure, PAGA Counsel will have incurred \$208,620.00 in attorneys' fees and \$21,366.76 in litigation costs. Singer Decl. ¶53, Exh. 5 – Consolidated Summary of Time & Costs, Exh. 6 - Itemized Costs; Kazandjian Decl. ¶7, Exh. 2 - Summary of Time & Costs and Exh. 3 - Itemized Costs; Declaration of Raul Perez, ("Perez Decl."), ¶¶5, 9.

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

The California Supreme Court affirmed the granting of attorneys' fees in common fund cases based on a percentage of the recovery. *Laffitte, supra*, at 503. A fee award based on a

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

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 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 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 \$334,530.00 in penalties to distribute to the State, the LWDA for enforcement and education, and to the allegedly aggrieved employees, as well as to compensate the PAGA Counsel representing the interests of the State.

B. Attorneys' Fees of 33.33% of the Settlement Payment is a Reasonable Fee

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.*, 162 Cal. App. 4th 43, 66, n.11 (2008) (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 in the lower-range of fee percentage awards which commonly range from 20% to 40% of a common fund. The requested sum constitutes fair compensation for undertaking complex, risky, expensive, and time-consuming litigation, strictly on a contingent basis, and for the results achieved for the

1 State, and the Aggrieved Employees, as well as Defendant’s current and future employees.
2 Numerous state and federal courts in California routinely approve fee requests equal to or more
3 than the amount sought here. Singer Decl. ¶¶54, 57. Some courts have found an award of 33%
4 of the common fund represents the “benchmark” in California. *Smith v. CRST Van Expedited,*
5 *Inc.*, 10-CV-1116- IEG WMC, 2013 WL 163293, *5 (S.D. Cal. Jan. 14, 2013) (“These
6 percentages compare favorably with” the California (33%) benchmark.); *Dennis v. Kellogg Co.*,
7 09-CV-1786-L WMC, 2013 WL 6055326, at *7 (S.D. Cal. Nov. 14, 2013). PAGA Counsel’s
8 fee request is in line with awards in similar cases in California and nationwide and demonstrates
9 PAGA Counsel’s fee request is consistent with market rates and is reasonable. Singer Decl.
10 ¶¶55-57.

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

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

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

26 The lodestar method is calculated by multiplying the number of hours reasonably
27 expended on the litigation by a reasonable hourly rate. *Staton, supra*, 327 F.3d at 965. A
28 reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience

1 in the relevant community. *PLCM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000);
2 *Hopson v. Hanesbrands Inc.*, 2009 U.S. Dist. LEXIS 33900 (N.D. Cal. Apr. 3, 2009).

3 PAGA Counsel have worked 322.8 hours to date prosecuting this action and calculate
4 the resulting lodestar fee on those hours at \$208,620.00. The hours expended were reasonable in
5 light of the complexity and duration of the litigation. Singer Decl. ¶53, Exh. 5 – Consolidated
6 Summary of Time and Costs; Kazandjian Decl. ¶¶8, 9, Exh. 2; Perez Decl. ¶5.

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

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

16 PAGA Counsel’s skill and experience support their hourly rates and are in line with
17 rates typically approved in wage and hour class action litigation in California and have been
18 specifically approved by numerous state and federal courts in California. Cohelan Khoury &
19 Singer’s practice is limited exclusively to litigating employment class actions on behalf of
20 employees and consumers. Cohelan Khoury & Singer have been appointed Class Counsel or co-
21 Class Counsel in over 300 such cases. As leading attorneys in the field, Plaintiffs’ counsel
22 continually monitors prevailing market rates of defense and plaintiff law firms and set the
23 billing rates to follow attorneys and staff of comparable skill, qualifications and experience.
24 Other wage and hour attorneys working as Class Counsel before California courts charge
25 comparable if not higher rates. Singer Decl. ¶¶3-11, 58, 59.

26 Capstone Law APC’s rates have been consistently approved by many federal and state
27 courts over the past several years. Perez Decl. ¶¶6-7.

28 As of today, Haig B. Kazandjian Lawyers, APC has expended approximately 88.5 hours

on this matter, with work still continuing. The hours expended were reasonable in light of the complexity and duration of the litigation. The firm's total lodestar for these hours amounts to \$55,312.50. The work performed in this matter, the backgrounds of my firm, as well as the individual backgrounds, training, and experience of the attorneys from Haig B. Kazandjian Lawyers, APC who worked on this matter, in litigating wage-and-hour matters, support a reasonable blended hourly rate of compensation at the rate of \$625 per hour for work performed by Counsel Haig B. Kazandjian Lawyers, APC. The rate is Haig B. Kazandjian Lawyers, APC's current billing rate and is supported by the extensive and specialized experience in these types of cases and has been approved by other courts. Kazandjian Decl. ¶9.

PAGA Counsel's skill and experience support their hourly rates and are in line with rates typically approved in wage and hour class action litigation in California and have been specifically approved by numerous state and federal courts in California. Haig B. Kazandjian Lawyers, APC's practice is primarily focused on litigating employment class actions on behalf of employees. Haig B. Kazandjian Lawyers, APC have been appointed Class Counsel or co-Class Counsel in numerous such cases. Kazandjian Decl. ¶10.

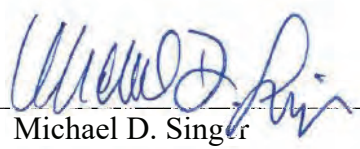
VIII. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request the Court approve the PAGA Settlement. PAGA Counsel will provide this PAGA Approval Motion to the Labor Workforce and Development Agency as required, via its website on the date the motion is served and filed with the Court.

Respectfully submitted,

COHELAN KHOURY & SINGER
HAIG B. KAZANDJIAN LAWYERS, APC
CAPSTONE LAW APC

Dated: May 16, 2023

By: 
Michael D. Singer
Counsel for Plaintiffs EMILY FERRER, ELIJAH WESTCOTT, MANUEAL BANUELOS MACIAS