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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO**

TREVOR WIPF, an individual, on behalf of
the State of California,

Plaintiff,

v.

ASI HASTINGS, INC., a California
Corporation, and DOES 1-50, Inclusive,

Defendants.

Case No: 37-2020-00043643-CU-OE-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
APPROVAL OF PAGA SETTLEMENT**

Hearing Date: September 24, 2021
Hearing Time: 10:30am

Honorable Judge John S. Meyer
Department 64

Trial Date: Not Set
Action Filed: November 30, 2020

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1 **I. INTRODUCTION**

2 This settlement covers an action brought under the California Private Attorneys General
3 Act, Cal. Labor Code §2699, et seq. (“PAGA”). The operative Complaint was filed by Plaintiff
4 Trevor Wipf (“Plaintiff”). Plaintiff brought claims on behalf of all individuals who, during the time
5 period of September 7, 2019, to March 8, 2021 (the “PAGA Period”), were employed and classified
6 by Defendant ASI Hastings, Inc. (“Defendant”) as non-exempt, in California (the “Aggrieved
7 Employees”).

8 Plaintiff alleged that Defendant failed to pay minimum wages for all time worked, including
9 for rest breaks, failed to pay overtime wages at the correct rate, failed to provide meal and rest
10 periods, failed to provide accurate wage statements, failed to reimburse business expenses, and
11 failed to provide wages when due. Based upon the foregoing conduct, Plaintiff contends that
12 Defendant is liable for PAGA penalties for underlying violations of Labor Code sections 201, 202,
13 203, 204 *et seq.*, 210, 226(a), 226.7, 351, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802,
14 and the applicable Wage Orders. Defendant denies Plaintiff’s claims, any liability therefor, and that
15 Plaintiff can successfully proceed with his claims including on a representative basis.

16 After a full day of mediation with mediator Hon. William C. Pate (Ret.) following an
17 extensive informal discovery exchange, the parties agreed to a mediator’s proposal to settle this
18 PAGA action for the total amount of One Hundred and Eighty Five Thousand Dollars And Zero
19 Cents (\$185,000.00). In accordance with California Labor Code §2699(l), Plaintiff now asks this
20 Court to review and approve the Parties’ mediated and agreed upon settlement of Plaintiff’s PAGA
21 claims.¹

22 The PAGA settlement is set forth in the accompanying Private Attorney General Act (Labor
23 Code Section 2698 *et Seq.*) Settlement Agreement and Release of All Claims (“Settlement
24 Agreement”). A true and correct copy of the Settlement Agreement which sets forth the terms for
25

26 ¹ Section 2699(l)(2) provides as follows: “The superior court shall review and approve any
27 settlement of any civil action filed pursuant to this part.” This is only a settlement of the PAGA
28 claims for civil penalties, and is not a class action settlement and does not release the individual
claims, if any, of the affected Aggrieved Employees. Cal. Labor Code § 2699(g)(1); *Iskanian v.*
CLS Transportation, 59 Cal. 4th 348, 381 (2014).

1 the settlement of the PAGA claims is attached as Exhibit #1 to the Declaration of Shani O. Zakay,
2 filed herewith. Capitalized terms shall have the same meaning as defined in the Settlement
3 Agreement. The LWDA has received notice of this Settlement and this motion as set forth in the
4 accompanying Declaration of Shani O. Zakay.

5 A proposed order confirming review and approval of the PAGA settlement is submitted
6 herewith.

7 **II. RELEVANT FACTS**

8 On September 3, 2020, Plaintiff Trevor Wipf gave written notice to the Labor and
9 Workforce Development Agency (“LWDA”) of his intent to assert a claim under the Private
10 Attorneys General Act of 2004 (“PAGA”) and his alleged bases for the claims. More than 65 days
11 passed after the notice letter was sent to the LWDA, and the LWDA did not indicate that it intended
12 to investigate the alleged violations referenced in the letter.

13 On November 30, 2020, Plaintiff filed the Action, a PAGA representative complaint, against
14 Defendant in the Superior Court of San Diego County, Case No. 37-2020-00043643-CU-OE-CTL.

15 On March 9, 2021, the Parties engaged in a full-day mediation with the Hon. William C.
16 Pate (Ret.). In anticipation of the mediation, the parties engaged in substantial informal discovery
17 related to the data and documents relevant to assess the value of the claims in the operative
18 complaint. Based upon information provided to Plaintiff’s counsel by Defendant as part of the
19 exchange of informal discovery in advance of and in support of mediation, as of the date of the
20 parties’ mediation, there were approximately 198 aggrieved employees who worked a total of
21 approximately 5,174 pay periods during the PAGA Period to the date of mediation on March 9,
22 2021. Defendant provided a large sample of time records and payroll records for the mediation.
23 Defendant also provided Plaintiff with all relevant employment policies, sample employee
24 schedules and break waivers, and other relevant documentation, as well as Plaintiff’s complete
25 personnel file.

26 At the mediation, the Parties engaged in extensive, arms-length negotiations. At the
27 conclusion of the full-day mediation, the parties had reached an agreement for settlement based on
28 Judge Pate’s proposal, which Plaintiff and Defendant ultimately accepted. The mediator’s proposal

1 called for this PAGA case to be resolved for the total amount of One Hundred and Eighty-Five
2 Thousand Dollars And Zero Cents (\$185,000.00), the agreement was memorialized in a
3 Memorandum of Understanding. The Parties thereafter negotiated and entered into a long form
4 settlement agreement. Accordingly, the Parties now ask the Court to approve the Parties'
5 Settlement.

6 **III. TERMS OF THE PAGA SETTLEMENT**

7 The PAGA settlement is subject to Court approval consistent with Labor Code § 2699. The
8 Settlement Agreement negotiated by the parties provides for Defendant to pay One Hundred and
9 Eighty Five Thousand Dollars And Zero Cents (\$185,000.00) as the "Gross Settlement Amount".
10 (Settlement Agreement at §4.01) This Gross Settlement Amount includes the following: (i) any
11 payment to the LWDA; (ii) any payment to Aggrieved Employees; (iii) the payment of fees and
12 costs to Plaintiff's counsel, as approved by the Court; and (v) all fees, costs, and expenses of
13 administration of this Agreement. (*Id.*) The "PAGA Payment" is defined as the amount remaining
14 from the Gross Settlement Amount after the deduction of the Settlement Administration Fee,
15 Plaintiffs' Counsel's Fee Amount and Plaintiffs' Counsels' Cost Amount. (Settlement Agreement
16 at §4.05)) (Declaration of Shani O. Zakay, at ¶4). Payment by Defendant shall be due within thirty
17 (30) days after the Effective Date. (Settlement Agreement at §5.04(c)).

18 The Net PAGA Payment shall represent Labor Code Section 2699 penalties, of which 75%
19 of the payment will be paid to the LWDA as the LWDA Payment and 25% will be paid to Aggrieved
20 Employees as Individual PAGA Payments, unless the Court determines otherwise. (Settlement
21 Agreement at §4.05.) A reallocation of the settlement funds amongst PAGA claims directed by the
22 Court shall not be a basis for either side to void the Settlement Agreement. (*Id.*) Aggrieved
23 Employees will be issued a Form 1099 for their share of the PAGA payments. (*Id.*) The Individual
24 PAGA Payment for each Aggrieved Employee shall be based on the number of bimonthly payroll
25 periods each Aggrieved Employee worked during the PAGA Period as a percentage of the total pay
26 periods worked by all Aggrieved Employees during the PAGA Period. (*Id.*). (Declaration of Shani
27 O. Zakay, at ¶4).

1 The “Aggrieved Employees” are defined as “all of Defendant’s current and former non-
2 exempt employees employed in California between September 7, 2019 and March 8, 2021.”
3 (Settlement Agreement at §1.01(iii)). Defendant provided Plaintiff’s Counsel with the number of
4 pay periods. Defendant represented that there are approximately 5,174 pay periods as of the Parties’
5 mediation date. (Declaration of Shani O. Zakay, at ¶4). After confirming the number of pay periods
6 in the PAGA period if the Court grants approval of the settlement, Defendant will provide a
7 supplemental declaration confirming the number of pay periods and Aggrieved Employees.

8 Notice shall be provided to the Aggrieved Employees in the following manner: No later than
9 fifteen (15) days after Effective Date² Defendant shall provide the Settlement Administrator with a
10 list of Aggrieved Employees (“Aggrieved Employees List”). The Aggrieved Employees List shall
11 state the first name and last name in separate columns for each Aggrieved Employee, the last known
12 home address for each such Aggrieved Employee, each Aggrieved Employee’s social security
13 number, and each Aggrieved Employee’s respective number of pay periods employed by Defendant
14 in California during the PAGA Period (Settlement Agreement at §5.03(a)(1)).

15
16
17 ² “Effective Date” means the date upon which the following have occurred: (a) approval of the
18 Settlement is granted by the Superior Court of California for the County of San Diego, or other
19 court assuming jurisdiction of this matter, (b) the Court’s Judgment approving the Settlement
20 becomes Final, and (c) the date of the time for filing or noticing any appeal of the Judgment has
21 expired. If there is an appeal of the Court’s Judgment, the date the Judgment is affirmed on appeal,
22 the date of dismissal of such appeal, or the expiration of the time to file a petition for writ of
23 certiorari to the California Supreme Court shall be the date the Settlement is Final. If there is an
24 intervener, but no appeal is filed, the expiration date of the time for filing or noticing any appeal of
25 the Judgment shall be the date the Settlement is Final. If there is no intervener in the Action, the
26 date the Court enters an order approving this Settlement shall be the date the Settlement is Final.
27 For purposes of this Agreement, “becomes final and is no longer appealable” shall mean the later
28 of: (a) the day after the last date by which a notice of appeal to the applicable Court of Appeal of
the order and judgment approving this Agreement may be timely filed and none is filed (*i.e.*, 60
days from notice of entry of judgment); (b) if an appeal is filed, and the appeal is finally disposed
of by ruling, dismissal, denial, or in a any other manner that confirms the validity of the order and
judgment, the day after the last date for filing a request for further review of the order and judgment
approving this Agreement passes, and no further review is requested; or (c) if an appeal is filed and
the order approving this Agreement is affirmed and further review of the order is requested, the day
after the review is finally resolved and the order and judgment approving this Agreement is
affirmed.

1 The individual PAGA Payments are considered penalties and will not be subject to local,
2 state or federal tax withholdings. All Aggrieved Employees who cash their settlement check may
3 receive an IRS Form 1099 reflecting this portion of the settlement. (Settlement Agreement at
4 §5.04(b)) The settlement checks issued to Aggrieved Employees shall remain valid for one hundred
5 eighty (180) days. Thereafter, all uncashed checks shall be voided, and the funds represented
6 thereby shall be paid to the Children Advocacy Institute in the name of the Aggrieved Employee.
7 (Settlement Agreement at 5.04(d)).

8 The PAGA settlement releases the “Released Claims” which are “any and all claims for civil
9 penalties under PAGA, of whatever kind or nature, whether known or unknown, arising during the
10 PAGA Period, based on the facts alleged in the operative complaint, as well as Plaintiffs’ notice
11 letters to the LWDA, and any resulting claim for attorneys’ fees and costs under PAGA, which
12 occurred during the PAGA Period. The release excludes individual claims (with the exception of
13 Plaintiff Trevor Wipf, Robert Peters, and Richard Simmons, per the terms of the Settlement
14 Agreement §1.01(xx)), including claims for wrongful termination, discrimination, unemployment
15 insurance, disability, workers’ compensations, and claims outside of the PAGA Period: “in no event
16 shall the Released PAGA Claims in this Agreement release any class claims or release any
17 individual claims.” (Settlement Agreement at § 1.01(xxii))

18 Pursuant to California Labor Code Section 2699(1), Plaintiff will provide a copy of the
19 Settlement Agreement to the LWDA concurrently with the filing of the instant motion for settlement
20 approval as well as a declaration confirming that Plaintiff has submitted the Settlement Agreement
21 to the LWDA in compliance with Labor Code Section 2699(1). In addition, Plaintiff shall submit
22 to the LWDA a copy of the Court’s judgment and order approving the Settlement Agreement within
23 ten (10) days after entry of judgment or order.

24 The additional amounts to be paid from the Settlement Sum other than the Net PAGA
25 Payment, subject to Court approval, are as follows: (1) Sixty-One Thousand Six-Hundred and Sixty
26 Dollars and Fifty Cents (\$61,666.50) shall be paid to Plaintiff’s Counsel for payment of attorneys’
27 fees, and up to Fifteen Thousand Dollars and Zero Cents (\$15,000.00) shall be paid to Plaintiff’s
28 Counsel for litigation expenses as set forth in the client's billing statement (pursuant to

1 Declaration(s) by Plaintiff's Counsel) in prosecuting the PAGA claims (Settlement Agreement at
2 §4.03) a Settlement Administrator Fee in an amount not to exceed \$3,500 (Settlement Agreement
3 at §4.04). If any of these amounts end up being less than estimated, the remaining amounts will be
4 added to the PAGA Fund.³

5 **IV. THE PARTIES HAVE SETTLED THE PAGA CLAIM**

6 The claim before this court is the representative claim under PAGA on behalf of the State
7 of California for civil penalties pursuant to the PAGA. The parties have agreed to settle this PAGA
8 claim in its entirety after informal discovery and arm's length mediation. The settlement is intended
9 to fully and finally resolve the PAGA claims asserted by Plaintiff on behalf of the State of
10 California. This is only a settlement of the PAGA claims for civil penalties, and is not a class
11 settlement and does *not* release the individual claims, if any, of the Aggrieved Employees.
12 Attorneys' fees equal to one-third of the Settlement Sum and litigation expenses will also be paid to
13 Plaintiff's Counsel as part of the settlement in accordance with California Labor Code § 2699(g)(1)
14 as set forth in the Agreement.

15 **V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE** 16 **SETTLEMENT OF THE PAGA CLAIM**

17 Labor Code § 2699(l) requires that the Court "shall review and approve any settlement of
18 any civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to
19 the agency at the same time that it is submitted to the court." Consequently, the parties respectfully
20 ask the Court to review and approve the settlement of the PAGA claims and the PAGA Settlement
21 Sum to be paid as part of the proposed settlement.

22 **A. The Settlement Sum To Be Paid Is Fair And Reasonable**

23 The Parties believe that the Settlement Sum is fair and reasonable and therefore "shall" be
24 reviewed and should be approved. In the case of *Price v. Uber Technologies*, Los Angeles Superior
25 Court Case No. BC544512, where a PAGA penalty claim for misclassification of 300,000 Uber

26 ³ Plaintiff has entered into a separate confidential settlement agreement with Defendant in regards
27 to the settlement of his individual claims, which provides for payment to him in exchange for a
28 general release of all claims. Plaintiff will supply a copy of the individual settlement agreement
to the Court for in-camera review upon request.

1 drivers was approved for \$7.5 million in PAGA penalties plus some changes to Uber’s policies to
2 allow drivers to drive for other companies like Lyft, California’s Labor Commissioner was asked
3 by the court to submit an amicus brief about its views of the standards to evaluate the fairness of a
4 PAGA settlement (where the State is the real party in interest). In its amicus brief filed in response
5 to that request, the Labor Commissioner Julie Hsu specifically stated that the main purpose of
6 PAGA penalties in the eyes of the Labor and Workforce Development Agency is to enforce
7 California’s Labor Code and obtain Labor Code compliance. Concerning the adequacy of PAGA
8 settlements, the Labor Commission noted that the purpose of PAGA penalties is to “promote
9 PAGA’s compliance and deterrence goals,” see Amicus Curiae Brief Submitted by the State Labor
10 Commissioner, *Price v. Uber Technologies*, Case No. BC544512 (June 16, 2017). As explained in
11 this Brief at page 1, the Labor Commissioner believes that labor issues are “best resolved by
12 applying principles of fairness and justice that have developed in other forms of representative
13 actions, as well as by considering PAGA’s role in helping the Labor Commissioner discharge her
14 mandate”, which is:

15 to vigorously enforce minimum labor standards in order to ensure employees are
16 not required or permitted to work under substandard unlawful conditions or for
17 employers that have not secured the payment of compensation, and to protect
18 employers who comply with the law from those who attempt to gain a competitive
advantage at the expense of their workers by failing to comply with minimum labor
standards.

19 Cal. Labor Code §90.5(a).

20 Where, as here, Labor Code compliance is obtained because an employer’s policies have
21 changed, PAGA’s purpose has been fulfilled and the monetary penalty components of the
22 Settlement become less significant or insignificant. Specifically, after the action was initiated,
23 Defendant adopted new policies which now ensure that employees receive paid rest-breaks
24 consistent with California law, and receive the correct rate of pay for overtime compensation. Based
25 on the Labor Commissioner’s logic, this change, which has been implemented, has eliminated the
26 issue of potential ongoing liability, and makes the Settlement before the Court for approval fair and
27 reasonable.
28

1 In addition, this Settlement Sum compares favorably to the estimated amount of PAGA
2 penalties owed. With the assistance of an expert, Plaintiff initially calculated that the maximum
3 amount of statutory PAGA civil penalties was potentially \$9,377,600 (based on maximum \$100 per
4 pay period for initial violations and \$200 per pay period for subsequent violations) and the fact that
5 there were approximately 5,174 pay periods at issue as of the mediation date. Importantly, however,
6 these calculations were performed at the maximum statutory rates for the PAGA penalties, when in
7 fact, it is likely that any penalties awarded would be at a lower rate.

8 California Labor Code Section 2699(e)(1) permits a Court to award a lesser amount than the
9 maximum civil penalty if based on the facts and circumstances to do otherwise would result in an
10 award that is "unjust, arbitrary and oppressive or confiscatory." Before and during the mediation,
11 Defendant argued, among other things, that it was unlikely that any Judge would award more than
12 the actual amounts owed on the claims, let alone the full \$100 or \$200 per violation. In *Carrington*
13 *v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal affirmed a judgment after trial
14 which only provided for a PAGA penalty of **\$5** per pay period. Therefore, at trial, any PAGA
15 penalties awarded in this case could be significantly less than Plaintiff's calculation, even had
16 Plaintiff prevailed on the PAGA claim. Here, multiplying the number of violations identified,
17 assumed, and extrapolated by Plaintiff's expert (26,148 violations) by **\$5** results in a total potential
18 liability of **\$130,740**. Further, multiplying the number of pay periods (5,174) by **\$5** results in a total
19 potential liability of **\$25,870**. Therefore, even assuming Plaintiff would have prevailed on all of his
20 claims in trial, the result obtained by Plaintiff in the Settlement exceeds the amount Plaintiff would
21 have recovered had the Court relied on *Carrington* in awarding the PAGA penalties.

22 Under PAGA, Courts have considerable discretion to reduce the penalty award. In *Fleming*
23 *v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. 2011), a federal court reduced PAGA
24 penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because the court found maximum
25 penalties "unjust" because the employees had suffered no injuries. Some trial courts have actually
26 awarded no civil penalties, even when Labor Code violations are established. *See also In re*
27 *Nordstrom Com. Cases*, 186 Cal. App. 4th 576, 589 (2010) (affirming an award of \$0 in PAGA
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1 penalties in a wage and hour class action); *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist.
2 LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

3 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each of
4 the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S. Dist.
5 LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff cannot
6 recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor
7 Code by the defendant."). Here, Plaintiff would need to prove that each Aggrieved Employee
8 suffered a violation for each pay period the employee worked.

9 The three primary claims in this PAGA action are based on (1) Defendant's alleged failure
10 to provide compliant meal and rest breaks to the Aggrieved Employees when a break was missed,
11 short or late, (2) Defendant's alleged miscalculation of the Aggrieved Employees' overtime rate by
12 failing to include commissions in the regular rate of pay, and (3) Defendant's alleged failure to
13 separately compensate Aggrieved Employees who received piece-rate compensation for rest breaks.

14 Here, a number of defenses asserted by Defendant presented serious threats to the claims of
15 the Plaintiff and the Aggrieved Employees. Defendant asserted that the employment practices
16 complied with all applicable Labor Laws. Most importantly and relevant to this case, Defendant
17 argued that the Supreme Court decision in *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012),
18 weakened, if not eliminated, Plaintiffs' claims, on liability, value, and manageability as to the meal
19 period and rest break claims. A major component of the damages alleged to have been suffered by
20 the Aggrieved Employees are attributed to missed meal breaks and rest breaks. Before and during
21 the mediation, Defendant aggressively argued that Defendant's policies and culture afforded the
22 Aggrieved Employees an opportunity to take timely meal periods and rest breaks, and that
23 employees like the Plaintiff *chose* not to take compliant breaks. Specifically, Defendant's written
24 policies encouraged Aggrieved Employees to take meal periods according to schedules compliant
25 with the California Labor Code, and included an outline of employees' rights with respect to breaks
26 based on the length of their shift. Defendant argued, therefore, that under the *Brinker* decision it
27 has no liability for the missed breaks whatsoever. Defendant argued that it adopted and strictly
28 enforced lawful policies, and thus afforded Plaintiff and the Aggrieved Employees the opportunity

1 to take compliant meal breaks. Because Plaintiff's claims were largely based on the missed meal
2 breaks, and because Defendant's policies were, indeed, compliant, this presented a very real concern
3 for Plaintiff and the Aggrieved Employees. If successful, this defense could eliminate or
4 substantially reduce any recovery. While Plaintiff believes that this defense, and others, could be
5 overcome, Defendant maintains these defenses have merit and therefore present a serious risk to
6 recovery.

7 Plaintiff's second major claim was based on Plaintiff's argument that Defendant failed to
8 separately compensate its piece-rate employees for rest breaks in accordance with the *Bluford v.*
9 *Safeway Stores, Inc.* 216 Cal.App.4th 864 (2013), decision. In response to this claim, Defendant
10 argued that it no longer employed any piece-rate employees. Defendant further argued that piece-
11 rate compensation was infrequent and only a small portion of employees received such
12 compensation, and the penalties for this claim are therefore minimal. In reviewing the sample
13 records provided by Defendant to Plaintiff for the mediation, Plaintiff's expert confirmed that
14 "piece-rate" compensation was rare, and concluded that extrapolated penalties for this claim are
15 likely limited to less than 30% of the pay periods. While Plaintiff believes that this defense, and
16 others, could be overcome, Defendant maintains this defense has merit and therefore presents a
17 serious risk to recovery. Defendant further maintains that, even if this defense fails, the liability
18 under this claim is minimal.

19 Plaintiff's last major claim was based on Plaintiff's argument that Defendant failed to
20 accurately calculate some Class Members' overtime rate by failing to include non-discretionary
21 commissions into the employees' regular rate of pay for purposes of the overtime calculation. In
22 response to this claim, Defendant argued that payment of commissions was infrequent, and
23 employees rarely earned a commission and overtime pay in the same pay period. Defendant argued
24 that and the penalties for this claim are therefore minimal. In reviewing the records provided by
25 Defendant to Plaintiff for the mediation, Plaintiff's expert confirmed that incentive compensation
26 was rare, and concluded that damages on this claim are likely limited to less than 5% of the pay
27 periods. While Plaintiff believes that this defense, and others, could be overcome, Defendant
28 maintains this defense has merit and therefore presents a serious risk to recovery for the Aggrieved

1 Employees. Defendant further maintains that, even if this defense fails, the liability under this claim
2 is minimal.

3 Defendant asserted additional defenses to the PAGA claim, not only as to liability but also
4 as to the amount of the penalties, reduction, and manageability. Defendant could argue that no
5 penalties prior to the PAGA notification and/or a Court finding of liability should be awarded
6 because the violations were not intentional, and at least some Courts have so ruled. In addition,
7 Defendant argued that any Court would substantially reduce the PAGA penalty awards in light of
8 decisions like *Carrington*.

9 These defenses present a significant risk to the PAGA claim and the potential that some or
10 all of the PAGA penalties sought may not be awarded. Given Defendant's potential defenses to the
11 violations at issue, the risks and costs of continued litigation, Plaintiff and his attorneys believe that
12 the PAGA Settlement Sum is fair and reasonable. This is particularly true given the changes that
13 Defendant has now made to its policies as described above. Plaintiff's Counsel have significant
14 experience litigating wage and hour claims including claims for PAGA penalties, and the Gross
15 Settlement Amount here is similar to or greater than similar settlements that courts have approved.
16 The Gross Settlement Amount was negotiated by experienced counsel at arm's length with the
17 assistance of a private mediator, Honorable William C. Pate (Ret.).

18 As set forth in the exhibit to the declaration of Shani O. Zakay, Esq. submitted concurrently
19 herewith, the LWDA has been provided notice of this motion and the PAGA settlement. The
20 decision of LWDA to accept the PAGA settlement and not oppose or object to this motion should
21 be given considerable weight. This is not a situation where the Court needs to be concerned about
22 the rights of absent employees as in a class settlement, as this PAGA-only settlement does not
23 release the individual claims of absent employees, and the LWDA is a sophisticated government
24 entity that is more than able to look out for its own rights.

25 **B. The Remaining Settlement Terms Are Fair And Reasonable**

26 Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code
27 § 2699(1) does not require that a court approve any other elements of the proposed settlement.
28 Because there are no class allegations, the approval provisions applicable to class settlements under

1 Cal. Code Civil Proc. §382 do not apply. Accordingly, the Court only needs to approve the
2 settlement of the civil penalties sought in the PAGA claim. Nevertheless, as explained herein, the
3 settlement terms for attorneys' fees and costs are reasonable.

4 VI. THE ATTORNEYS' FEES AND COSTS ARE FAIR AND REASONABLE

5 PAGA does not have any requirements for reviewing attorneys' fees, and Plaintiff's position
6 is that the payment of attorneys' fees and costs in this settlement is a matter of contract for a
7 contingent representation. Nevertheless, should this Court review the requested attorneys' fees, it
8 is clear that the requested fees and costs are reasonable.

9 In *Laffitte v. Robert Half Int'l, Inc.*, 1 Cal. 5th 480, 503 (2016), the California Supreme
10 Court unequivocally held that when "litigation established a monetary fund for the benefit of the
11 class members, and the trial court in its equitable powers awards class counsel a fee out of that fund,
12 the court may determine the amount of a reasonable fee by choosing an appropriate percentage of
13 the fund created" without considering the amount of hours expended on the case. *Id.* The Court
14 further held that "[t]he recognized advantages of the percentage method – including relative ease of
15 calculation, alignment of incentives between counsel and the class, a better approximation of market
16 conditions in a contingency case, and the encouragement it provides counsel to seek an early
17 settlement and avoid unnecessarily prolonging litigation – convince us the percentage method is
18 a valuable tool that should not be denied by our trial courts." *Id.* Consistent with *Laffitte*, the Ninth
19 Circuit has held that PAGA and/or Class Counsel should not be penalized for achieving a timely
20 result. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002) ("We do not mean to imply that
21 class counsel should necessarily receive a lesser fee for settling a case quickly; in many instances,
22 it may be a relevant circumstance that counsel achieved a timely result for class members.").

23 California Courts have consistently recognized "that most fee awards based on either a
24 lodestar or percentage calculation are 33%." *McCrary v. Elations Co., LLC*, No. EDCV 13-0242
25 JGB (SPx), 2016 U.S. Dist. LEXIS 24050, at *2 (C.D. Cal. Feb. 25, 2016); *McClellan v. Chase*
26 *Home Fin. LLC*, No. SACV 12-1331-JGB (JEMx) 2015 U.S. Dist. LEXIS 118005, at *20 (C.D. Cal.
27 Aug. 31, 2015) (explaining that while the attorneys' fee award that approximated 32% of all sums
28

1 paid under the Settlement Agreement was reasonable after citing numerous other cases finding that
2 an award of 33% of the common fund was common in class actions)⁴

3 Plaintiff's Counsel's diligent and efficient litigation of this action resulted in the creation of
4 an ascertainable common fund of \$185,000.00 that will substantially benefit the state of California
5 and the aggrieved employees. Thus, Plaintiff's Counsel obtained greater Labor Code compliance
6 and Defendant's policies have changed, which means the primary objective of PAGA as set forth
7 by the Labor Commissioner in the *Uber* case has been achieved.

8 Plaintiff's Counsel seek approval of an award of attorneys' fees in the amount of \$61,666.50
9 representing 1/3 of the common fund. As set forth in the Parties' Settlement Agreement, the
10 attorneys' fees shall be allocated between Plaintiff's Counsel as follows: Blumenthal Nordrehaug
11 Bhowmik De Blouw, LLP's share will be 40%; and Zakay Law Group APC's share will be 60%.

12 Plaintiff's Counsel have also each provided information about the tasks that the two law
13 firms performed on this case. Plaintiff's Counsel's request for attorneys' fees in the amount of 1/3
14 of the monetary common fund is consistent with the amount awarded in other cases as described in
15 detail above. Under *Laffitte*, the Court need not undertake any lodestar cross-check where, as here,
16 the percentage of the common fund sought equates to 1/3 of the common fund obtained.⁵

17 Finally, as set forth in the accompanying Declaration of Zakay at ¶16, Plaintiff's Counsel
18 will be recovering litigation expenses in the total amount of approximately \$6,085.91, which is less
19 than the costs called for in the settlement agreement. These expenses are documented in the
20 accompanying Declaration of Zakay at ¶16.

22 ⁴ In reaching its decision in *McClellan*, the court recognized that "California district courts routinely
23 award attorneys' fees in the range of 30-40% in class actions that result in the recovery of a common
24 fund under \$10 million." *McClellan*, No. SACV 12-1331-JGB (JEMx) 2015 U.S. Dist. LEXIS
25 118005, at *20 (quoting *Miller v. CEVA Logistics USA, Inc.*, No. 2:13-CV-01321-TLN, 2015 U.S.
26 Dist. LEXIS 104704, 2015 WL 4730176, at *8 (E.D. al. Aug. 10, 2015) and citing *In re Mego Fin.*
27 *Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000).

28 ⁵ Although not required, Plaintiff's Counsel's lodestar is provided also supports the award. As
detailed in the accompanying billing statement attached hereto to the Zakay Declaration, Plaintiff's
Counsel's current lodestar is \$71,649 for more than 129.3 hours of work. The attorneys' fees
recovered here represents a negative 0.86 lodestar multiplier. The firms have worked on this action
for more than 14 months. In addition, there will be significant additional lodestar still to be incurred
to complete the settlement.

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VII. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court approve the PAGA settlement and the Settlement Sum as set forth in the Settlement Agreement and enter the proposed order submitted herewith.

DATED: August 30, 2021

ZAKAY LAW GROUP, APLC

By: 

Shani O. Zakay
Attorney for Plaintiff