

COHELAN KHOURY & SINGER

Isam C. Khoury (SBN 58759)

ikhoury@ckslaw.com

Michael D. Singer (SBN 115301)

msinger@ckslaw.com

Marta Manus (SBN 260132)

mmanus@ckslaw.com

605 C Street, Suite 200

San Diego, California 92101

Telephone: (619) 595-3001/Facsimile: (619) 595-3000

Attorneys for Plaintiff PRINCE BANZOUZI MALGHA

on behalf of himself and other aggrieved employees

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

PRINCE BANZOUZI MALGHA

on behalf of himself and other aggrieved
employees,

Plaintiff,

vs.

WILINE NETWORKS INC., a Delaware
Corporation; and DOES 1 through 100,
inclusive,

Defendants.

CASE NO. 20-CIV-04862

ASSIGNED FOR ALL PURPOSES TO:

The Honorable V. Raymond Swope
Department 23

REPRESENTATIVE ACTION

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

Date: July 3, 2023

Time: 3:00 p.m.

Dept: 23

Complaint filed: November 6, 2020

Trial date: Not set

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I. INTRODUCTION

Plaintiff Prince Banzouzi Malgha (“Plaintiff”) seeks approval of a non-reversionary Private Attorneys General Act of 2004 (“PAGA”) settlement of two-hundred eighty-five thousand dollars (\$285,000). The proposed Settlement will benefit approximately 134 individuals employed by Defendant Wiline Networks Inc. (“Defendant”) as non-exempt hourly paid employees at any time during the Covered Period defined as September 1, 2019 to June 23, 2022 (“Covered Period”). Declaration of Isam C. Khoury (“Khoury Decl.”), ¶ 9, Exhibit 1 - Private Attorneys General Act Settlement Agreement and Release (“Settlement Agreement” or “SA”) and the Addendum to SA (“Addendum”), attached as Exhibit 2 to Khoury Decl.

Plaintiff requests the Court approve this PAGA Settlement, order it implemented according to the terms of the Agreement, and enter Final Judgment.

II. THE PARTIES AND AGGRIEVED EMPLOYEES

A. Plaintiff and Defendant

Defendant is an internet service provider, connecting its customers through a state-of-the-art network of Data Centers throughout all major metro areas in California, including San Diego, Orange County, Los Angeles, San Jose, San Francisco, Oakland, and Sacramento. Khoury Decl., ¶ 11.

Plaintiff Prince Banzouzi Malgha worked for Wiline as a non-exempt hourly paid employee for approximately 3 months until March 2020 when his employment ended. Khoury Decl., ¶ 12; SA, ¶ 1(a).

B. The Aggrieved Employees

Aggrieved Employees are all persons employed by Wiline in California as non-exempt hourly paid employees at any time during the Covered Period defined as September 1, 2019 to June 23, 2022. Aggrieved Employees worked as technicians and various other titles. Through the end of the Covered Period, there were 134 Aggrieved Employees who worked an estimated aggregate 3,250 Pay Periods. Khoury Decl., ¶ 13; SA, ¶ 3(a)(4).

III. PROCEDURAL HISTORY, INVESTIGATION, AND DISCOVERY

On September 1, 2020, Plaintiff gave written notice to the Labor Workforce and

1 Development Agency (“LWDA”) and to Wiline of his intent to pursue PAGA civil penalties
2 pursuant to Labor Code sections 2698, *et seq.* for Wiline’s failure to pay all wages, including
3 minimum and overtime wages; failure to provide meal and rest periods; failure to record hours
4 worked; failure to reimburse business-related expenses; unlawful agreements; failure to pay sick
5 pay; and derivative claims for the failure to provide accurate itemized wage statements; and the
6 failure to pay all wages due during employment and upon separation of employment. Khoury
7 Decl., ¶ 14, Exhibit 3 – PAGA Notice. At no time did the LWDA notify Plaintiff of an intention
8 to investigate the allegations contained in the PAGA Notice and Defendant did not serve notice
9 it intended to cure any alleged defect, pursuant to the PAGA (Labor Code § 2699.3). Khoury
10 Decl., ¶ 15.

11 On November 6, 2020, Plaintiff filed a representative action under the PAGA alleging
12 violations contained in the PAGA Notice on behalf of himself and all other Aggrieved
13 Employees. Khoury Decl., ¶ 16; SA, ¶ 1(a)(c). The Parties engaged in a substantial amount of
14 litigation, including numerous sets of written discovery and the partial deposition of Plaintiff
15 and Defendant’s PMQ. Khoury Decl., ¶ 17.

16 After over a year of litigation, the Parties agreed to attend mediation. In preparation for
17 mediation, PAGA counsel reviewed and analyzed the data and all information obtained through
18 informal and formal discovery and extrapolated PAGA civil penalties for each alleged violation
19 on behalf of all alleged Aggrieved Employees. Khoury Decl., ¶ 18.

20 **IV. PLAINTIFF’S CONTENTIONS AND DEFENDANT’S DEFENSES**

21 Plaintiff contended that Defendant failed to pay all minimum and overtime wages for all
22 hours worked, including due to unlawful time rounding as well as a practice of auto-deducting
23 thirty minutes for each shift for a meal period regardless of whether a compliant meal period
24 was taken. Khoury Decl., ¶ 19. Plaintiff also contended that Defendant failed to provide off-
25 duty and timely meal and rest periods because Aggrieved Employees had to work through
26 breaks and were not paid any meal or rest break premiums. Plaintiff also contended that
27 Defendant failed to record meal periods. Defendant never produced any records in formal
28 discovery showing that any meal periods were recorded. Khoury Decl., ¶ 20.

1 Plaintiff also contended that although Aggrieved Employees incurred reasonable
2 business cell phone expenses in the discharge of their duties for Defendant, they were not
3 reimbursed for said expenses. Plaintiff also contended that Defendant required employees to
4 sign agreements containing unlawful terms, namely releases in order to receive their final pay.
5 Khoury Decl., ¶ 21.

6 Defendant contended it paid its employees properly for all hours worked and did not
7 have a time rounding practice. According to Defendant, employees filled out their own time
8 cards and were required to ensure accurate reporting of hours worked. Khoury Decl., ¶ 22. With
9 respect to meal and rest periods, Defendant contended that it properly informed employees of
10 the right to meal and rest periods via the employee handbook. Defendant argued that it did not
11 automatically deduct thirty-minutes for meal breaks, that its employees were adequately
12 informed of the right to timely meal and rest breaks via the employment policy and that there
13 was no evidence that employees were required to work through any breaks. *Id.*

14 Defendant further contended that it did not require employees to sign releases to receive
15 their final wages and that the only agreement signed by allegedly Aggrieved Employees was a
16 Propriety Information Agreement. Khoury Decl., ¶ 23. Defendant also argued that it regularly
17 reimbursed employees for vehicle and cell phone usage and that some employees were in fact
18 provided with a cell phone to use for work. *Id.*

19 Defendant vehemently contested the merits and the manageability of Plaintiff's claims
20 and argued that the majority of the claims, including the meal and rest break claims would
21 require substantial individualized issues and would thus not be manageable at trial. Khoury
22 Decl., ¶ 24. Defendant also argued that all of its employees, including Plaintiff, signed
23 arbitration agreements in which they agreed to arbitrate their individual claims and that a
24 motion to compel arbitration would more than likely be granted. *Id.*

25 **V. SUMMARY OF PROPOSED SETTLEMENT**

26 **A. Mediation**

27 On June 23, 2022, the Parties met for mediation and engaged in good faith, arms'-length
28 and informed negotiations facilitated by Steven Paul, an experienced and well-regarded wage

and hour mediator. Although the Parties did not reach a settlement at the mediation, they continued negotiations with the assistance of the mediator, which included a review of information concerning Defendant's financial viability, and were ultimately able to reach an agreement, for which Plaintiff now seeks Court approval. Khoury Decl., ¶ 25; SA, ¶ 1(a)(d)

B. Monetary Relief

Pursuant to the terms of this Settlement, Defendant will pay a maximum non-reversionary Settlement Payment of \$285,000. Khoury Decl., ¶ 10. Subject to Court approval, from the Settlement Payment, the following shall be deducted: 1) administration expenses of \$10,000.00 to CPT Group, Inc., 2) PAGA Counsel's attorneys' fees of up to \$95,000.00, and litigation costs of \$15,000.00. The remaining sum estimated at \$165,000.00 will be disbursed as directed by the PAGA (Labor Code § 2699(i)) with \$123,750.00 (75%) paid to the Labor and Workforce Development Agency ("LWDA"); and, \$41,250.00 (25%) distributed proportionately to Aggrieved Employees¹ based on the number of Pay Periods each worked during the period from September 1, 2019 to June 23, 2022. Khoury Decl., ¶ 10. Accordingly, subject to Court approval, Plaintiff proposes the \$285,000.00 Settlement Payment be distributed as follows:

1. GROSS PAGA AMOUNT:	\$ 285,000.00
PAGA Counsel's Fees:	-\$ 95,000.00
PAGA Counsel's Litigation Costs:	-\$ 15,000.00
Administration Payment:	-\$ 10,000.00
2. PAGA PENALTIES:	\$ 165,000.00
Labor Workforce & Development Agency: 75%	\$ 123,750.00
Aggrieved Employees: 25%	\$ 41,250.00

Pursuant to PAGA, 25% of the PAGA Penalties estimated at \$41,250.00 will be distributed proportionately to the 134 Aggrieved Employees employed during the Covered Period (September 1, 2019 through June 23, 2022) based on the number Pay Periods each worked during the Covered Period ("Compensable Pay Periods"). With an aggregate 3,250 Pay Periods worked by all Aggrieved Employees, each will receive an estimated \$12.69 per pay

¹ All former and current non-exempt employees of Defendant who were employed during the period of time between September 1, 2019 and June 23, 2022. SA, ¶ 3(a)(4).

period. Khoury Decl., ¶¶ 26-27; SA, ¶¶ 3(a)(1) – (a)(4).

C. Scope of Release

The PAGA Settlement provides for a release of only claims alleged in the operative complaint. Specifically, the Released Claims release the following:

“All claims for civil penalties under PAGA that arose during the PAGA Period that were actually alleged or that could have been alleged in the Action by Plaintiffs, on behalf of the State of California and the PAGA Aggrieved Employees arising out of their employment with Defendant based on the facts alleged or that could have been alleged based on the facts in the Complaint filed in the Action and including but not limited to: (a) penalties pursuant to Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 432.5, 510, 512, 558, 1174, 1197, 1197.1, 1198, and 2802; (b) claims for the attorney’s fees and costs incurred in the prosecution of this Action on behalf of the PAGA Aggrieved Employees; and (c) any other remedies, penalties, or interest available under the PAGA based on the facts alleged in the Complaint.”

Khoury Decl., ¶ 28; SA, ¶ 10.

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* (2009) 46 Cal.4th 969, 986. 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 p. 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

No later than fourteen (14) calendar days after the Court’s order granting approval of the Settlement, Defendant will provide the PAGA Settlement Administrator with a list of all Aggrieved Employee, containing the following information for each Aggrieved Employee: first and last name, last known address, social security number, and Compensable Pay Periods (defined as “pay periods between September 1, 2019 through June 23, 2022.”) Khoury Decl., ¶ 29; Exhibit 2 - Addendum, ¶ 9(b). Before mailing checks to the Aggrieved Employees, the PAGA Settlement Administrator will conduct one National Change of Address database to

1 update stale addresses and then mail the Aggrieved Employee's Individual Settlement Share and
2 letter explaining the Settlement and the basis for the payment. SA, ¶¶ 9(d)(2) and (3);
3 Declaration of Julie Green on behalf of CPT Group ("Green Decl."), ¶ 6 and Exhibit B. If the
4 envelope containing the letter and check is returned as undeliverable, CPT Group will perform a
5 skip-trace using a social security number to locate a current mailing address, and re-mail the
6 envelope to the updated address. SA, ¶ 9(d)(2); Green Decl., ¶ 6. If any check remains uncashed
7 after 180 days of mailing, it will be voided, and the value of the uncashed check will be
8 forwarded to the State of California's Controller, Unclaimed Property Division for further
9 handling on behalf of the Aggrieved Employee. SA, ¶ 9(d)(4); Green Decl., ¶ 6.

10 **E. Disbursement of Settlement Funds**

11 Defendant shall not be required to commence funding of the Net Settlement Amount
12 until the later of 10 business days after the effective date, or December 27, 2022. Defendant
13 shall fund the Settlement in six (6) payments. The first payment of \$35,000 will be due the later
14 of ten (10) business days after the effective date, or December 27, 2022. The remaining five
15 payments of \$50,000 each will be due on the first of each month following the first payment.
16 Khoury Decl., ¶ 30; SA, ¶ 4. The Parties agreed to the installment payment schedule due to
17 Defendant's financial position and difficulty paying a lump sum. Khoury Decl., ¶ 31.

18 **VI. PAGA'S PURPOSE AND PROCEDURE**

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

20 "The California legislature enacted PAGA after a 2004 budget shortfall that led to
21 understaffing in the Labor and Workforce Development Agency ("LWDA") and insufficient
22 resources to enforce the Labor Code. PAGA was intended to address these problems and ensure
23 more vigorous enforcement of the labor and employment laws." *Tseng v. Nordstrom, Inc.*
24 (C.D.Cal. Dec. 19, 2016, No. CV11-8471-CAS(MRWx)) 2016 U.S. Dist. LEXIS 176790, *13-
25 14 (citations omitted).

26 "[T]he purpose of PAGA is to incentivize private parties to recover civil penalties for
27 the government that otherwise may not have been assessed and collected by overburdened state
28 enforcement agencies.... Unlike class actions, these civil penalties are not meant to compensate

1 unnamed employees because the action is fundamentally a law enforcement action.” *Tseng v.*
2 *Nordstrom, Inc., supra*, at *13-14

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

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

15 A plaintiff does not bring a PAGA claim on his or her own behalf as an individual claim,
16 but “as the proxy or agent of the state’s labor law enforcement agencies.” *Arias v. Superior*
17 *Court* (2009) 46 Cal.4th 969, 986; see also *Reyes v. Macy’s, Inc.* (2011) 202 Cal.App.4th 1119,
18 1123-1124; *Iskanian v. CLS Transp. Los Angeles, LLC* (2015) 59 Cal.4th 348, 380. When an
19 aggrieved employee brings a PAGA claim, “the government is always the real party in interest.”
20 *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego County* (2015) 234 Cal.App.4th 1109,
21 1119; *Montano v. The Wet Seal Retail, Inc.* (2015) 232 Cal.App.4th 1214, 1222 (“[A] PAGA
22 action is a dispute between an employer and the State agency.”).

23 A PAGA plaintiff represents “the same legal right and interest as state labor law
24 enforcement agencies,” and seeks the same civil penalties that could have been collected by the
25 LWDA. *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego County, supra*, 234
26 Cal.App.4th at p. 1119; see also *Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825
27 (“PAGA plaintiffs do not have property rights in their cases.”).

28 ///

B. Plaintiff Exhausted the PAGA’s Administrative Prerequisite

A PAGA action is commenced by the aggrieved employee or representative giving written notice to the LWDA and employer of the specific provisions of the Labor Code alleged to have been violated (“PAGA Notice”). Labor Code § 2699.3(c)(1). The LWDA has 60 days to inform the aggrieved employee whether it intends to investigate the violations alleged. If the LWDA does not serve notice, and the employer does not cure the defect(s), a civil action may be initiated 65 days after service of the PAGA Notice. Labor Code § 2699.3(c)(2). Here, notice of a cure was not provided by Defendant, and the LWDA did not provide notice it intended to investigate the charges. Khoury Decl., ¶ 14; Exhibit 3 – PAGA Notice.

VII. 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 desires. 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 that is unjust, arbitrary and oppressive, or confiscatory.’” *Ramirez v. Benito Valley Farms, LLC* (N.D.Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137272, *6-8.

“Because state law enforcement agencies are the ‘real parties in interest’ for PAGA claims, the Court’s task in reviewing the settlement is to ensure that the state’s interest in enforcing the law is upheld.” “Other than the provisions discussed above, however, the PAGA does not establish a standard for evaluating PAGA settlements.” *Ramirez v. Benito Valley Farms, LLC, supra*, 2017 U.S. Dist. LEXIS at *6-8.

A trial court has discretion to approve a proposed class action settlement based on established factors used to evaluate reasonableness, including “the strength of plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed

1 settlement.” *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 128; *Hanlon v.*
2 *Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. When a court is satisfied a settlement
3 meets this standard, it orders notice to the class, and conducts a second approval hearing to
4 finally decide the fairness of the proposed settlement. Cal. Rules of Court, Rules 3.769(c), (e)-
5 (f).

6 In contrast to a class action settlement, the Parties are not obliged to “satisfy class action
7 requirements,” when seeking approval of a PAGA settlement. *Arias v. Superior Court, supra*,
8 46 Cal.4th at pp. 980-988; *Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117,
9 1121 (PAGA actions are not class actions under state law). Unlike class actions, there is no
10 requirement in a PAGA settlement, and no mechanism, for a court to conduct a two-step
11 settlement approval review. “Unnamed employees need not be given notice of the PAGA claim,
12 nor do they have the ability to ‘opt-out’ or ‘contest a settlement.’” *Ochoa-Hernandez v.*
13 *CJADERS Foods, Inc.* (N.D. Cal. April 2, 2010) 2010 U.S. Dist. LEXIS 32774, *13.

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

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

23 “A PAGA action is at the heart of a civil enforcement action filed on behalf of and for
24 the benefit of the state, not a claim for class relief.” *Baumann v. Chase Inv. Servs. Corp., supra*,
25 747 F.3d at p. 1124. The Court’s focus is not the amount aggrieved employees ultimately
26 receive as a result of a settlement, but on whether the total settlement achieves PAGA’s
27 objectives. Here, the proposed Settlement fulfills PAGA’s purpose by (1) enforcing the law, (2)
28 collecting penalties from an employer and recovering \$123,750.00 (75% of the penalties) on

1 behalf of the State of California for purposes of enforcement and education; and (3) distributing
2 \$41,250.00 (25% of the penalties) to the Aggrieved Employees. Labor Code § 2699(i); Khoury
3 Decl., ¶ 32.

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.* (2016) 201 F. Supp. 3d 1110, 1133.

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.* (N.D. Cal. 2014) 35 F. Supp. 3d 1116. When the Labor Code section
15 violated “provides for a civil penalty to be assessed and collected by the LWDA,” the PAGA
16 allows an employee to recover that penalty. Labor Code § 2699(a). When the violated section
17 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 rest break or meal period, failed to pay all proper wages due, failed to timely pay final wages,
22 failed to reimburse business-related expenses, failed to issue accurate and itemized wage
23 statements, and required employees to agree to enter into unlawful agreements. The actual
24 amount of expenses or unpaid wages is immaterial to liability under the PAGA. Defendant need
25 only to have violated the Labor Code at least once during a pay period to impose liability.

26 Here, Plaintiff seeks penalties for violation of Labor Code sections 201-203, 204, 210,
27 226, 226.3, 226.7, 432.5, 510, 512, 558, 1174, 1194, 1197, 1187.1, 1198, and 2802 of which
28 75% will be paid to the State of California’s Labor Workforce and Development Agency and

25% will be paid to the PAGA Employees pursuant to Labor Code section 2699(i). Khoury Decl., ¶ 33. Plaintiff is also entitled to recovery of attorney’s fees and costs pursuant to the PAGA. Labor Code § 2699(g)(1).

D. PAGA Penalties

For mediation, Defendant informed Plaintiff’s counsel that there are 124 Aggrieved Employees with approximately 2,408 pay periods. After mediation, Defendant provided that there are 134 Aggrieved Employees who worked 3,250 pay periods during the Covered Period. Khoury Decl., ¶ 34.

For mediation, PAGA penalties were calculated using extrapolation from the data and time records produced by Defendant. Plaintiff estimated there were 150 employees from September 1, 2019 through September 23, 2022 (the mediation analysis was extrapolated to 90 days after the June 23, 2022 mediation) with a total of 2,744 pay periods². Khoury Decl., ¶ 35.

Initial violation rates were used, based on the defense argument, “courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code.” *Vieyara-Flores v. Sika Corp.* (C.D. Cal. 2019) 2019 U.S. Dist. LEXIS 98081, *13; see also *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209. The Court in *Amaral* held that the “initial violation” rate is assessed per pay period, and the “subsequent violation rate” cannot be assessed until the defendant has been put on notice of the violation.

1. Failure to Pay All Wages Due

Plaintiff alleges that Defendant had an unlawful time rounding policy, resulting in the underpayment of all minimum and overtime wages. These alleged unlawful practices caused a violation of Labor Code section 1197 for the failure to pay minimum and regular wages and a violation of Labor Code section 510 for the failure to pay overtime wages. (Labor Code sections 1197.1 and 558 provide for civil penalties for violations of Labor Code sections 1197 and 510

² This number was based on Plaintiff’s expert’s extrapolation. After mediation, Defendant provided the total number of pay periods in the Covered Period are 3,250. Therefore, for purposes of calculating maximum exposure here, Plaintiff will use 3,250 pay periods.

respectively.) These civil penalties are recoverable by Plaintiff pursuant to Labor Code section 2699(a).

Plaintiff acknowledged that rounded time entries did not occur in each and every shift and each and every pay period. The analysis of time records showed that approximately 60% of the pay periods were affected by Defendant's allegedly unlawful time rounding practice. Therefore, the resulting penalty would be \$195,000 (3,250 * 60% x \$100). Khoury Decl., ¶ 36.

Plaintiff utilized the same assumptions to calculate civil penalties for failure to pay all hours worked at the correct overtime rate in violation of Labor Code section 510. Plaintiff alleged that Defendant failed to include compensation such as bonus pay into the calculation of the regular rate of pay for purposes of paying overtime wages. The analysis of time and pay records showed a 15.8% violation which equals approximately 514 affected pay periods (15.8% of 3,250). This results in a penalty of \$51,400 (514 pay periods x \$100). In sum, the civil penalties for failure to pay all minimum and overtime wages owed were estimated at approximately \$246,400 (\$195,000 + \$51,400). Khoury Decl., ¶ 37.

2. Failure to Provide Compliant Meal Periods and Rest Breaks

Plaintiff also alleged that Defendant failed to pay all wages because it unlawfully deducted thirty minutes of pay from each shift regardless of whether a thirty minute off-duty meal period was actually taken. 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* (2012) 53 Cal. 4th 1004, 1035. 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.

PAGA Counsel calculated civil penalties for each pay period in which Aggrieved Employees worked during through September 23, 2022 (90 days after the mediation date). Plaintiff damages expert analyzed the time records and determined the number of unique meal

period³ violations during the Covered Period. This resulted in 2,011 pay periods with a unique meal break violation. Using the \$50 per penalty pursuant to Labor Code section 558, Defendant's exposure for this claim would be \$100,500 (2,011 Pay Periods * \$50 per Pay Period). Khoury Decl., ¶ 38. Realistically, this figure should be discounted by 50% considering issues of proving meal periods were not missed or delayed by choice. Therefore, the realistic exposure for this claim is \$50,250. *Id.*

Because Labor Code section 226.7 rest periods are not subject to the same clock-in and clock-out requirements as meal periods, violation rates and proof of a non-compliant or waived rest break would require reliance on potentially competing testimony and declarations from Aggrieved Employees. Assuming 100% of the 3,250 pay periods had a violation, this would yield a maximum civil penalty of \$325,000. However, realistically, it is more likely that only approximately 50% of the pay periods had at least one violation, resulting in a maximum civil penalty of \$162,500 (3,250 pay periods * 50% violation rate * \$100 per pay period). Khoury Decl., ¶ 39.

3. Failure to Reimburse Business Expenses

Plaintiff sought recovery of civil penalties for Defendant's failure to reimburse Aggrieved Employees as required by Labor Code section 2802 for use of their personal cell phones for business calls and messaging and other work-related communications and use of their personal vehicles to drive to and from customer's locations, wherein they incurred mileage expenses. Plaintiff alleged that while some expenses were reimbursed, there were times when reimbursement was short and didn't cover all expenses incurred by Aggrieved Employees. Defendant argued that business expenses are not required to be reimbursed in the same pay period as incurred and that it did eventually reimburse the majority of expenses due and that it provided the majority of its employees with a company car and cell phone. Additionally, only some of the Aggrieved Employees (field technicians) required a cell phone or a car to carry out

³ Unique meal break violations were defined as shifts with at least one of the following: 1) recorded 1st meal break after the end of the fifth hour or work for shifts greater than five hours; 2) 1st meal break less than 30 minutes for shifts greater than five hours; 3) no 1st meal break for shifts greater than five hours; and 4) no second meal break for shifts greater than ten hours. Khoury Decl., ¶ 38.

their job duties. Based on these factors, it is reasonable to assume a violation for approximately 25% of the pay periods, resulting in approximately 814 affected pay periods during the Covered Period. Based on this, the maximum exposure is estimated at \$81,400 (814 * \$100). Khoury Decl., ¶ 40.

4. Failure to Provide Accurate Itemized Wage Statements

Pursuant to Labor Code section 226, accurate and itemized wage statements must be provided to all employees. Assuming a 100% violation rate in each of the 3,250 pay periods during the PAGA Period, the maximum exposure Aggrieved Employees could claim is estimated at \$325,000 (3,250 pay periods * \$100). However, a 50% violation rate is more realistic because the alleged underpayment of wages did not occur in every single pay period. Therefore, assuming a 50% violation at the initial penalty rate of \$100, the resulting penalty would be equal to \$162,500 (3,250 pay periods * \$100 violation rate). Khoury Decl., ¶ 41.

5. Failure to Timely Pay Wages Owed During Employment

The potential exposure for violation of Labor Code section 204 is dependent on proving wages were owed on the underlying claims during employment and were not timely paid. Plaintiff alleged that wages were often paid late, which the wage statements would show. Khoury Decl., ¶ 42. Defendant represented that there were 67 currently employed Aggrieved Employees who worked 2,350 pay periods through March 31, 2022. as of September 12, 2021. Assuming 100% violation rate for all pay periods worked by current employees, the maximum civil penalties for this claim would be \$235,000 (2,350 pay periods * \$100.) However, a 50% violation is more realistic because the alleged underpayment of wages did not occur in each pay period worked by all current Aggrieved Employees. Therefore, are more realistic exposure for this claim is a civil penalty of \$117,500. Khoury Decl., ¶ 43.

6. Failure to Timely Pay Wages on Separation

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. Khoury Decl., ¶ 44. Defendant represented that at the time of mediation, there were 82 former Aggrieved Employees through March 31, 2022. Therefore, the maximum civil

1 penalty is \$8,200 (82 x \$100.). Khoury Decl., ¶ 45.

2 **7. Willful Failure to Maintain Records**

3 Labor Code section 1174.5 provides for a one-time \$500 civil penalty for a violation of
4 Defendant's obligation to maintain records that reflect total hours worked and beginning and
5 ending time of each work period and meal period. Khoury Decl., ¶ 46.

6 **8. Unlawful Agreements**

7 Plaintiff sought recovery of civil penalties for Defendant's requirement that employees
8 sign agreements containing unlawful terms, including terms purporting to broadly assign rights
9 to inventions to the Defendants, to unlawfully restrict their rights to seek gainful employment,
10 to waive their right to initiate representative actions, and to agree to release all claims in order to
11 receive their final wages. Assuming all 134 Aggrieved Employees were required to sign the
12 allegedly unlawful agreements, Plaintiff could potentially recover a penalty for every pay
13 period. However, arguably, a more realistic position is that the penalty would only apply as a
14 one-time penalty because employees did not sign these agreements every pay period. Therefore,
15 assuming one pay period per employee, the maximum penalty would be \$13,400 (134 EEs x
16 \$100). Khoury Decl., ¶ 47.

17 **9. Discounts for Risks at Trial and Judicial Discretion in Reducing Civil**
18 **Penalties**

19 In considering whether to accept the settlement, Plaintiff also had to consider additional
20 risks associated with pursuing these claims to final judgment, including avoiding summary
21 adjudication, adverse evidentiary rulings, prosecuting the claims at trial, winning a judgement,
22 proving liability, and avoiding any reversals at the trial and appellate court levels. Indeed,
23 Plaintiff had to consider the real risk that a court would find these claims were not manageable
24 in light of the fact that "courts have inherent authority to ensure that PAGA claims can be fairly
25 and efficiently tried and, if necessary, may strike a claim that cannot be rendered manageable."
26 *Wesson v. Staples the Office Superstore, LLC* (September 9, 2021) 2021 Cal. App. LEXIS 743,
27 *18.

28 ///

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

Defendant's PAGA exposure on the alleged claims was discounted for risks which included not proving the underlying Labor Code violations, as well as the Court's authority to completely reduce penalties, as long as not to "zero." *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal. App. 4th 1112, 1135; *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504 (the penalty rate was dropped to \$5.00 per pay period.) Based on these risks, Defendant's maximum exposure, estimated at \$842,750 (\$246,500 + \$50,250 + \$162,500 + \$81,400 + \$162,500 + \$117,500 + \$8,200 + \$500 + \$13,400), was reduced by 50% for a maximum exposure estimated at \$421,375. Khoury Decl., ¶ 48.

Here, the Net Settlement Amount of \$165,000 is all allocated to PAGA civil penalties under the terms of the Settlement, and is within the range, or higher, of other settlements. *See Magadia v. Wal-Mart Assocs.* (N.D.Cal. 2019) 384 F. Supp. 3d 1058, 1101, citing, among others, *Ceja-Corona v. CVS Pharm., Inc.* (E.D. Cal. Jan. 14, 2015) 2015 U.S. Dist. LEXIS 5118 (\$10,000 PAGA penalties in settlement of \$900,000), recommendation adopted, (E.D. Cal. Mar. 3, 2015) 2015 U.S. Dist. LEXIS 25730; *Nen Thio v. Genji, LLC* (N.D. Cal. 2014) 14 F. Supp. 3d 1324, 1330 (\$10,000 PAGA penalties, \$1.25m settlement); *Franco v. Ruiz Food Prods.* (E.D. Cal. Nov. 27, 2012) 2012 U.S. Dist. LEXIS 169057, *5-6 (\$10,000 PAGA penalties, \$2.5m settlement); *Garcia v. Gordon Trucking, Inc.* (E.D. Cal. Oct. 31, 2012) 2012 U.S. Dist. LEXIS 160052 (\$10,000 PAGA, \$3.7m settlement).

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

PAGA Counsel requests \$95,000.00 for their attorneys' fees (33 1/3 % of the Settlement Payment), and \$15,000 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 \$129,117.00 in attorneys' fees and \$15,602.89 in litigation costs. Khoury Decl., ¶¶ 49, 54, 61, Exhibit 4 - Summary of Time & Costs, Exhibits 5 (A-D) – Time Records, Exhibit 9 - Itemized Costs.

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.* (9th Cir. 2002) 290 F.3d 1043, 1047; *Laffitte v. Robert Half International, Inc.* (2016)1 Cal.5th 480, 503. "Despite its primacy, the lodestar method is not necessarily utilized in common fund cases." *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 27.

The California Supreme Court affirmed the granting of attorneys' fees in common fund cases based on a percentage of the recovery. *Laffitte v. Robert Half International, Inc.*, *supra*, 1 Cal.5th at p. 503. 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 Court also approved an optional lodestar cross-check. *Id.* at p. 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) (C.D. Cal. June 10, 2005) 2005 U.S. Dist. LEXIS 13627, *27 (citing *Hensley v. Eckerhart* (1983) 461 U.S. 424). 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 \$165,000 in penalties to distribute to the State, the LWDA for enforcement and education, and to the Aggrieved Employees, as well as to compensate the PAGA Counsel representing the interests of the State. Defendant, alerted to the alleged violations, has an enhanced clarity with respect to its rounding, meal and rest period, and expense reimbursement policies.

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.* (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* (1998) 17 Rev. Litig. 525, 546; 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 50% 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 State, and the Aggrieved Employees, as well as Defendant's current and future employees. Numerous state and federal courts in California routinely approve fee requests equal to or more than the amount sought here. Khoury Decl., ¶ 50. Some courts have found an award of 33% of the common fund represents the "benchmark" in California. *Smith v. CRST Van Expedited, Inc.*, 10-CV-1116- IEG WMC (S.D. Cal. Jan. 14, 2013) 2013 WL 163293, *5 ("These percentages compare favorably with" the California (33%) benchmark.); *Dennis v. Kellogg Co.*, 09-CV-1786-L WMC, (S.D. Cal. Nov. 14, 2013) 2013 WL 6055326, at *7. PAGA Counsel's fee request is in line with awards in similar cases in California and nationwide and demonstrates PAGA Counsel's fee request is consistent with market rates and is reasonable. Khoury Decl., ¶¶

51-53.

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

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

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

The lodestar method is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *Staton v. Boeing Co.* (2001) 327 F.3d 938, 965. A reasonable hourly rate is the prevailing rate charged by attorneys of similar skill and experience in the relevant community. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095; *Hopson v. Hanesbrands Inc.* (N.D. Cal. Apr. 3, 2009) 2009 U.S. Dist. LEXIS 33900.

PAGA Counsel have worked 238.9 hours⁴ to date prosecuting this action and calculate the resulting lodestar fee on those hours at \$129,117.00. The hours expended were reasonable in

⁴ Included in the total hours is an additional 10 hours, following the filing of this motion, will be worked to prepare for and attend the approval hearing, provide supplemental information and documentation should the Court request it, interact with Defense counsel and the administrator with respect to funding and distribution, approval of checks, transmittal documents, responding to employee inquiries, handling uncashed checks, etc. Khoury Decl., ¶ 55.

light of the complexity and duration of the litigation. Khoury Decl., ¶¶ 54-55, Exhibit 4 – Summary of Time and Costs.

D. PAGA Counsel’s Hourly Rates Are Reasonable

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

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. Cohelan Khoury & Singer’s practice is limited exclusively to litigating employment class actions on behalf of employees and consumers. Cohelan Khoury & Singer have been appointed Class Counsel or co-Class Counsel in over 200 such cases. As leading attorneys in the field, Plaintiff’s counsel continually monitors prevailing market rates of defense and plaintiff law firms and set the billing rates to follow attorneys and staff of comparable skill, qualifications and experience. Other wage and hour attorneys working as Class Counsel before California courts charge comparable if not higher rates. Khoury Decl., ¶¶ 56-60.

IX. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests 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.

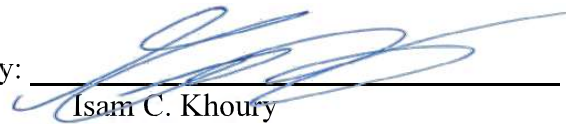
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COHELAN KHOURY & SINGER

Dated: January 25, 2023

By: _____



Isam C. Khoury

Michael D. Singer

Marta Manus

Counsel for Plaintiff PRINCE BANOZUZI MALGHA