

Joseph W. Rose, Bar No. 232261
joe@joeroselaw.com
Mehran Tahoori, Bar No. 283313
mehran@joeroselaw.com
ROSE LAW, APC
4092 Bridge Street
Fair Oaks, California 95628
Telephone: (916) 273-1260
Facsimile: (916) 290-0148

Michael E. Velarde, Bar No. 266272
mvelarde@michaelvelardelaw.com
VELARDE & VELARDE
19200 Von Karman Ave., Suite 400
Irvine, California 92612
Telephone: (949) 492-4241
Facsimile: (949) 606-7168

Attorneys for Plaintiff
JUSTIN DE LEON, individually and
on behalf of all other Aggrieved Employees

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF VENTURA**

JUSTIN DE LEON, individually
and on behalf of all others similarly
situated,

Plaintiff,

v.

VIP EMERGENT CARE, INC. D/B/A VIP
URGENT CARE,
JAIME ALONSO DIAZ, M.D., and
DOES 1 through 50, inclusive,

Defendants.

Case No. 56-2021-00549419-CU-OE-VTA

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION FOR
APPROVAL OF PAGA SETTLEMENT**

Complaint Filed: January 21, 2021
Department: 42
Judge: Hon. Henry Walsh

[Filed concurrently with proposed order and
declarations of Joseph W. Rose and Justin De
Leon]

Motion Hearing Date: April 6, 2023
Motion Hearing Time: 8:30 a.m.
Reservation Number: 2717446

TABLE OF CONTENTS

I. INTRODUCTION	1
II. LITIGATION HISTORY	4
III. INFORMAL DISCOVERY AND MEDIATION	5
IV. RELEVANT LAW UNDER PAGA	6
A. PAGA Statutory Scheme	6
B. Standard of Review for PAGA Settlements.....	6
C. Statutory Requirements of PAGA	8
D. Purpose of PAGA	9
E. Fairness of PAGA Settlements	10
F. California Policy Favoring Settlements	11
V. THE TERMS OF THE SETTLEMENT ARE FAIR AND REASONABLE	12
A. The Settlement Terms Are Manifestly Fair and Reasonable	12
B. The Settlement was Reached Through an Arm’s-Length Bargaining Process Between Parties Represented by Experienced Counsel.....	13
C. The Strengths and Weaknesses of Plaintiff’s Claims	13
1. Potential Manageability Issues.....	14
2. The Outcome in Litigation is Highly Uncertain	15
3. Damage Issues.....	15
D. The Expense, Complexity and Likely Duration of Further Litigation.....	17
E. The Presence of a Government Participant.....	17
F. The Extent of Investigation Completed	17
VI. THE AGREED UPON ATTORNEYS’ FEES, COSTS AND INCENTIVE PAYMENTS ARE FAIR AND REASONABLE.....	18

1	A. The Attorneys’ Fees Are Appropriate Under the Common Fund Doctrine.....	18
2	B. The Out of Pocket Litigation Costs Are Reasonable	20
3	C. The Requested Incentive Payments Is Reasonable	20
4	VII. CONCLUSION	21

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Allen v. American Multi-Cinema Inc.,</i> Case No. RG-11-585502	15
<i>Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.,</i> Case No. 05cv1199– IEG–CAB, 2009 WL 2448430) (S.D. Cal. Aug.10, 2009)	16
<i>Amaral v. Cintas,</i> 163 Cal.App.4th 1157 (2008)	16
<i>Amey v. Cinemark USA Inc.,</i> Case No. 13-CV-05669-WHO, 2015 WL 2251504 (N.D. Cal. May 13, 2015	14
<i>In re Apple Computer, Inc. Derivative Litig.,</i> Case No. C 06-4128 JF (HRL), 2008 WL 4820784 (N.D. Cal. Nov. 5, 2008)	13
<i>Arias v. Superior Court,</i> 46 Cal.4th 969 (2009)	6. 10-11
<i>Bank of America v. Cory,</i> 164 Cal.App.3d 66 (1985)	18
<i>Bell v. Farmers Insurance Exchange,</i> 115 Cal.App.4th 715 (2004)	19
<i>Boeing Co. v. Van Gemert,</i> 444 U.S. 472 (1980)	19
<i>Bowers v. First Student, Inc.,</i> Case No. 2:14-CV-8866-ODW	14
<i>Brewer v. Connell Chevrolet,</i> Orange County Superior Court, Case No. 30-2016-00852123-CU-	20
<i>Brown v. Cinemark USA, Inc.,</i> 705 F. App’x 644 (9th Cir. 2017)	14
<i>Caliber Bodyworks, Inc. v. Superior Court,</i> 134 Cal.App.4th 365 (2005)	9
<i>Cardenas v. McLane Foodservice, Inc.,</i> 796 F. Supp. 2d 1246 (C.D. Cal. 2011)	14
<i>In re Cellphone Fee Termination Cases,</i> 186 Cal.App.4th 1380 (2010)	20

1	<i>Chavez v. Netflix, Inc.</i> , 162 Cal.App.4th 43 (2008).....	19
2	<i>Childers v. Anthony Shenouda Inc.</i> , Case No., BC517798	15
3		
4	<i>Clark v. American Residential Services LLC</i> , 175 Cal.App.4th 785 (2009).....	11, 20
5		
6	<i>Cotter v. Lyft, Inc.</i> 176 F.Supp.3d 930 (N.D. Cal. Apr. 7, 2016)	14
7	<i>Cotter v. Lyft, Inc.</i> , 193 F.Supp.3d 1030 (N.D. Cal. June 23, 2016)	16
8		
9	<i>Dunk v. Ford Motor Co.</i> , 48 Cal.App.4th 1794 (1996).....	11, 17
10		
11	<i>Favila v. Katten Muchin Rosenman LLP</i> 188 Cal.App.4th 189, 213 (2010)	1
12	<i>Fleming v. Covidien Inc.</i> , Case No. (OPX), 2011 WL 7563047 (C.D. Cal. Aug. 12, 2011).....	16
13		
14	<i>Franco v. Ruiz Food Products, Inc.</i> , Case No. 1:10-cv-02354-SKO, 2012 WL 5941801 (E.D. Cal. Nov. 27, 2012).....	12
15		
16	<i>Garcia v. Pep Boys</i> , Orange County Superior Court, Case No. 30-2014-00720574-CU-OE-CJC.....	19
17	<i>Garcia v. Macy's</i> , San Bernardino County Superior Court, Case No. CIVDS1516007	19
18		
19	<i>Glass v. UBS Financial Services, Inc.</i> , 2007 WL 221862 (N.D. Cal., Jan. 26, 2007, Case No. C-06-4068 MMC), <i>aff'd</i> (9th Cir. 2009) 331 Fed. Appx. 452.....	21
20		
21	<i>Gutilla v. Aerotek, Inc.</i> , Case No. 115CV00191DADBAM, 2017 WL 2729864 (E.D. Cal. Mar. 22, 2017).....	8-9
22		
23	<i>Ingram v. The Coca-Cola Co.</i> , 200 F.R.D. 685 (N.D. Ga. 2001)	20
24	<i>Iskanian v. CLS Transp. L.A., LLC</i> , 59 Cal.4th 348 (2014).....	6, 9
25		
26	<i>Kullar v. Foot Locker Retail, Inc.</i> , 168 Cal.App.4th 116 (2008).....	7, 11, 13
27		
28	<i>Laffitte v. Robert Half Int'l Inc.</i> , 1 Cal.5th 480 (2016).....	19

1	<i>Litty v. Merrill Lynch & Co.,</i> Case No. CV 14-0425 PA	14
2	<i>Makabi v. Gedalia,</i> 2016 Cal.App. Unpub.	17
4	<i>Mendez v. Tween Brands, Inc.,</i> Case No. 2:10-cv-00072-MCE-DAD, 2010 WL 2650571 (N.D. Cal. Apr. 2, 2010)	10
6	<i>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles,</i> 186 Cal.App.4th 399 (2010)	7, 20
7	<i>O'Connor v. Uber Techs., Inc.,</i> Case No. 13-03826-EMC (N.D. Cal. Jul. 29, 2016)	7
9	<i>Ochoa-Hernandez v. CJADERS Foods, Inc.,</i> Case No. C 08-2073 MHP, 2010 WL 1340777 (N.D. Cal. Apr. 2, 2010)	8
11	<i>Ortiz v. CVS Caremark Corp.,</i> Case No. C-12-05859 EDL, 2014 WL 1117614 (N.D. Cal. Mar. 19, 2014)	14
12	<i>Osumi v. Sutton,</i> 151 Cal.App.4th 1355 (2007)	8
14	<i>Perez v. Staffmark Investment, LLC,</i> Riverside County Superior Court, Case No. MCC1401137	20
16	<i>Reed v. United Teachers Los Angeles,</i> 208 Cal.App.4th 322 (2012)	11
17	<i>Rincon v. West Coast Tomato Growers, LLC,</i> Case No. 13-CV-2473-JLS (KSC), 2018 WL 8281046 (S.D. Cal. Feb. 12, 2018)	8
19	<i>Schiller v. David's Bridal, Inc.,</i> Case No. 1:10-cv-616-AWI-SKO, 2012 WL 217001 (E.D. Cal. June 28, 2012)	12
21	<i>Smith v. Rae Venter Law Group,</i> 29 Cal.4th 345 (2002)	16
22	<i>Stambaugh v. Superior Court,</i> 62 Cal.App.3d 231 (1976)	11
24	<i>State v. Levi Strauss & Co.,</i> 41 Cal.3d 460	13
26	<i>Staton v. Boeing Co.,</i> 327 F.3d 938 (9th Cir. 2003)	19
28	<i>People ex rel. Stratham v. Acacia Research Corp.,</i> 210 Cal.App.4th 487 (2012)	18

1	<i>In re Taco Bell Wage & Hour Actions,</i>	
	2016 U.S. Dist. LEXIS 48557	17
2	<i>Trang v. Turbine Engine Components Technologies Corp.,</i>	
3	Case No. CV 12-07658 DDP, 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012)	16
4	<i>Van Vranken v. Atlantic Richfield Co.,</i>	
5	901 F.Supp. 294 (N.D. Cal. 1995).....	20-21
6	<i>In re Warner Commc'ns Sec. Litig.,</i>	
	618 F.Supp. 735 (S.D.N.Y. 1985)	17
7	<i>Wershba v. Apple Computer, Inc.,</i>	
8	91 Cal.App.4th 224 (2001)	11
9	Statutes	
10	2003 Cal. Legis. Serv. Chapter 906.....	9
11	<u><i>California Labor Code</i></u>	
12	§ 90.5(a).....	10
13	§ 203	16
14	§ 2698 <i>et seq.</i>	<i>passim.</i>
15	§ 2699 <i>et seq.</i>	<i>passim.</i>
16	§ 2699(i)	9 18
17	§ 2699(a).....	6 10
18	§ 2699(l)	9
19	§ 2699(l)(2).....	1, 6, 8
20	§ 2699(f)(2)	16
21	§ 2699(g)(l).....	18
22	§ 2699(h)	16
23	§ 2699.3	18
24	§ 2699.3(a)(1)	8
25	§ 2699.3(b)(4).....	17
26		
27		
28		

Court Rules

California Rules of Court

Rule 3.769.....10

Other Authorities

California Code of Regulations

Title 8, § 13520.....16

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to California Labor Code § 2699(1)(2), Plaintiff Justin De Leon (“Plaintiff”) seeks this Court’s approval of the Settlement of his claims asserted under the Private Attorneys’ General Act (“PAGA”) with Defendants VIP Emergent Care, Inc. D/B/A VIP Urgent Care, a dissolved¹ California corporation, and Jaime Alonso Diaz, M.D.² (collectively “Defendants” or “VIP”).

This is a common fund, non-reversionary settlement with the following key terms:

1. A non-reversionary common fund totaling Thirty-Five Thousand Dollars and Zero Cents (\$35,000.00);

2. Fourteen Thousand Seven Hundred Sixty-Seven Dollars and Eighty Three Cents (\$14,767.83) of the common settlement fund is allocated for payment to the State of California Labor and Workforce Development Agency (LWDA) and to the Aggrieved Employees (i.e., all seven (7) former non-exempt workers in California who were employed by Defendant in California at any time from September 23, 2019, though the date of approval of this settlement, for settlement of PAGA claims (the “PAGA Payment”);

3. Seventy-Five Percent (75%) of the PAGA Payment shall be paid directly to the California Department of Industrial Relations (DIR) Accounting Unit and Twenty-Five Percent (25%) shall be distributed to approximately seven (7) Aggrieved Employees in a pro rata share based on the number of pay periods worked for VIP from October 8, 2019, though the date of approval of this settlement³ (i.e., the date of the PAGA Settlement);

4. The non-reversionary common fund will also include: a) Eleven Thousand Six Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$11,666.67) allocated to Plaintiff’s counsel for attorneys’ fees, and Three Thousand Sixty-Five Dollars and Fifty Cents (\$3,065.50) is allocated to Plaintiff’s counsel as reimbursement for advanced litigation costs; b) administrative costs to the settlement administrator

¹ Although VIP Emergent Care, Inc. is dissolved, lawsuits may be filed and served against a dissolved corporation whether the cause of action arose before or after dissolution (Code Civ. Proc. § 416.20) and the superior court can enforce an action against a dissolved corporation (Corp. Code § 2011(a)). “The shareholders of a dissolved corporation do not cease to exist as shareholders, nor do they lose all interest in, or responsibility for, the affairs of the corporation upon dissolution.” (*Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 213.)

² Dr. Diaz has personally liability under Labor Code § 558.1 as an owner, director, officer, and managing agent of VIP Emergent Care, Inc.

³ VIP stopped operating its business in September 2020, and issued final paychecks to its employees in October 2020.

estimated not to exceed Five Hundred Dollars and No Cents (\$500.00); and c) a proposed enhancement payment for Plaintiff of Five Thousand Dollars and No Cents (\$5,000.00);

5. The releases are limited to PAGA issues *only*.⁴

This is a good result for this case, particularly when taking into account the following considerations:

1. In September 2020, Defendants completely ceased their operations in California and VIP Emergent Care, Inc. dissolved, having employed approximately seven (7) total employees at its Simi Valley during the PAGA Period beginning September 23, 2019. Defendants are no longer in business.

2. The work schedules and work experiences of employees who worked at a separate Tarzana location jointly owned and operated by Defendants until September 23, 2019, were not typical of Defendants' Simi Valley employees. Plaintiff himself never worked at the Tarzana location. Plaintiff therefore believes Defendants' arguments against numerosity, commonality, and typicality under Code of Civil Procedure § 382 would likely succeed in defeating class certification.

3. A penalty of \$35,000 is large enough to satisfy the dual statutory purpose of the PAGA, considering Defendants' potential exposure, Defendants' small number of employees, and Plaintiff's risk of continued prosecution, as further explained below.

4. The central allegation in this case is Defendants' employees typically worked a 10-hour workday schedule while compensated at the straight time rate for all hours worked during the workday rather than at the overtime rate of one and one-half (1½) times Plaintiff's regular hourly rate of pay (i.e. \$27.00) for hours worked in excess of eight (8) in a single workday, as required by California Labor Code section 510, and Industrial Welfare Commission Order 4-2001. Plaintiff alleges Defendants adopted no regularly scheduled alternative workweek that was valid under Labor Code section 511 for Defendants' Simi Valley location and filed no alternative workweek election results with the Department of Industrial Relations as required by Labor Code section 511. Defendants dispute there was no alternative workweek in place for the Simi Valley workforce, contending there was a voluntary election of employees for an alternative workweek meeting the spirit, if not the letter, of the Labor Code and applicable IWC Wage Orders. This practice ceased in September 2020 because VIP in Simi Valley ceased operations.

⁴ Defendants separately reached a settlement with Plaintiff on his individual non-PAGA claims that do not require court approval. (Rose Decl. 14.)

5. Other group allegations in this case involve alleged nonpayment of employees who worked “off-the-clock,” in violation of California’s minimum wage laws (Cal. Lab. Code § 1191; IWC Wage Order No. 2001-4), failure by VIP to relieve employees of all duty for the purpose of taking uninterrupted 10-minute paid rest breaks for every four (4) hours of work, and 30-minute unpaid meal periods.

6. Proving Plaintiff’s meal period, rest period, off-the-clock, claims would be highly dependent on testimony of individual employees none of whom are still in the employ of VIP Simi Valley.

7. If this case had proceeded to trial, VIP asserts it would have presented evidence that VIP’s policies did not result in systematic denials of proper meal and rest periods and minimum wages for all hours of work.

8. VIP would have argued that the trial would not be “manageable” as a PAGA action because the alleged violations were too disparate and individualized to be adjudicated in one action.

9. VIP could also have argued that the subsequent violations under PAGA only start to accrue after employers receive notice through a citation from the Labor Commissioner, which would have significantly decreased VIP’s exposure. (*See Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209, [holding “[u]ntil the employer has been notified that it is violating a Labor Code provision...the employer cannot be presumed to be aware that its continuing underpayment of employees is a ‘violation’ subject to penalties.”].)

10. All PAGA awards are discretionary and can be reduced by the Court under Labor Code § 2699(e)(2), “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.” Thus, were this matter to go to trial, any award granted would be at the discretion of the Court. Plaintiff recognizes that, although he would present persuasive grounds to avoid reducing the penalties, the Court could determine otherwise and significantly reduce the PAGA penalties.

Given these considerations, Plaintiff believes additional delays and risks of continued prosecution and trial justified settling at this point to ensure recovery for the LWDA and the aggrieved employees.

This motion for court approval of this settlement is unopposed.

II. LITIGATION HISTORY AND PROCEDURAL BACKGROUND

Plaintiff filed this initially as a putative class action and also a PAGA action on January 21, 2021, on behalf of “[a]ll persons currently or formerly employed by Defendants as Non-Exempt Employees within California during the Class Period,...” (the “Plaintiff Class”). The putative class action complaint identifies two putative subclasses—the Former Employee Subclass, consisting of “[a]ll members of the Plaintiff Class whose employment was voluntarily or involuntarily terminated and who were not paid all wages due and owing at the time of discharge,” and the Applicant Subclass, consisting of “[a]ll members of the Plaintiff Class who applied for employment on or after January 1, 2018, and were asked by Defendants unlawful questions about their criminal conviction history before receiving a conditional offer of employment in violation of the California Fair Chance Act.”

As explained in greater detail below, however, during civil discovery, Plaintiff learned that Defendants’ solitary operation in Simi Valley employed only seven (7) employees including Plaintiff during the applicable limitations period, and the work schedules and work experiences of employees who worked at a separate Tarzana location jointly operated by Defendants until September 23, 2019, were not typical of Defendants’ Simi Valley employees. Therefore, Plaintiff believes he cannot meet numerosity, commonality, or typicality requirements for class treatment under Code of Civil Procedure § 382.

Before instituting this civil action, Plaintiff provided legally sufficient notice of the PAGA claims on September 23, 2020, to the California Labor and Workforce Development Agency (LWDA) through that agency’s Internet case submission system, receiving assigned case number LWDA-CM-807442-20. PAGA notice was immediately sent to Defendants by Certified Mail (Trk. No. 70192280000040471933) and was delivered on September 25, 2020. The LWDA did not exercise its discretion to investigate within 65 days of receiving Plaintiff’s notice, thereby authorizing Plaintiff to proceed with this action in superior court on behalf of himself and other aggrieved employees.

Plaintiff’s unverified complaint alleges wage and hour violations for failing to compensate employees for on-call time, failing to provide unpaid meal periods and paid rest periods, failing to provide reporting time wages, failing to pay split shift premiums, failing to pay for time spent driving between work locations, and derivative violations for providing inaccurate wage statements, keeping inaccurate records, and failing to pay wages upon termination of employment, under the California Labor Code and

applicable Industrial Welfare Commission (IWC) Wage Orders.

The parties attended a full-day mediation with Shane Sagheb, Esq. on September 9, 2022, and reached an agreement in principle to settle the PAGA claims.⁵ Mr. Sagheb is an experienced employment litigator and mediator having more than 30 years of experience as an advocate for both defendant employers and select employees as well as a neutral in such cases.

In advance of and preparation for mediation, the parties exchanged documentary evidence including employee, wage, and payroll data samples, and other relevant employment information allowing Plaintiff to analyze and estimate the magnitude of potential penalties under various theories of liability.

The parties have finalized a long form proposed settlement of this PAGA action.

The history of the case and terms of the proposed Settlement are explained in the PAGA Settlement Agreement attached to the Declaration of Joseph W. Rose as Exhibit 1.

A proposed letter notifying the aggrieved employees of the PAGA Settlement is attached as Exhibit C to the settlement agreement. (Decl. Rose, Ex. 1.)

Plaintiff sent the proposed settlement to the LWDA. (Rose Decl. ¶ 22.)

III. INFORMAL DISCOVERY AND MEDIATION

The parties agreed to participate in a day-long mediation with mediator Shane Sagheb, a well-respected mediator with extensive experience in resolving wage and hour class action and PAGA representative action disputes. This full day mediation took place on September 9, 2022. Plaintiff attended this mediation along with his counsel. (Rose Decl. ¶¶ 17, 19).

Between the initial filing of the action and mediation, Plaintiff's counsel and Defense counsel discussed what information was needed to successfully mediate the case. Defense counsel provided detailed data of VIP's employees over the course of the PAGA Period beginning September 23, 2019, and ending with VIP's cessation of Simi Valley operations in September 2020. (Rose Decl. ¶ 15.) Defense

⁵ Plaintiff also advanced and settled individual claims relating to his alleged unlawful termination from employment on or about December 31, 2019, following his request to use paid sick leave under the Healthy Workplaces Health Families Act, VIP's alleged failure to allow Plaintiff access to his own itemized wage statements throughout his employment, and VIP's alleged failure to withhold state and federal income taxes in accordance with Plaintiff's designations on forms W-4 and DE-4, and unlawful pre-employment inquiry about conviction history in violation of the Fair Chance Act, Government Code, § 12952 et seq. Defendants have denied these allegations. These individual non-PAGA claims are not typical of other VIP workers and were settled for \$15,000 inclusive of attorney's fees. Court approval of Plaintiff's individual settlement is not required by law, but Plaintiff discloses it here in full candor to the Court.

counsel documents confirming VIP’s divestment of the Tarzana location by September 23, 2019, the commencement of the PAGA Period. Plaintiff’s counsel was able to the review and analyze this data with Plaintiff and discuss the range of penalties that applied to the different employment positions. (Rose Decl. ¶ 16.)

The parties each investigated the claims asserted, developed exposure models, and prepared detailed mediation briefs, which Plaintiff exchanged with Defendant. On Septemebr 15, 2022, the parties resolved this matter after a full-day mediation. (Rose Decl. ¶¶ 16-18; Exhibit 1.) Plaintiff’s counsel detrmind this case could not reasonably be certified by the Court as a class action under Code of Civil Procedure section 382 as lacking in numerosity and commonality/typicality, insofar as the Tarzana location and claims unique to Plaintiff in Simi Valley. (Rose Decl. ¶ 17.)

IV. RELEVANT LAW UNDER PAGA

A. PAGA statutory scheme

Under PAGA, an “aggrieved employee” may bring an action for civil penalties on behalf of himself and other current or former employees. (Cal. Lab. Code § 2699(a).) A plaintiff suing under PAGA “does so as the proxy or agent of the state’s labor law enforcement agencies.” (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) Accordingly, a judgment in a PAGA action “binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government.” (*Id.*; *Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, 381 [“When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party.”].)

B. Standard of review for PAGA settlements

Labor Code § 2699(1)(2) provides “the superior court shall review and approve any settlement of any civil action filed pursuant to this part.” In a settlement of a PAGA action brought by an aggrieved employee, the court must “review and approve” the settlement. (Cal. Lab. Code § 2699(1)(2).)

There are no statutory or common law standards for approval of PAGA settlements, but the legislative history of the PAGA sheds some light on the approval requirement as it was phrased in Labor Code § 2699, subdivision (1), prior to the July 1, 2016, amendments. (*See* Cal. Lab. Code § 2699(1)

(2015) (amended 2016) [“The superior court shall review and approve any penalties sought as part of a proposed settlement...”].)

The court approval requirement was added to PAGA as part of the amendments to the Act that were introduced as Senate Bill 1809 in February of 2004 and signed by the Governor and filed with the Secretary of State on August 11, 2004. (*See* Legislative Counsel’s Digest to Senate Bill No. 1809, attached as Exhibit 2 to Rose Decl. ¶ 22.)

Senator Joseph L. Dunn, who authored both the original PAGA bill (SB 796) and the amendments (SB 1809) sent a letter addressed to the President Pro Tem of the Senate on July 29, 2004, during the consideration of the amendments in Senate Bill 1809, which was published in the Senate Daily Journal, “to clarify the intent of subdivision (l)” of what would become Labor Code § 2699 (*see* 7/29/04 Letter from Sen. Dunn to Sen. Burton, attached as Exhibit 3 to Rose Decl. ¶ 23).

Senator Dunn’s letter provided, “The purpose of court review of the penalties in subdivision (l) is to ensure that settlements involving penalties arising under Labor Code Section 2699 do not undercut the dual statutory purposes of punishment and deterrence, or result in unjust, arbitrary, and oppressive, or confiscatory settlements” (Rose Decl. ¶ 23, Exhibit 3.)

To Plaintiff’s counsel’s knowledge, this is the only statement in the legislative history directly addressing the purpose of the court approval requirement.

The letter does not address any specific factual issues to be considered, but it does provide some very broad criteria that the courts should consider whether the penalties are so small as to “undercut the dual purposes of punishment and deterrence” or so large that they may result in an “unjust, arbitrary and oppressive, or confiscatory” settlement.

These broad criteria appear to give the Court wide latitude in determining whether to approve the penalties proposed as part of a PAGA settlement.

The criteria focus on the effect the penalties may have on the defendant employer rather than the LWDA or the aggrieved employees who will receive the penalties, which is different than the analysis of a class action settlement, which instead typically focuses on the amount received by the class and compares that to the reasonable range of potential outcomes in the case (*see, e.g., Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130; *Munoz v. BC! Coca-Cola Bottling Co. of L.A.* (2010) 186

Cal.App.4th 399,407).

The Labor Code does not require the two-step settlement approval process utilized in class actions (i.e., preliminary approval followed by final approval). Instead, PAGA settlements are reviewed via a single motion. (*See Salazar v. Sysco Central Cal, Inc.* (E.D. Cal. Feb. 2, 2017) No. 15-cv-01758-DAD, 2017 WL 1135801, *2 [rejecting the application of class action settlement rules and procedures for PAGA settlement approval].) The California Labor Workforce Development Agency has explained that when trial courts are reviewing PAGA settlements, they should consider whether “the relief provided for under the PAGA [is] genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public.” (*O’Connor v. Uber Techs., Inc.* (N.D. Cal. Jul. 29, 2016) No. 13-03826-EMC, CF No. 736 at 2-3; *see also Salazar*, 2017 WL 1135801, *2 [quoting the above passage].) Accordingly, nothing in the PAGA changes the strong judicial preference in support of approving settlements. (*See e.g., Osumi v. Sutton*, 151 Cal.App.4th 1355, 1357 (2007) [confirming the “[s]trong public policy in favor of the settlement of civil cases”].)

Neither the California Rules of Court nor the PAGA statute provides specific standards or procedures apart from Labor Code section 2699(1)(2). However, several recent federal cases have evaluated these issues and provided persuasive authority on the appropriate standards of review. Federal courts have approved PAGA settlements “if the settlement terms (1) meet the statutory requirements set forth by PAGA, and (2) are fundamentally fair, reasonable, and adequate in view of PAGA’s public policy goals.” (*Rincon v. West Coast Tomato Growers, LLC* (S.D. Cal. Feb. 12, 2018) No. 13-CV-2473-JLS (KSC), 2018 WL 8281046, *62; *Gutilla v. Aerotek, Inc.*, (E.D. Cal. Mar. 22, 2017) No. 115CV00191DADBAM, 2017 WL 2729864, at *3 [same].)

C. Statutory requirements of PAGA

PAGA imposes limits on litigants. First, to bring an action under PAGA, an aggrieved employee must first provide written notice to the LWDA as well as to the employer. Cal. Lab. Code § 2699.3(a)(1). Further, as to monetary relief, a plaintiff suing under PAGA is limited to recovery of civil penalties only, rather than damages available privately through direct or class action claims. *Gutilla v. Aerotek, Inc.*, *supra*, 2017 WL 2729864, at *2. Because “an aggrieved employee’s action under . . . [PAGA] functions as a substitute for an action brought by the government itself, PAGA is limited to the recovery of civil

1 penalties; statutory penalties cannot be recovered.” *Rincon*, 2018 WL 828104, at *3, citing *Iskanian*, 327
2 P.3d at 147. Any civil penalties recovered must be distributed as follows: 75% to the LWDA, and the
3 remaining 25% to the aggrieved employees. Cal. Lab. Code § 2699(i). PAGA also requires that claim
4 notices, responses, and certain court documents be filed with the LWDA via its electronic filing system
5 such as the court complaint alleging PAGA claims, any proposed settlement of PAGA claims and any
6 Court Order or Judgment in any PAGA case. Cal. Lab. Code § 2699(l).

7 **D. Purpose of PAGA**

8 In 2003, the California Legislature enacted the PAGA after declaring: (i) adequate financing of
9 labor law enforcement is necessary to achieve maximum compliance; (ii) staffing levels for state labor
10 law enforcement agencies has declined and unable to keep up with a growing labor market; (iii) vigorous
11 assessment and collection of civil penalties provides a meaningful deterrent to unlawful conduct; and (iv)
12 that it is therefore in the public interest to allow aggrieved employees, acting as private attorneys general,
13 to seek and recover civil penalties for Labor Code violations. (*See e.g., Gutilla, supra*, WL 2729864, at
14 *2 [citing 2003 Cal. Stat. 6629].)

15 PAGA was enacted because the Legislature believed it necessary “to achieve maximum
16 compliance with state labor laws” and “to ensure an effective disincentive for employers to engage in
17 unlawful and anticompetitive business practices.” (*Caliber Bodyworks, Inc. v. Superior Court*, 134
18 Cal.App.4th 365, 374 (2005) [citing 2003 Cal. Legis. Serv. Ch. 906 §§ 1(b)].) The Legislature found
19 that, while self-policing efforts have had some success, “in other cases the only meaningful deterrent to
20 unlawful conduct is the vigorous assessment and collection of civil penalties as provided in the Labor
21 Code.” (*Id.*) Through PAGA, the Legislature thus: (1) sought to “enlist[] willing citizens in the task of
22 private enforcement,” (*Iskanian, supra*, 59 Cal.4th at 390); (2) “deputized” aggrieved employees to sue
23 on behalf of the State to enforce state labor laws; and (3) authorized them to recover civil penalties,
24 attorneys’ fees, and costs. (2003 Cal. Legis. Serv. Ch. 906 (Legislative Counsel’s Digest).) In bringing
25 a PAGA action, “[t]he employee-plaintiff acts as the proxy or agent of the state labor enforcement
26 agencies, representing the same legal right and interest as those agencies” (*Iskanian, supra*, 59
27 Cal.4th at 394.)

28 As for the interests of the LWDA (in whose shoes Plaintiff stands), its top enforcement priorities

are “to vigorously enforce minimum labor standards in order to ensure employers are not required or permitted to work under substandard unlawful conditions . . .” and to “protect 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.” (Cal. Lab. Code § 90.5(a).)

E. Fairness of PAGA settlements

A PAGA action is a quasi-law-enforcement action and therefore a PAGA settlement does not have to meet the requirements of a class action. *Arias*, 46 Cal. 4th at 982. Thus, a court’s “fairness” review of a PAGA settlement necessarily implicates unique features that render the process distinct from approval of a class action settlement under Rule 3.769 of the California Rules of Court.

In evaluating the adequacy of the settlement amount, the Court’s focus is not the dollar amount(s) “aggrieved employees” are to receive, but rather, must focus on the total settlement amount in achieving PAGA’s objective because “[t]he remedy sought in a PAGA suit consists of civil penalties, not individual or class damages.” (*Mendez v. Tween Brands, Inc.* (N.D. Cal. Apr. 2, 2010) No. 2:10-cv-00072-MCE-DAD, 2010 WL 2650571, *4, [citing Cal. Lab. Code § 2699(a)].) “Unlike class actions, these civil penalties are not meant to compensate unnamed employees because the action is fundamentally a law enforcement action.” *Ochoa-Hernandez v. CJADERS Foods, Inc.*, No. C 08-2073 MHP, 2010 WL 1340777, at *4 (N.D. Cal. Apr. 2, 2010). “Unlike a class action seeking damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.” (*Id.*)

Consistent with the fact that unnamed employees have no property interest in a PAGA claim, “[u]nnamed employees need not be given notice of the PAGA claim, nor do they have the ability to opt-out of the representative PAGA claim.” (*Id.* at *5.) This renders the approval process of a PAGA settlement distinct from a class action settlement, as there is no need for the Court to employ the “two-step approval process” required under Rule 3.769 of the California Rules of Court.

Finally, unlike a class action settlement under Rule 3.769, the scope of release permitted in a PAGA settlement is limited. While judgment in a PAGA action is binding not only on the named employee Plaintiffs but also on government agencies and any aggrieved employee not a party to the

proceeding, the nonparty employees *would not* be bound by the judgment as to remedies other than civil penalties. (*Arias, supra*, 46 Cal. 4th at 986-87.) Thus, except for the named Plaintiff, the scope of a release in a PAGA settlement is confined to the PAGA penalties alleged in the complaint and PAGA claims that were or could have been alleged pursuant to PAGA.

F. California policy favoring settlements

California courts have a strong policy in favor of settlement. (*Stambaugh v. Superior Court* (1976) 62 Cal.App.3d 231, 236.) To be approved, a settlement must be “fair, reasonable and adequate to all concerned.” *Reed v. United Teachers Los Angeles*, 208 Cal.App.4th 322, 337 (2012). There is an initial presumption of fairness when, as here, the settlement agreement was negotiated at arm’s length by experienced counsel. (*See, e.g., Kullar v. Foot Locker Retail, Inc., supra*, 168 Cal.App.4th at 130; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) Where these factors exist, a court’s review is generally “limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Dunk, supra*, 48 Cal.App.4th at 1801.)

“In the context of a settlement agreement, the test is not the maximum amount Plaintiffs might have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the circumstances.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 250. “A settlement need not obtain 100 percent of the damages sought in order to be fair and reasonable.” (*Id.*) Compromise is inherent and necessary in the settlement process. (*Id.*) Thus, even if the relief afforded by the proposed settlement is substantially narrower than it would be if the suit was to be successfully litigated, this is no bar to a class settlement because the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. (*Id.*) In addition, courts review the discovery process and information received through it in assessing whether the parties sufficiently developed the claims and their supporting factual bases before reaching settlement. (*See Kullar, supra*, 168 Cal.App.4th at 129-31.) Information is sufficient where it allows the parties and the Court to form “an understanding of the amount that is in controversy and the realistic range of outcomes of the litigation.” (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 801.)

V. THE TERMS OF THE SETTLEMENT ARE FAIR AND REASONABLE

A. The settlement terms are manifestly fair and reasonable

1. As set forth in the Settlement Agreement attached as Exhibit 1 to the Rose Declaration, the parties have agreed to a common fund settlement of Thirty-Five Thousand Dollars (\$35,000), which is further allocated as follows: (i) Labor and Workforce Development Agency (LWDA) and to the Aggrieved Employees (i.e., all seven (7) former non-exempt workers in California who were employed by Defendant in California at any time from September 23, 2019, though the date of approval of this settlement, for settlement of PAGA claims (the “PAGA Payment”); (ii) Seventy-Five Percent (75%) of the PAGA Payment shall be paid directly to the California Department of Industrial Relations (DIR) Accounting Unit and Twenty-Five Percent (25%) shall be distributed to approximately seven (7) Aggrieved Employees in a pro rata share based on the number of pay periods worked for VIP from October 8, 2019, though the date of approval of this settlement⁶ (i.e., the date of the PAGA Settlement); (iii) Eleven Thousand Six Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$11,666.67) allocated to Plaintiff’s counsel for attorneys’ fees, and Three Thousand Sixty-Five Dollars and Fifty Cents (\$3,065.50) is allocated to Plaintiff’s counsel as reimbursement for advanced litigation costs; (iv) administrative costs, estimated not to exceed Five Hundred Dollars (\$500); and (iv) the proposed enhancement payment for Plaintiff of Five Thousand Dollars (\$5,000). The releases are limited to PAGA issues *only*.

Plaintiff and his counsel complied with the PAGA statutory requirements. (Rose Decl. ¶¶ 11, 22.) This settlement was negotiated at arm’s length by experienced counsel with the assistance of an experienced mediator. (Rose Decl. ¶¶ 14-19, 28-31.) Plaintiff’s counsel carefully evaluated the potential PAGA liability and exposure in this case, as well as the likelihood of success. (Rose Decl. ¶¶ 15-18.)

Although case law regarding approvals of PAGA-only settlements is somewhat sparse, the few rulings issued strongly indicate that this settlement is fair and reasonable. (*See e.g., Franco v. Ruiz Food Products, Inc.* (E.D. Cal. Nov. 27, 2012) No. 1:10-cv-02354-SKO, 2012 WL 5941801 [court approved total PAGA penalty of \$10,000, with the \$2,500 employee portion divided between as many as 2,055 current and former employees]; *Schiller v. David’s Bridal, Inc.* (E.D. Cal. June 28, 2012) No. 1:10-cv-

⁶ VIP stopped operating its business in September 2020, and issued final paychecks to its employees in October 2020.

616-AWI-SKO, 2012 WL 217001 [court approved total PAGA penalty of \$10,000, with the \$2,500 employee portion divided between as many as 3,326 individuals].

Thus, based on these circumstances, this settlement is clearly fair and reasonable.

B. The settlement was reached through an arms'-length bargaining process between parties represented by experienced counsel

“[W]hat transpires in settlement negotiations is highly relevant to the assessment of a proposed settlement’s fairness.” (*State v. Levi Strauss & Co.* (1986) 41 Cal.3d 460, 482.) Courts presume the absence of fraud or collusion in the negotiation of a settlement, unless evidence to the contrary is offered; thus, there is a presumption that settlement negotiations are conducted in good faith. (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 581 [quoting *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1117-1118.]

There can be no doubt as to the fairness of the settlement before this Court. The parties participated in a full-day mediation with Shane Sagheb, who provided useful, neutral analysis of the issues and risks to both sides. (Rose Decl. ¶¶ 15-19.)⁷ At all times, the parties’ negotiations were adversarial and non-collusive. (Rose Decl. ¶ 19.) Additionally, both VIP and Plaintiff were represented by experienced counsel through the negotiations. (Rose Decl. ¶¶ 1, 29-31.) (*See Kullar v. Foot Locker Retail, Inc., supra*, 168 Cal.App.4th at 129 [courts should weigh “the competency and integrity of counsel and the involvement of a neutral mediator in assuring ... that a settlement agreement represents an arm’s length transaction entered without self-dealing or other potential misconduct.”].)

Based on information obtained through informal discovery, Plaintiff’s counsel was able to assess the strengths and weaknesses of the case and the benefits of settlement. (Rose Decl. ¶¶ 15-16, 18.) As a result, Plaintiff’s counsel firmly believes that the settlement represents a very favorable resolution of these claims consistent with the purposes of the PAGA. (Rose Decl. ¶ 21.)

C. The strengths and weaknesses of plaintiff’s claims

“In determining whether the proposed settlement falls within the range of reasonableness, perhaps the most important factor to consider is Plaintiff’s expected recovery balanced against the value of the

⁷ *In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 WL 4820784 (N.D. Cal. Nov. 5, 2008) (mediator’s participation weighs considerably against any inference of a collusive settlement).

settlement offer.” (*Cotter v. Lyft, Inc.* (N.D. Cal. Apr. 7, 2016) 176 F.Supp.3d 930, 935, internal quotation omitted).

Plaintiff has put forth in detail above the relative strengths and weakness of this case, which favor this settlement.

1. Potential manageability issues

A PAGA action must be manageable. A PAGA claim will be deemed unmanageable if individualized inquiries—such as whether and under what circumstances an employee was required to work off-the-clock without compensation at the end of a given work shift or whether an employee missed a meal or rest period—are often necessary to establish liability and ascertain which employees are aggrieved. (*See e.g., Cardenas v. McLane Foodservice, Inc.* (C.D. Cal. 2011) 796 F. Supp. 2d 1246, 1260 [“Given the statutory language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of the Labor Code by the defendant.”]; *Ortiz v. CVS Caremark Corp.* (N.D. Cal. Mar. 19, 2014) No. C-12-05859 EDL, 2014 WL 1117614, at *4 [striking PAGA claim: “[T]he circumstances of this case make the PAGA claim here unmanageable because a multitude of individualized assessments would be necessary ... [p]roof of this [off-the-clock] claim would be unmanageable, and could not be done with statistical or survey evidence but only with detailed inquiries about each employee claimed to have done so and her manager’s knowledge thereof.”]; *Amey v. Cinemark USA Inc* (N.D. Cal. May 13, 2015) No. 13-CV-05669-WHO, 2015 WL 2251504, at *16, rev’d and remanded sub nom; *Brown v. Cinemark USA, Inc.* (9th Cir. 2017) 705 F. App’x 644 [dismissing PAGA claims; “[W]hen the evidence shows, as it does here, that numerous individualized determinations would be necessary to determine whether any class member has been injured by [Louis Vuitton’s] conduct, then allowing a representative action to proceed is inappropriate.”]; *Bowers v. First Student, Inc.* (C.D. Cal. Apr. 23, 2015) No. 2:14-CV-8866-ODW EX, 2015 WL 1862914, at *4 [striking PAGA claim; “A PAGA claim can be considered unmanageable when ‘a multitude of individualized assessments would be necessary.’”] (internal quotations and citations omitted); *Litty v. Merrill Lynch & Co.*, No. CV 14-0425 PA PJWX, 2014 WL 5904904, at *3 (C.D. Cal. Nov. 10, 2014) [striking PAGA claim: “PAGA representative action allegations can be stricken where such claims would be unmanageable ... The circumstances of this case make the PAGA claim unmanageable because a

multitude of individualized assessments would be necessary.”].)

For example, to establish liability for meal and rest period violations, individualized inquiries would likely be required as to whether the aggrieved employees were inhibited from taking provided meal and rest periods. As to the paid rest periods, Plaintiff could not exclusively rely on timecards as such periods are not tracked in VIP’s timekeeping records. Thus, it may be necessary to provide individualized testimony about the circumstances pertaining to each employee establish liability. Accordingly, as VIP argues, manageability concepts could prevent pursuit of the alleged PAGA claims here because they would supposedly require several ‘mini-trials’ for each aggrieved employee regarding, among other things, whether they missed or had a non-compliant meal or rest period, the reason for the non-compliant meal or rest period, whether the employee properly noted the non-compliant meal or rest period, and whether they received premium pay for it, etc. Given the cessation of VIP operations, eliciting testimony from former employees could prove unmanageable.

2. The outcome in litigation is highly uncertain

Trial is always uncertain. Indeed, several PAGA trials have resulted in defense verdicts. (*See e.g., Childers v. Anthony Shenouda Inc.*, Case No., BC517798 in the Los Angeles County Superior Court, Hon. Elihu Berle presiding [trial of misclassification case under PAGA resulting in a defense verdict after bench trial]; *Allen v. American Multi-Cinema Inc.*, Case No. RG-11-585502, in the Alameda County Superior Court, Hon. George C. Hernandez presiding [trial of seating claims under PAGA resulted in a defense verdict following a bench trial]. Thus, in the face of such uncertainty, settlement was advantageous to Plaintiff, the LWDA, and the aggrieved employees as it secured a substantial monetary recovery and serves the intended purposes of the PAGA.

3. Damages issues

Plaintiff recognizes that there is a significant chance the Court would decline to stack penalties and also exercise its discretion to reduce PAGA penalties based on the particular facts of this case, including most notably VIP’s arguments that no on-call violations or other violations occurred.

The potential exposure described here incorporates the possibility that multiple violations can be assessed for a particular pay period for a particular employee. There is a significant chance that the Court would decline to stack on derivative violations for an employer that maintains comprehensive, facially

compliant policies. Even without stacking derivative violations, a given employee may present multiple PAGA violations (e.g., for meal and rest violations, unpaid overtime, itemized wage statements) for a particular pay period. There is a chance that the Court would decline to assess multiple violations per pay period per employee.

With respect to derivative claims, such as penalties under Labor Code section 203 as incorporated into the PAGA, defendants typically argue that no waiting-time penalties can be awarded unless the failure to pay wages is “willful,” an element that Plaintiff acknowledges could be difficult to prove. (*See* 8 CCR 13520 “[a] willful failure to pay wages within the meaning of Labor Code § 203 occurs when an employer intentionally fails to pay wages to an employee when those wages were due.”); *Smith v. Rae Venter Law Group*, 29 Cal.4th 345, 354 n.2 (2002) [holding that a good faith dispute that any wages are due will preclude an award of waiting time penalties]. VIP may further argue that an employer’s failure to pay wages is not willful unless it reached the standard of “gross negligence or recklessness.” (*See Amaral v. Cintas* (2008) 163 Cal.App.4th 1157, 1201.)

Plaintiff also recognizes that some courts have interpreted PAGA, i.e., Labor Code section 2699(f)(2), to impose the enhanced “subsequent violation penalty” or “heightened penalty” only after an employer has been notified that its conduct violates the Labor Code. (*See Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209; *Trang v. Turbine Engine Components Technologies Corp.* (C.D. Cal. Dec. 19, 2012) No. CV 12–07658 DDP (RZx), 2012 WL 6618854; *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.* (S.D. Cal. Aug.10, 2009) No. 05cv1199– IEG–CAB, 2009 WL 2448430.) While many commentators contend this interpretation is erroneous, this interpretation has gained traction with some courts.

PAGA gives courts wide latitude to reduce the amount of civil penalties “based on the facts and circumstances of a particular case” when “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” (*Labor Code* § 2699(h).) In reducing PAGA penalties, courts have considered issues including whether the employees suffered actual injury from the violations, whether VIP was aware of the violations, and the employer’s willingness to fix the violation. (*Cotter v. Lyft, Inc.* (N.D. Cal. June 23, 2016) 193 F.Supp.3d 1030, 1037; *Fleming v. Covidien Inc.* (C.D. Cal. Aug. 12, 2011) No. (OPX), 2011 WL 7563047, at *4 [district court reduced PAGA penalties from \$2.8M to \$500,000—

a reduction of \$82.2%—because the court found maximum penalties “unjust” finding the employees had suffered no injuries).⁸) For instance, in the *Lyft* case, the court found that a \$1 million PAGA settlement was fair and reasonable in light of the unsettled nature of the law, resulting in a \$2.52 per pay period award to the aggrieved employees—there were 397,110 pay periods in a \$1 million PAGA settlement, resulting in a 97.5% reduction from the maximum. In *Fleming v. Covidien, supra*, the court reduced the potential penalties by over 82%, awarding \$500,000 for 28,742 pay periods at issue. Here, VIP argues the court should exercise its discretion to significantly reduce the PAGA penalties. Considering the foregoing, Plaintiff had to consider that such argument may find a sympathetic ear.

D. The expense, complexity and likely duration of further litigation

To assess the fairness, adequacy, and reasonableness of a class action settlement, the court also should consider the expense, complexity, and likely duration of further litigation. (*Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at 1801.) Here, as outlined above, the parties faced the expense and uncertainty of a hard-fought trial, and regardless of which party prevailed, and the likelihood of an appeal was high.

E. The presence of a government participant

As set forth above, 75% of the penalty is paid to the LWDA, and Labor Code § 2699.3(b)(4) permits the LWDA to comment on the penalties. This provides an independent check on collusive settlements which are too low. (*Id.*)

F. The extent of investigation completed

As detailed above, the settlement was reached only after the case was thoroughly investigated by counsel and had reached the stage where “the Parties certainly have a clear view of the strengths and weaknesses of their cases” sufficient to support the settlement. (*In re Warner Commc’ns Sec. Litig.* (S.D.N.Y. 1985) 618 F.Supp. 735, 745.)

///

///

///

⁸ Some courts have awarded no PAGA penalties even when Labor Code violations were established. (*See, e.g., Makabi v. Gedalia* (2d Dist.Ct.App. 2016) Cal.App.Unpub. 1489, *5-7 [no PAGA penalties awarded by Los Angeles Superior Court]; *In re Taco Bell Wage & Hour Actions* (E.D. Cal. 2016) U.S. Dist. LEXIS 48557, *40-43 [PAGA penalties denied after trial].

VI. THE AGREED UPON ATTORNEYS' FEES, COSTS AND INCENTIVE PAYMENTS ARE FAIR AND REASONABLE

For the efforts and the substantial risk undertaken by Plaintiff's counsel in obtaining a \$35,000 common fund settlement that benefits the LWDA and Aggrieved Employees, the parties allocated \$ \$11,666.67 to Plaintiff's counsel for attorneys' fees, and \$3,065.50 to Plaintiff's counsel as reimbursement for advanced litigation costs. This amount equates to 33-1/3% of the \$35,000 common fund in attorney's fees plus \$3,065.50 in reimbursement for litigation costs. (Rose Dec. ¶¶ 24-27.) As discussed below, these costs and fees are warranted under the law and within the range of fees commonly awarded in similar cases. (*Id.*)

A. The attorneys' fees are appropriate under the common fund doctrine

PAGA provides that a Plaintiff is entitled to recover reasonable attorneys' fees, expenses, and costs under Labor Code § 2699(g)(1), reading: "Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs, including any filing fee paid pursuant to subparagraph (B) of paragraph (1) of subdivision (a) or subparagraph (B) of paragraph (1) of subdivision (c) of Section 2699.3." As discussed below, qui tam actions such as those under PAGA, reasonable attorney's fees and costs are typically awarded under the common fund doctrine where, as here, the litigation creates a common fund of money in a specific amount for the benefit of others.

"A qui tam action is one brought under a statute that allows a private person to sue as a private attorney general to recover damages or penalties, all or part of which will be paid to the government." (*People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 491-492.) "A PAGA representative action is therefore a type of qui tam action." (*Id.* At 382.) Indeed, the majority of the civil penalties recovered in a PAGA action are paid to the state, with a smaller portion paid to the aggrieved employees (e.g., 75% paid to the state; 25% paid to the aggrieved employees). (*See* Labor Code 2699(i).) As here, where a common fund is created in a qui tam action by the successful litigation of a Plaintiff and his attorney, the Plaintiff's attorneys are entitled to recover their fees from the common fund. (*Bank of America v. Cory* (1985) 164 Cal.App.3d 66, 89-91 ["Those benefiting from the recovery of the fund, in this case some depositors and eventually the People of the State of California, must bear their share of the cost of litigation."].)

Likewise, in this case, through the successful efforts of Plaintiff and his attorneys, a common fund

was created in the amount of \$35,000 for the benefit of the Aggrieved Employees and the State of California. Thus, these beneficiaries should bear their share of the costs and attorneys' fees, which fees and costs must be deducted from the \$35,000 settlement amount under the common fund theory. Moreover, such fees are properly deducted as a percentage of the settlement amount of \$35,000. (*Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478-482; *Six (6) Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1311; *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 967. "When a number of persons are entitled in common to a specific fund, and an action brought by ... Plaintiffs for the benefit of all results in the creation or preservation of that fund, such ... Plaintiffs may be awarded attorneys' fees out of the fund." (*Serrano v. Priest* (1977) 20 Cal.13d 25, 34; see e.g., *Dunk, supra*, 48 Cal.App.4th at 1809; *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715, 726; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 65-66; *Sanders v. City of Los Angeles* (1970) 3 Cal.13d 252, 261-263; *Wershba, supra*, 91 Cal.App.4th at 254 ["courts recognize two methods for calculating attorney fees in class actions: the lodestar/multiplier method and the percentage of recovery"].)

California state and federal courts routinely award attorneys' fees equaling one-third of the common fund. (See e.g., *Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal.5th 480, 506 ["33- $\frac{1}{3}$ percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits"]; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66 n.11 [accord]; Eisenberg & Miller, Attorney Fees in Class Action Settlements: An Empirical Study, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004, at 35 [independent studies of class action litigation nationwide conclude that fees representing one-third of the total recovery is consistent with market rates].) Notably, the California Supreme Court in *Laffitte* affirmed a fee award representing 33- $\frac{1}{3}$ percent of the fund. (See *Laffitte, supra*, 1 Cal.5th at 506.)

A one-third common fund attorneys' fee award is also consistent with what courts have awarded in other representative action cases. The following list shows PAGA actions where attorneys' fees were awarded on a common fund basis of 33- $\frac{1}{3}$ %:

- *Garcia v. Macy's*, San Bernardino County Superior Court, Case No. CIVDS1516007 [33- $\frac{1}{3}$ % fee awarded on \$12,500,000 settlement of a PAGA only case];
- *Garcia v. Pep Boys*, Orange County Superior Court, Case No. 30-2014-00720574-CU-OE-CJC [33- $\frac{1}{3}$ % fee awarded on a \$1,030,000 settlement of a PAGA only case];

1 ▪ *Brewer v. Connell Chevrolet*, Orange County Superior Court, Case No. 30-2016-
2 00852123-CU- OC-CXC [33-1/3% fee awarded on a PAGA only case]; and

3 ▪ *Perez v. Staffmark Investment, LLC*, Riverside County Superior Court, Case No.
4 MCC1401137 [33-1/3 % fee awarded on a \$650,000 settlement of a PAGA only case].

5 Awarding attorneys’ fees based on a one-third portion of the gross settlement amount is favored
6 by California courts when a fund established for the common benefit of others is involved, as is the case
7 here.

8 Based on the foregoing, attorneys’ fees in the amount of \$11,666.67 in this case is proper based
9 on 33-1/3% of the \$35,000 common fund established through the efforts of and risks assumed by Plaintiff’s
10 counsel.

11 **B. The litigation costs advanced by Plaintiff’s counsel are reasonable and necessary**

12 Plaintiff’s counsel has documented the \$3,065.50 in costs incurred and advanced in this litigation.
13 Most of these costs consist of court filing fees, service of process, couriers, and the mediator’s
14 professional fee. (Rose Dec. ¶ 27.) These costs were both necessary and reasonable considering the
15 \$35,000 common fund achieved by Plaintiff and his counsel’s efforts. (*Id.*)

16 **C. The requested incentive payment to Plaintiff is reasonable**

17 The use of incentive payments to lead plaintiffs in representative actions has long been approved
18 by California courts. (*See, In re Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393,
19 as modified (July 27, 2010); *see also, Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715, 725-26
20 (2004), as modified on denial of reh’g (Mar. 9, 2004); *Munoz v. BCI Coca-Cola Bottling Co. of Los*
21 *Angeles, supra*, 186 Cal.App.4th 399, 412. Plaintiffs are generally entitled to incentive compensation for
22 initiating the litigation on behalf of others, taking the time to prosecute the case, and incurring financial
23 and personal risk. *See Clark v. American Residential Services LLC, supra*, 175 Cal.App.4th 785, 803
24 [reiterating the rule that “[a]n incentive award is appropriate if it is necessary to induce an individual to
25 participate in the suit.”]; *Ingram v. The Coca-Cola Co.* (N.D. Ga. 2001) 200 F.R.D. 685, 694 [approving
26 incentive awards of \$300,000 to each named plaintiff in recognition of services to class by responding to
27 discovery, participating in mediation process and taking the risk of stepping forward]; *Van Vranken v.*
28 *Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294, 300 [approving \$50,000 participation award].

1 Here, the incentive award of \$10,000 for Plaintiff is far lower than awards found to be fair and reasonable
2 in other cases. (*Van Vranken v. Atlantic Richfield Co.*, *supra*, 901 F.Supp. 294, 300 [holding that
3 incentive award of \$50,000 to each named plaintiff was fair and reasonable]; *Glass v. UBS Financial*
4 *Services, Inc.* (N.D. Cal., Jan. 26, 2007, No. C-06-4068 MMC)2007 WL 221862, at *16, *affd* (9th Cir.
5 2009) 331 Fed. Appx. 452 [approving incentive award of \$25,000 for each of four named plaintiffs].
6 This amount is very reasonable given the time and effort expended by the Plaintiff and approval of this
7 amount is warranted.

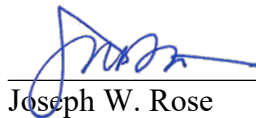
8 VII. CONCLUSION

9 For the foregoing reasons, the Court should grant Plaintiff's Motion for Approval of PAGA
10 settlement. Approval is respectfully requested.

11 Dated: March 20, 2023

ROSE LAW, APC

12 By:



13 Joseph W. Rose
14 Attorneys for Plaintiff,
15 JUSTIN DE LEON, individually and
16 on behalf of all other Aggrieved Employees
17
18
19
20
21
22
23
24
25
26
27
28