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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF ALAMEDA**

JUAN REBULLOZA, an individual, on behalf of  
the State of California, as a private attorney  
general, and on behalf of all others similarly  
situated,

Plaintiff,

v.

ACOSTA EMPLOYEE HOLDCO LLC, a  
Florida Limited Liability Company; and DOES 1-  
50, inclusive,

Defendants.

CASE NO.: RG21087775

*Assigned to the Hon. Raj Chatterjee*

**NOTICE OF MOTION AND MOTION TO  
APPROVE PAGA SETTLEMENT  
PURSUANT TO THE PRIVATE  
ATTORNEY GENERAL ACT OF 2004;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

*[Declarations of Joshua Falakassa and  
Mehrdad Bokhour and [Proposed] Order filed  
concurrently herewith]*

**Hearing Information:**

Date: March 7, 2022  
Time: 10:00 a.m.  
Dept.: 503

Complaint Filed: February 1, 2021  
Trial Date: None Set

1           **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2           **PLEASE TAKE NOTICE** that on March 7, 2022 at 10:00 a.m., or as soon thereafter as this  
3 matter may be heard by the Hon. Raj Chatterjee in Department 503 of the Alameda County Superior  
4 Court for the State of California, located at the 1225 Fallon Street, Oakland, CA 94501, Plaintiff  
5 Juan Rebulloza (“Plaintiff”) will and hereby does move this Court for an order approving a  
6 settlement pursuant to the Private Attorneys General Act of 2004, California Labor Code § 2698 *et*  
7 *seq.* (“PAGA”). Additionally, contingent on the Court’s approval of the PAGA settlement, Plaintiff  
8 requests that the court dismiss his remaining non-PAGA class claims without prejudice.

9           This motion is based upon this Memorandum of Points and Authorities; the Declarations of  
10 Joshua Falakassa, Mehrdad Bokhour, and Juan Rebulloza in support thereof; the Settlement  
11 Agreement and Release of PAGA Claims (the “Settlement Agreement” and/or the “Settlement”);  
12 the [Proposed] Order granting approval of PAGA Representative Action Settlement; all other  
13 records, pleadings, and papers on file in this action; and upon such other evidence or argument as  
14 may be presented to the Court at the hearing of this motion.

15 Dated: February 23, 2022

FALAKASSA LAW, P.C.  
BOKHOUR LAW GROUP, P.C.

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BY: \_\_\_\_\_

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JOSHUA FALAKASSA  
MEHRDAD BOKHOUR  
ANWAR D. BURTON

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*Attorneys for Plaintiff Juan Rebulloza*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This PAGA representative action stems from the alleged failure of defendant Acosta  
4 Employee Holdco, LLC (hereinafter “Defendant”) to pay for all hours worked, failure properly  
5 provide compliant duty-free meal periods and rest breaks, failure to adequately reimburse for  
6 necessary business expenses, failure to provide all wages due upon separation of employment, and  
7 wage statement violations. As a result, Plaintiff seeks to recover civil penalties under the Labor  
8 Code Private Attorneys General Act of 2004, California Labor Code § 2698 *et seq.* (“PAGA”).

9 Based on these alleged violations, Plaintiff, as a private attorney general for the State of  
10 California, sought civil penalties under PAGA. PAGA actions are a type of *qui tam* action filed on  
11 behalf of the state to assist it with labor law enforcement. (*Iskanian v. CLS Transportation Los*  
12 *Angeles, LLC* (2014) 59 Cal.4th 348, 380–382.) As such, the state is the real party in interest in a  
13 PAGA action. (*Id.* at 382.) Accordingly, and pursuant to the PAGA, the Labor and Workforce  
14 Development Agency (“LWDA”) was timely served with a copy of the Settlement Agreement  
15 concurrently filed with this instant Motion to Approve the PAGA Settlement.

16 Plaintiff and the aggrieved employees work and/or worked for Defendant as non-exempt  
17 hourly employees within the State of California from January 28, 2020, through March 7, 2022 or  
18 the date that the Court approves this settlement, whichever occurs earlier (the “PAGA Settlement  
19 Members”). The PAGA Settlement Members contend that Defendant: (1) failed to pay for all hours  
20 worked; (2) failed to provide code compliant meal periods; (3) failed to provide code compliant rest  
21 periods; (4) failed to failed to reimburse necessary business expenses; (5) failed to pay wages due  
22 at separation of employment; (6) failed to provide accurate itemized wage statements; (7) violated  
23 business and professions code § 17200, *et seq.*; and (8) owes civil penalties under PAGA.

24 Plaintiff alleges that Defendant owes PAGA penalties as a result of its alleged violations of  
25 various Labor Code sections and Industrial Welfare Commission Wage Order No. 1-2001 (“Wage  
26 Order No. 1-2001”). Defendant denies these claims, denies any fault or wrongdoing, and disputes  
27 Plaintiff’s characterization of liability, and availability of penalties. Thus, the Parties fully dispute  
28 the merits of the claims and defenses.

1       Following extensive discussions, as well as negotiations and the exchange of informal  
2 discovery, the Parties engaged in a full session of mediation on January 26, 2022, with Marc Feder,  
3 Esq. serving as the mediator. Mr. Feder has extensive experience in wage and hour class and PAGA  
4 actions. Through the mediator's and the Parties efforts in mediation, the Parties were able to reach  
5 a settlement of the Action. The Parties subsequently memorialized the terms in the long-form  
6 Settlement Agreement as set forth in the Settlement Agreement and Release of PAGA Claims  
7 ("Settlement Agreement") attached at **Exhibit "A"** to Declaration of Joshua Falakassa ("Falakassa  
8 Decl.") filed concurrently herewith.

9       Now with a comprehensive Settlement Agreement that resolves the claims alleged in this  
10 case, Plaintiff seeks this Court's approval of the \$525,000.00 Total Settlement Payment involving  
11 approximately 1,046 PAGA Settlement Members. This Settlement merits approval because it fulfills  
12 the purpose of PAGA (*i.e.*, to deter violations of the Labor Code and secure obedience of  
13 California's labor laws; and to provide relief that is genuine, meaningful, and consistent with  
14 California's goal of benefitting the public through enforcement of labor laws).

15       Because this is a PAGA-only settlement, the process for approval is straight-forward: "The  
16 superior court shall review and approve any settlement of any civil action filed pursuant to this part."  
17 (Labor Code § 2699(1)(2).) Based on the California Supreme Court's holdings in *Arias v. Superior*  
18 *Court*, 46 Cal.4th 969 (2009) and *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348  
19 (2014), there is no requirement under PAGA for Plaintiff to establish the requirements of class  
20 certification (*i.e.* numerosity, typicality, commonality and adequacy) nor is there the usual two-step  
21 preliminary and final approval process as found in class actions. Rather, this PAGA-only settlement  
22 merely requires a one-step review and approval process. For these reasons and those discussed  
23 below, the Parties now seek the Court's approval of the Settlement.

## 24 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### 25 **A. Factual Background**

26       Defendant is a full-service sales and marketing company for consumer-packaged goods with  
27 more than 100 offices around the world, including California, and over 20,000 employees.  
28 (Falakassa Decl. ¶ 13.) Plaintiff and similarly situated employees worked as non-exempt "Retail

1 Merchandisers,” “Retailer Coverage,” Retail Service Merchandisers,” and other non-exempt  
2 employees for Defendant during the relevant time period. (*Id.*)

3 During the relevant time period, Plaintiff alleges that Defendant failed to pay Plaintiff and  
4 other PAGA Settlement Members for all hours worked, including minimum and overtime wages,  
5 failed to provide compliant meal and rest periods, failed to adequately reimburse all necessary  
6 business expenses, failed to pay all earnings at their separation of employment, and failed to provide  
7 complete and accurate wage statements and as such owes civil penalties under PAGA. (Falakassa  
8 Decl. ¶ 14.)

9 For example, Defendant’s policies and practices required Plaintiff and the Aggrieved  
10 Employees to perform off-the-clock tasks, such as checking emails and reporting data and other  
11 developments to their supervisors. (Falakassa Decl. ¶ 15.)

12 Moreover, Defendant’s meal period policies/practices and the requirements of the job  
13 resulted in Plaintiff and the Aggrieved Employees being prevented from taking full 30-minute  
14 uninterrupted and duty-free meal periods as required by the Labor code and applicable Wage Orders.  
15 (Falakassa Decl. ¶ 16.) Indeed, from the data provided by Defendants, the majority of shifts over 5  
16 hours did not have a recorded meal period, and a substantial percentage of shifts had shortened or  
17 late meal periods. (*Id.*) Both the meal and rest period policies of Defendants did not comply with  
18 California law as they put the onus on non-exempt employees to ensure that they took their breaks  
19 “in accordance with the state’s laws” but failed to outline any details about the Labor Code  
20 requirements regarding meal periods and rest breaks. (*Id.*)

## 21 **B. Procedural History**

22 On January 28, 2021, Plaintiff’s counsel sent notice to the California Labor & Workforce  
23 Development Agency (“LWDA”) of his intent to pursue a representative action pursuant to PAGA,  
24 on behalf of himself and the State of California, as well as on behalf of a group of aggrieved  
25 employees (the “PAGA Notice”). (Falakassa Decl. ¶ 17.)

26 This PAGA Notice is required under Labor Code § 2699.3(a)(1)(A) as a prerequisite to  
27 bringing a PAGA representative claim against an employer. On or about August 4, 2021, Plaintiff  
28 sent a supplemental notice alleging additional claims. (Falakassa Decl. ¶ 18.) The LWDA did not

1 respond to either notice, thus allowing Plaintiff to file the instant lawsuit. Labor Code §  
2 2699.3(a)(2)(A). (*Id.*)

3 On February 1, 2021, Plaintiff filed his Complaint on behalf of himself, the State of  
4 California, as a private attorney general, and all others similarly situated and aggrieved employees.  
5 (Falakassa Decl. ¶ 19.)

6 Through his PAGA claim, Plaintiff seeks penalties for Defendant's violation of Labor Code  
7 §§ 201-203, 204, 210, 226(a), 206(e), 226.3, 226.7, 510, 512, 1174, 1194, 1197.1, 1199, and 2800-  
8 2802. (Falakassa Decl. ¶ 20.)

9 Although Defendant denies the allegations and vowed to vigorously defend against them,  
10 the Parties agreed to attend mediation. (Falakassa Decl. ¶ 23.)

11 In preparation for mediation, the Parties exchanged documents and information that allowed  
12 both sides to evaluate the potential exposure and potential risk, such as a sampling of time and  
13 payroll records for the PAGA Settlement Members, review of Defendant's employee handbook and  
14 relevant meal and rest break policies, along with timekeeping and overtime procedures, wage  
15 statements, and the total number of employees and workweeks during the PAGA Period. (Falakassa  
16 Decl. ¶ 24.)

17 During this process, Plaintiff's counsel analyzed, researched, and investigated the potential  
18 issues, including matters related to the calculation of damages, trial management, and appellate  
19 issues and risks. (Falakassa Decl. ¶ 25.)

20 On January 26, 2022, the Parties attended mediation with Marc Feder, Esq., an experienced  
21 mediator in wage and hour matters. (Falakassa Decl. ¶ 26.) During that mediation, the Parties  
22 exchanged further information and discussed all aspects of the case, including the risks and delays  
23 of litigation, the risk associated with proceeding in a representative capacity, liability under the  
24 claims asserted, and the ability to recover and measure damages and/or penalties. (*Id.*) The  
25 settlement negotiations were at all times at arm's length and although conducted in a professional  
26 manner, were adversarial. (*Id.*)

27 With guidance from the mediator, the Parties reached agreement regarding the major terms  
28 of the settlement and subsequently finalized those terms in a long-form Settlement Agreement.

1 (Falakassa Decl. ¶ 27.)

2 This Settlement was the culmination of protracted discussions between the Parties following  
3 a thorough analysis of the pertinent facts and law at issue. The Parties now present the Settlement  
4 Agreement to this Court for approval. (Falakassa Decl. ¶ 22.)

5 **III. PAGA AND ITS REQUIREMENTS**

6 PAGA provides an enforcement mechanism for California’s labor laws by enlisting  
7 individual plaintiffs as private attorneys general to recover civil penalties for the state, with a share  
8 also going to the aggrieved employees. Due to the lack of financing for California’s agencies, and  
9 the substantial number of Labor Code violations by California employers, the California Legislature  
10 found that it was in the public interest to allow aggrieved employees to act as “private attorneys  
11 general” to enforce and recover civil penalties on behalf of the State of California for Labor Code  
12 violations committed by employers. (*Arias, supra*, 46 Cal.4th at 980.) As the Legislature that  
13 adopted PAGA observed, “the only meaningful deterrent to unlawful conduct is the vigorous  
14 assessment and collection of civil penalties as provided in the Labor Code.” (Stats. 2003 ch. 906, §  
15 1(b).)

16 Moreover, the Labor Code’s primary purpose is to “ensure employees are not required or  
17 permitted to work under substandard unlawful conditions ... and to protect employers who comply  
18 with the law from those who attempt to gain a competitive advantage at the expense of their workers  
19 by failing to comply with minimum labor standards.” (Labor Code § 90.5(a).) Therefore, the  
20 Legislature determined that “adequate financing of labor law enforcement was necessary to achieve  
21 maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies  
22 had declined and were unlikely to keep pace with the future growth of the labor market, and that it  
23 was therefore in the public interest to allow aggrieved employees, acting as private attorneys general,  
24 to recover civil penalties for Labor Code violations, with the understanding that labor law  
25 enforcement agencies were to retain primacy over private enforcement efforts.” Thus, Plaintiff,  
26 acting as a private attorney general and proxy for the State of California, filed this action seeking  
27 civil penalties for Defendant’s alleged violations of the Labor Code.

1 Penalties recovered under PAGA “shall be distributed as follows: 75 percent to the Labor  
2 and Workforce Development Agency for enforcement of labor laws and education of employers and  
3 employees about their rights and responsibilities under this code ...; and 25 percent to the aggrieved  
4 employees.” (Lab. Code § 2699(i).)

5 Before filing a PAGA action, an aggrieved employee must first provide written notice to the  
6 LWDA and the employer of the particular Labor Code violations the aggrieved employee alleges  
7 the employer has violated. (Labor Code § 2699.3(a)(1).) This notice provides the LWDA with the  
8 opportunity to investigate and prosecute the claim. The employee may only sue on the state’s behalf  
9 if the LWDA fails to respond to the notice within 65 days, responds that it does not intend to  
10 investigate, or investigates and does not issue a citation within 185 days. (Labor Code §§  
11 2699.3(a)(2), 2699(h).)

12 In this case, Plaintiff provided the LWDA with the PAGA Notice advising it of the alleged  
13 Labor Code violations, but the LWDA deferred the prosecution of these violations to Plaintiff and  
14 his attorneys. Accordingly, the Settlement and the \$525,000.00 common fund created by it for the  
15 benefit of the State and PAGA Settlement Members, is solely the result of the work performed by  
16 Plaintiff and his attorneys on this case – all while the PAGA Settlement Members will preserve their  
17 own separate individual claims should they wish to pursue them.

18 Any settlement of a PAGA action brought by an aggrieved employee must be approved by  
19 the court. (Lab. Code § 2699(1)(2).) In 2009, the California Supreme Court considered the PAGA  
20 approval process and, more specifically, whether an aggrieved employee needs to meet class  
21 certification requirements. (*Arias, supra*, 46 Cal.4th at 976.) After a substantial review of the  
22 legislative history of PAGA, the Court held that an aggrieved employee's representative action  
23 brought on behalf of the state and other aggrieved employees against an employer for PAGA  
24 violations ***does not*** need to meet the requirements for class certification nor does there need to be  
25 notice to the other employees. (*Id.* At 975, 980-88.) As the Court held, a plaintiff bringing suit under  
26 PAGA does so as the proxy or agent of California's labor law enforcement agencies. (*Id.* At 986.)  
27 Thus, the Court reviews any proposed settlement and approves it if it is deemed to be fair and  
28 reasonable.

1 Accordingly, the Parties to this current PAGA action have reached such an agreement and  
2 now seek this Court's approval of the Settlement.

#### 3 **IV. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

4 The following is a summary of the principal terms of the Settlement Agreement.

##### 5 **A. PAGA Settlement Members and Terms of the Settlement**

6 PAGA Settlement Members are defined as, all current and former hourly non-exempt  
7 employees of Defendant in California at any time from January 28, 2020, through either March 27,  
8 2022 or the date that the Court approves this Settlement, whichever occurs earlier. (*See Settlement*  
9 *Agreement* ¶¶ 7 & 8.) The number of PAGA Settlement Members, including Plaintiff, is estimated  
10 to be 1,046 individuals who worked approximately 28,500 pay periods during the relevant time  
11 period. (*Falakassa Decl.* ¶ 28.)

12 The Settlement provides that Defendant will pay a ***Total Settlement Payment of One***  
13 ***Hundred and Eighty-Five Thousand Dollars (\$525,000.00)*** (the "Total Settlement Payment"),  
14 inclusive of payments to the LWDA and PAGA Settlement Members, payment of Plaintiff's  
15 Enhancement Award, attorneys' fees and litigation costs,<sup>1</sup> and third-party Settlement  
16 Administration Costs.<sup>2</sup> (*Settlement Agreement* ¶ 16.) After payment of attorneys' fees and litigation  
17 costs, Plaintiff's Enhancement Award, Settlement Administration Costs, and any other court  
18 mandated and/or approved deductions, approximately \$95,898.94 remains (the "PAGA Fund").

##### 19 **B. Settlement Allocation to the LWDA and PAGA Settlement Members**

20 Pursuant to the Settlement Agreement, the PAGA Fund in the amount of approximately  
21 \$96,448.94 shall be designated as PAGA penalties to be allocated between the LWDA and the  
22 PAGA Settlement Members pursuant to Labor Code section 2699(i) with 75% paid to the LWDA  
23 (the "LWDA PAGA Portion") and 25% paid to the PAGA Members (the "Aggrieved Employees'  
24

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25 <sup>1</sup> Plaintiff's Counsel will seek a standard fee of one-third (\$175,000.00) of the Total Settlement Payment, and  
26 reimbursement of actual litigation costs of up to \$15,000.00 (*Settlement Agreement* ¶ 33.) Although the Settlement  
27 Agreement contemplates that litigation costs are to be reimbursed up to \$15,000.00, Plaintiff's counsel was able to come  
28 in *under budget* and have only incurred \$10,886.20.

<sup>2</sup> The Parties have selected ILYM Group, Inc. as the Settlement Administrator, and its estimated costs of \$7,500 (which  
is also *under budget* as it is less than the \$10,000.00 estimate at the time of the Settlement Agreement) will be deducted  
from the Total Settlement Payment. (*Settlement Agreement* ¶ 38.)

PAGA Portion”) on a pro-rata basis.

The following chart reflects the estimated payments from the Settlement Agreement:

|                                                                         | Total Amount        |
|-------------------------------------------------------------------------|---------------------|
| <b>Total Settlement Payment</b>                                         | \$525,000.00        |
| Plaintiff’s Counsel’s fees (1/3)                                        | \$175,000.00        |
| Plaintiff’s Counsel’s litigation costs ( <i>not to exceed</i> \$15,000) | \$10,886.20         |
| Plaintiff’s Enhancement Award                                           | \$10,000.00         |
| Administration Costs ( <i>not to exceed</i> \$10,000.00)                | \$7,500             |
| <b>The PAGA Fund (PAGA Penalties)</b>                                   | <b>\$321,613.80</b> |
| • 75% to the LWDA                                                       | \$241,210.35        |
| • 25% to the PAGA Members                                               | \$80,403.45         |

Based on these distributions, the LWDA PAGA Portion will be approximately \$241,210.35 (75 percent of the PAGA Penalties) and the amount paid to PAGA Settlement Members for civil penalties under PAGA is estimated to be \$80,403.45 (25 percent). (Falakassa Decl. ¶ 52.)

#### C. Individual Payments and the Notice

As noted, twenty-five percent (25%) of the PAGA penalties will be allocated to the PAGA Settlement Members. (Settlement Agreement ¶¶ 39-40.) Based on the numbers provided by Defendant, approximately 1,046 current and former PAGA Settlement Members will share in their pro-rate portion of the PAGA Fund. The Settlement Agreement provides a very fair and equitable means of allocating this fund.

Each PAGA Settlement Member shall receive a portion of the PAGA penalties on a pro-rata basis based on the number of pay periods that each PAGA Settlement Member received a paycheck from Defendant during the PAGA Period. The amount to be paid per pay period for each PAGA Settlement Member will be calculated by dividing the number of pay periods that the PAGA Settlement Member had during her/his employment with Defendant during the PAGA Period by the total aggregate number of all PAGA Settlement Members’ pay periods during their employment with Defendant during the PAGA Period. (Settlement Agreement ¶¶ 40, 42.) All Individual Payments made to PAGA Settlement Members will be reported on an IRS Form 1099. (Settlement Agreement ¶ 42(a).)

1 The Settlement is non-reversionary and does not require PAGA Settlement Members to  
2 submit a claim form to reap financial benefit from the Settlement. Within ten (10) days after the  
3 Court issues an Order approving the Settlement, Defendant shall provide the Settlement  
4 Administrator with a list of the names, addresses and number of pay periods/paychecks issued to  
5 each of the PAGA Settlement Members during the PAGA Period. (Settlement Agreement ¶ 43.)

6 Further, within thirty (30) days after the Effective Date<sup>3</sup> or the date the Total Settlement  
7 Payment is fully funded, whichever is later, the Settlement Administrator shall pay to the LWDA  
8 an amount equivalent to Seventy-Five percent (75%) of the PAGA Fund, or as otherwise directed  
9 by the Court and shall also remit a total of Twenty-Five percent (25%) of the PAGA Fund to PAGA  
10 Settlement Members. (Settlement Agreement ¶¶ 44-45.) A letter approved by the Parties will be  
11 included in the mailing of the Individual Payment to each PAGA Settlement Member. (*Id.* at ¶ 45.)

12 The Individual Payment checks shall be sent to each PAGA Settlement Member by U.S.  
13 First Class mail to the PAGA Settlement Member's address. (*Id.* at ¶ 48.) Finally, within thirty (30)  
14 days after the Effective Date, or the date in which the Total Settlement Payment is fully funded,  
15 whichever is later, the Settlement Administrator shall distribute Plaintiff's Enhancement Award (as  
16 awarded by the court) and the court approved Plaintiff's Counsel Payment and approved litigation  
17 costs. (*Id.* at ¶ 47.) Within this same time period, the Settlement Administrator shall also deduct an  
18 amount equivalent to the Settlement Administration Costs. (*Id.* at ¶¶ 54.)

19 Individual Payment checks issued to PAGA Settlement Members pursuant to the Settlement  
20 Agreement will expire one hundred and eighty (180) days from the date they are mailed by the  
21 Settlement Administrator. (*Id.* at ¶ 51.) Any unclaimed funds after the 180-day period shall be sent  
22 to the Controller of the State of California to be held pursuant to the Unclaimed Property Law,  
23 California Civil Code § 1500, *et. seq.* for the benefit of the PAGA Settlement Member. (*Id.*)

24  
25  
26 <sup>3</sup> "Effective Date" means the later of: (a) the date that approval of the Settlement is granted by the Superior Court of  
27 California for the County of Alameda, or other court assuming jurisdiction of this matter; (b) if any timely objections  
28 or intervenor requests are filed and not subsequently withdrawn, the 60th day after the Court enters an Order or Judgment  
approving of this PAGA Settlement; or (c) if any timely appeals are filed, the date of the resolution (or withdrawal) of  
any such appeal in a way that does not alter the material terms of the Settlement. (Settlement Agreement ¶ 4.)

1           **D.       The Limited Release**

2           Importantly, the California Supreme Court has explained that other employees are bound by  
3 a PAGA adjudication only with respect to civil penalties, just as they would be “bound by a  
4 judgment in an action brought by the government.” (*Arias, supra*, 46 Cal.4<sup>th</sup> at 986.) In accordance  
5 with this rule, the release of the PAGA Members herein is narrowly tailored to include release from  
6 liability for claims seeking *civil penalties* under California Labor Code Section 2698 *et seq.*  
7 predicated on the alleged California Labor Code and Wage Order No. 1-2001 violations asserted in  
8 the operative Complaint.

9           **E.       Attorneys’ Fees and Litigation Costs**

10          Plaintiff’s Counsel request one-third of the Total Settlement Payment, or up to \$175,000.00,  
11 in attorneys’ fees, and \$10,886.20 in reimbursement of actual litigation costs. (Settlement  
12 Agreement ¶ 33.) Further discussion and support for the requested awards is set forth in Sections VI  
13 and VII, *infra*, and the accompanying Falakassa Decl. ¶¶ 54-62 and Declaration of Mehrdad  
14 Bokhour (“Bokhour Decl.”) ¶ 19-25 filed concurrently herewith.

15       **V.       THE SETTLEMENT IS FAIR, REASONABLE, AND SHOULD BE APPROVED**

16          In 2016, PAGA was amended to require the Court to “review and approve any settlement of  
17 any civil action filed pursuant to this part.” Labor Code § 2699(1)(2). The amendment also requires  
18 that the “proposed settlement shall be submitted to the agency at the same time that it is submitted  
19 to the court.” As such, on the day of filing of this Motion, the Settlement is also being concurrently  
20 submitted to the LWDA in accordance with this section. (Falakassa Decl. ¶ 41.)

21       **A.       Standards for Approval of a PAGA Settlement**

22          The legislative history of PAGA makes little mention of the approval requirements in § 2699,  
23 subdivision (1). PAGA was passed by the legislature as Senate Bill (“SB”) 796, and it was signed  
24 by the Governor and filed with the Secretary of State on October 12, 2003. *See*, Legislative Digest  
25 re Senate Bill No. 796. It took effect on January 1, 2004.

26          The original version of the act did not contain the court approval requirement now codified  
27 in § 2699(1). That subdivision was added as part of the amendments to the Act that were introduced  
28 as SB 1809 in February 2004 and signed by the Governor on August 11, 2004. *See*, Legislative

1 Digest re Senate Bill No. 1809. Those amendments took effect immediately, and the Court approval  
2 requirement of § 2699(l) was one of the provisions that the legislature made retroactive to January  
3 1, 2004. *Id.*

4 Senator Joseph L. Dunn authored both the original PAGA bill (SB 796) and the amendments  
5 (SB 1809). On July 29, 2004, during the consideration of the amendments in SB 1809, Senator Dunn  
6 sent a letter addressed to the President Pro Tem of the Senate, which was published in the Senate  
7 Daily Journal, “to clarify the extent of subdivision (1)” of what is now section 2699. He was sending  
8 this letter “in response to an issue raised by the Judicial Council of California.” *Id.* In the letter,  
9 Senator Dunn stated,

10 The purpose of court review of the penalties in subdivision (l) is to ensure that  
11 settlements involving penalties arising out of Labor Code Section 2699 do not  
12 undercut the dual statutory purposes of punishment or deterrence, or result in unjust,  
arbitrary, and oppressive, or confiscatory settlements. *Id.*

13 The broad criteria appear to give the Court wide latitude in determining whether to approve  
14 the penalties proposes as part of a PAGA settlement. Interestingly, the criteria focus on the effect  
15 the penalties may have on the defendant-employer rather than the LWDA or the aggrieved  
16 employees who will receive the penalties. (*See, Iskanian, supra*, 59 Cal.4<sup>th</sup> at 313 (stating that while  
17 the State clearly has an interest “in receiving the proceeds of civil penalties,” the penalties are “used  
18 to deter violations.”)) This is different than the analysis of a class action settlement, which typically  
19 focuses on the amount received by the class and compares that to the reasonable range of potential  
20 outcomes in this case. (*Cf., e.g., Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4<sup>th</sup> 116,  
21 130.) Moreover, “there is not requirement that the Court certify a PAGA claim for representative  
22 treatment” as in a class action. (*Villalobos v. Calandri Sunrise Farms LP* (C.D. Cal. July 2015) 2015  
23 WL 12732709, at \*5.)

24 **B. The Civil Penalties are Appropriate Under the Circumstances**

25 Here, the penalties are appropriate when considered in light of the principles discussed in  
26 Senator Dunn’s letter. Plaintiff contends that a ***non-reversionary*** Total Settlement Payment of  
27 \$525,000.00 represents an excellent recovery that is large enough to punish or deter Defendant. The  
28 proposed Settlement provides a fair and reasonable monetary recovery for the LWDA and PAGA

1 Settlement Members in the face of hotly disputed claims. (Falakassa Decl. ¶ 42.)

2       **First**, although PAGA and its legislative history do not seem to require a comparison with  
3 the “maximum value” of the claims to the actual settlement amount, the penalties are reasonable  
4 when considered in this context as well. (Falakassa Decl. ¶ 43.) The number of PAGA Settlement  
5 Members in the PAGA covered period is only 1,064 and the number of PAGA-eligible pay periods  
6 is only 28,500. (*Id.*) Further, while Plaintiff believes the claims are meritorious and that he would  
7 have recovered unreduced penalties, Defendant asserts numerous defenses to the claims. (*Id.*) First  
8 and foremost is that the United State Supreme Court is poised to rule on the issue of whether the  
9 Federal Arbitration Act (“FAA”) requires enforcement of a bilateral arbitration agreement providing  
10 that an employee cannot raise representative claims, including under the California Private  
11 Attorneys General Act. (*Id.*; *See also, Viking River Cruises, Inc. v Moriana* (Docket No. 20-1573).)  
12 That issue alone could potentially prove fatal to Plaintiff’s representative action, ergo any settlement  
13 offer in lieu of the fallout of the Supreme Court’s decision is fair and reasonable. (*Id.*)

14       **Second**, a significant factor in evaluating the value of a PAGA-only case is that all PAGA  
15 awards are discretionary and subject to potentially significant reduction by the Court. (Falakassa  
16 Decl. ¶ 44.) Defendant maintains that given its good faith and *de minimis* defenses, this Court would  
17 exercise its discretion to substantially reduce any PAGA penalties if it were to find Defendant liable  
18 for any of Plaintiff’s claims. (*Id.*; *See also, Labor Code* §§ 203, 2699(e)(2); *Thurman v. Bayshore*  
19 *Transit Mgmt., Inc.* (2012) 203 Cal.App.4<sup>th</sup> 1112, 1135 (affirming reduction of PAGA penalties);  
20 *Fleming v. Covidien, Inc.* (C.D. Cal. Aug. 12, 2011, No. (OPX)) 2011 WL 7563047, at \*4 (reducing  
21 PAGA penalties from \$2.8 million to \$500,000).)

22       Additionally, Defendant could argue that Plaintiff could only seek PAGA penalties at the  
23 \$100 “initial” violation rate, as opposed to the \$200 “subsequent” violation rate, since before  
24 Plaintiff initiated this action, Defendant had never been put on notice by a court or the Labor  
25 Commissioner that its practices violated the Labor Code. (Falakassa Decl. ¶ 45; *See also, Amaral v.*  
26 *Cintas Corp. No. 2*, 163 Cal.App.4<sup>th</sup> 1157, 1209 (2008) (finding “initial” violation rate applies until  
27 employer has been notified that it is violating a Labor Code provision).) As a result, Plaintiff took  
28 this into consideration in calculating penalties. (*Id.*)

1 Finally, many of the claims were derivative of each other, which tended to undermine any  
2 stacking of penalties. (Falakassa Decl. ¶ 48.) In light of the foregoing, Plaintiff's Counsel took into  
3 consideration, when valuing the merits of these claims, the chances of prevailing on the derivative  
4 violations, as well as the additional hurdles of prevailing under each standalone violation in light of  
5 the defenses raised, and applied the appropriate discounts. (*Id.*)

6 Based on the data provided by Defendant, the proposed maximum exposure for the PAGA  
7 claims for PAGA Settlement Members is \$2,850,000. (Falakassa Decl. ¶ 49.) Based on the data  
8 provided, it appeared that there was a meal period violation 50% of the shifts and Plaintiff applied  
9 the same analysis for rest period violations. (*Id.*) The proposed Settlement of \$525,000.00 represents  
10 approximately 20% *of the potential maximum exposure.* (*Id.*)

11 However, courts can exercise their discretion to reduce the amount of PAGA penalties.  
12 (Falakassa Decl. ¶ 50; *See also, e.g., Fleming v. Covidien Inc.*, 2011 WL 7563047, at \*4 (C.D. Cal.  
13 Aug. 12, 2011) (reducing PAGA penalties to \$500 per employee prior to the 75-25 split).) The Total  
14 Settlement Payment here is already analogous to that awarded by the Court in *Covidien*. (*Id.*)  
15 Accordingly, the proposed Settlement approximates or provides the same or an even better result  
16 than some actual PAGA trials that were litigated to completion, though other cases also provided  
17 for a greater award than *Covidien*. (*Id.*) Thus, the PAGA settlement amount is reasonable in light of  
18 significant risks and uncertainties associated with the PAGA claims in this case. (*Id.*)

19 Defendant vigorously disputed the merits of Plaintiff's claims. Specifically, Defendant  
20 argued that Plaintiff's rest period claim fails because Defendant maintains policies that provide  
21 employees with a rest break compliant with applicable law. (Falakassa Decl. ¶ 46.)

22 Defendant contends that Plaintiff's allegations regarding denied rest breaks are entirely false.  
23 Defendant further argued it was prepared to call every single current employee to testify as witnesses  
24 at trial that not a single employee was ever denied a rest break. (Falakassa Decl. ¶ 47.)

25 **Third**, the scope of the release of the PAGA Settlement is necessarily strictly confined to  
26 those PAGA civil penalties that were or could have been alleged in the operative Complaint.  
27 (Falakassa Decl. ¶ 51.) The PAGA Released Claims do not release any PAGA Settlement Members'  
28 non-PAGA claims for alleged violations of the Labor Code. (*Id.*) Individual PAGA Settlement

1 Members who believe they have been denied, for example, minimum wage or overtime, can  
2 maintain those rights to pursue those claims in another proceeding. (*Id.*) In that respect, the  
3 Settlement also requires that each PAGA Settlement Member receive a notice, *i.e.*, the PAGA  
4 Notice, which describes this litigation and the Settlement sum. (*Id.*) Plaintiff contends that this notice  
5 will educate PAGA Settlement Members as to the requirements of the Labor Code, something that  
6 is in the public interest and consistent with PAGA’s purposes. (*Id.*; *See also*, Labor Code § 2699(j)  
7 (stating that civil penalties recovered under PAGA shall be distributed to the LWDA for [among  
8 other things] “education of employers and employees about their rights and responsibilities under  
9 this code.”).)

10 **Fourth**, the proposed Settlement, even with deductions, provides a substantial sum of  
11 \$241,210.35 to the State and \$80,403.45 to PAGA Settlement Members. (Falakassa Decl. ¶ 52.) The  
12 Settlement secured by Plaintiff here is equal to or greater than other PAGA penalty awards approved  
13 by California state courts resulting in much lower PAGA penalty payments on a per capita basis.  
14 (*Id.*; *See also, e.g., Penaloza v. PPG Industries Inc.*, Case No. BC471369, 2013 WL 2917624 at \*2  
15 (Super. Ct. L.A. County, May 20, 2013) (approving PAGA penalties of \$5,000.00 to class of 667  
16 members); *Cabrera v. Advantage Sale & Marketing, LLC*, Case No. BC485259, 2013 WL 1182822  
17 (Super. Ct. L.A. County, March 12, 2013) (approving PAGA penalties of \$10,000.00 for class of  
18 approximately 3,000 members).)

19 **Fifth**, public policy strongly favors the settlement of litigation. (Falakassa Decl. ¶ 53;  
20 *Consumer Advocacy Group v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4<sup>th</sup> 46, 63.)  
21 Because the proposed Settlement is neither unjust nor ignores the public interest, it should be  
22 approved. (*Id.*)

## 23 **VI. THE ATTORNEYS’ FEES REQUEST IS FAIR AND REASONABLE**

24 For their efforts and the risk that they undertook in obtaining a common fund settlement that  
25 benefits the LWDA and PAGA Settlement Members, the Parties allocated one-third of the Total  
26 Settlement payment up to \$175,000, to Plaintiff’s Counsel for reasonable attorneys’ fees.  
27 (Settlement Agreement ¶ 28.) These fees are warranted under the law and within the range of fees  
28 commonly awarded in similar cases.

1           **A. Attorneys' Fees Are Recoverable under the Common Fund Doctrine**

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

10           "A qui tam action is one brought under a statute that allows a private person to sue as a  
11 private attorney general to recover damages or penalties, all or part of which will be paid to the  
12 government." (*People ex rel. Stratham v. Acacia Research Corp.* (2012) 210 Cal.App.4<sup>th</sup> 487, 491-  
13 492.) "A qui tam action 'is a type of private attorney general lawsuit' [citation], in which 'the qui  
14 tam plaintiff stands in the shoes of the state or political subdivision [citation].'" (*Id.* at p. 501.) As  
15 the name of the PAGA statute makes clear (e.g., "Labor Code Private Attorney General Act"), a  
16 PAGA action is a qui tam action because the statute allows the employee plaintiff, acting as the  
17 proxy of the state's labor law enforcement agency, to sue his or her employer for Labor Code  
18 violations and recover civil penalties that otherwise would have been assessed and collected by the  
19 Labor and Workforce Development Agency (LWDA). (*Iskanian v. CLS Transp. Los Angeles, LLC*  
20 (2014) 59 Cal.4<sup>th</sup> 348, 380.) "A PAGA representative action is therefore a type of *qui tam* action."  
21 (*Id.* at p. 382.) Here, where a common fund is created in a qui tam action by the successful litigation  
22 of a plaintiff and his attorneys, the plaintiff's attorneys are entitled to recover their fees from the  
23 common fund. (*Falakassa Decl.* ¶ 55; *See also, Bank of America v. Cory* (1985) 164 Cal.App.3d 66,  
24 89-91.)

25           Moreover, a more generic application of the common fund doctrine is found "consistently  
26 in California when an action brought by one party creates a fund in which other persons are entitled  
27 to share." (*City and County of San Francisco v. Sweet* (1995) 12 Cal.4<sup>th</sup> 105, 110.) An award of fees  
28 from the gross settlement amount under the common fund doctrine prevents unjust enrichment of

1 those who benefit from the common fund through the successful efforts of plaintiff's counsel and  
2 furthers the important goal of attracting competent counsel to handle representative actions  
3 enforcing minimum labor standards. (Falakassa Decl. ¶ 56; *See also, Laffitte v. Robert Half Int'l,*  
4 *Inc.* (2016) 1 Cal.5<sup>th</sup> 480, 503.) In affirming the use of the common fund doctrine in California, the  
5 California Supreme Court summarized the benefits of the percentage method of recovery stating:

6       The recognized advantages of the percentage method – including relative ease of  
7       calculation, alignment of incentives between counsel and the class, a better  
8       approximation of market conditions in a contingency case, and the encouragement it  
9       provides counsel to see an early settlement and avoid unnecessarily prolonging the  
      litigation [citations] – convince us the percentage method is a valuable tool that should  
      not be denied our trial courts.

10 (*Id.*; *See also, Lealao v. Beneficial Cal. Ins.* (2000) 82 Cal.App.4<sup>th</sup> 19, 48 (observing that the key  
11 advantage of the common-fund method is that it focuses on the total benefit conferred on the  
12 beneficiaries resulting from the efforts of counsel).) Thus, the common fund approach is the most  
13 reasonable one here given the nature of the case and of the Parties' Settlement.

14       **B.       A Fee of One-Third the Total Settlement Payment is Fair and Reasonable**

15       Among the factors considered in determining whether the requested fee percentage is  
16 reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of  
17 plaintiff's counsel and the quality of work performed by plaintiff's counsel; (4) the contingent nature  
18 of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases.  
19 (*Vizcaino v. Microsoft Corp.* (9<sup>th</sup> Cir. 2002) 290 F.3d 1043, 1048-50.) All these factors support an  
20 award here of one-third of the common fund.

21       First, the efforts of Plaintiff's Counsel resulted in a common fund Settlement amount of  
22 \$525,000.00. This is a good PAGA settlement considering the contested issues.

23       Second, Plaintiff faced significant risks going forward with the litigation. As discussed,  
24 Defendant raised various defenses, such that Plaintiff faced risky issues going forward with this  
25 litigation, as well as the fact that it would have taken significant time to realize any recovery in this  
26 action along with the possibility of post-trial appeals. (Falakassa Decl. ¶ 58.)

27       Third, Plaintiff's Counsel are experienced representative and class action litigators, and have  
28 previously achieved significant PAGA and class action awards. This experience and expertise,

1 combined with the high quality of work performed in this case by Plaintiff's Counsel, resulted in the  
2 Settlement achieved. *See*, (Falakassa Decl. ¶ 5-11); (Bokhour Decl. ¶ 5-13.)

3 Fourth, Plaintiff's Counsel represented Plaintiff (and the State of California) in this matter  
4 on a strictly contingency basis and, as such, had to forego other financial opportunities to litigate  
5 other cases (contingency and hourly), incurred the risk of non-recovery after investment of time,  
6 money, and resources, and have done so since the inception of this case without payment or  
7 compensation. This is not an easy burden for Plaintiff's Counsel and, if the best that could be hoped  
8 for is merely to be paid the customary hourly rate, such would not be sufficiently incentivize future  
9 similar private attorney general/qui tam cases with contingency risks. (Falakassa Decl. ¶ 58-60)

10 Fifth, the request for attorney's fees in the amount of one-third of the common fund falls well  
11 within the norms accepted by state and federal courts in California in comparable representative  
12 actions. (Falakassa Decl. ¶ 57) The following list shows PAGA actions and mixes PAGA/class  
13 action cases where attorney's fees were awarded on a common fund basis in a range between 33.33%  
14 and 40%:

- 15 • *Banda v. Verizon California, Inc.*, Los Angeles Superior Court Case No. BC434587  
16 (**35% fee awarded** on \$15,000,000 settlement of mixed PAGA/class claims);
- 17 • *Robles v. DCH*, Los Angeles County Superior Court Coordination Proceeding Case  
18 No. 4833 (**33.33% fee awarded** on \$4,035,600 settlement of mixed PAGA/class  
19 claims);
- 20 • *Padilla v. Staffmark Investment, Inc.*, San Bernardino County Superior Court Case  
21 No. CIVDS1408641 (**33.33% fee awarded** on \$2,000,000 settlement of a **PAGA**  
22 **only case**);
- 23 • *Bengel v. Career Strategies Temporary, Inc.*, Los Angeles County Superior Court  
24 Case No. BC 565227 (**33.33% fee awarded** on \$750,000 settlement of PAGA/class  
25 claims);
- 26 • *Birch v. Office Depot*, United States District Court for the Southern District of  
27 California, Case No. 06cv1690 DMS (**40% fee awarded** on \$16,000,000 settlement  
28 of mixed PAGA/class claims);

- *Brewer v. Connell Chevrolet*, Orange County Superior Court Case No. 30-2016-00852123-CU-OC-CXC (**33.33% fee awarded on a PAGA only case**);
- *Garcia v. The Pep Boys*, Orange County Superior Court Case No. 30-20014-007205740-CU-OE-CJC (**33.33% fee awarded** on \$1,030,000 settlement of a **PAGA only case**);
- *Perez v. Staffmark Investment, LLC*, Riverside County Superior Court Case No. MCC1401137 (**33.33% fee awarded** on a \$650,000 settlement of a **PAGA only case**).

(*Id.*)

Moreover, the award of a one-third fee recovery under the common fund doctrine was recently approved by the California Supreme Court in *Laffitte, supra*, 1 Cal.5<sup>th</sup> 480, 503. For all of the above reasons, a common fund fee award here in the amount of one-third of the \$525,000.00 common fund created by Plaintiff and his attorneys is fair and reasonable.

#### **VII. THE REQUESTED LITIGATION COSTS ARE FAIR AND REASONABLE**

Plaintiff's Counsel requests reimbursement of their actual out-of-pocket expenses incurred to prosecute this action. These expenses were incidental and necessary to the effective representation of the employees. (*See, Harris v. Marhoefer* (9th Cir. 1994) 24 F.3d 16, 19.) Plaintiff's Counsel are permitted to recover their litigation costs and expenses under the common fund doctrine. (*See, Serrano III*, 20 Cal.3d at 35 (common fund doctrine permits recovery of fees and costs from the fund); *Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1424 n.6 (costs are recoverable from the common fund "[o]f necessity, and for precisely the same reasons discussed above with respect to the recovery of attorneys' fees by...[Plaintiffs'] attorneys").) Furthermore, Plaintiff's Counsel are entitled to recover "those out-of-pocket expenses that would normally be charged to a fee-paying client." (*Harris, supra*, 24 F.3d at 19.)

The Settlement Agreement authorized Plaintiff's Counsel to seek recovery of litigation costs not to exceed \$15,000.00. As set forth below, the total litigation costs for Plaintiff's Counsel to date is **\$10,886.20**:

|     |                                  |             |
|-----|----------------------------------|-------------|
| (1) | Mediation                        | \$7,000     |
| (2) | Expert review of payroll records | \$1,637.54  |
| (3) | PAGA Filing Fee                  | \$75        |
| (4) | PAGA Compliant and other filings | \$1,674.45  |
| (5) | PAGA Filing Fee                  | \$75        |
| (6) | Process Server Fee               | \$74.25     |
| (7) | Total                            | \$10,886.20 |

(Bokhour Decl. ¶ 24.)

#### **VIII. SUBMISSION TO THE LWDA**

As set forth in the Falakassa Decl. at ¶ 41, the Settlement and this Motion are concurrently being submitted to the LWDA in accordance with Labor Code § 2699(1)(2). The proof of electronic submission is attached as **Exhibit B** to the Falakassa Decl.

#### **IX. THE SETTLEMENT ADMINISTRATOR**

The Parties have agreed to use ILYM Group, Inc. as the Settlement Administrator. The Settlement Administrator will be responsible for processing the Individual Payments and providing notice to the PAGA Settlement Members.

#### **X. CONCLUSION**

For the foregoing reasons, Plaintiff requests the court approve the Settlement Agreement.

Dated: February 22, 2022

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