

JCL LAW FIRM, APC

Jean-Claude Lapuyade (State Bar #248676)
Sydney Castillo Johnson (State Bar #343881)
5440 Morehouse Drive, Suite 3600
San Diego, CA 92121
Telephone: (619) 599-8292
Facsimile: (619) 599-8291
jlapuyade@jcl-lawfirm.com
scastillo@jcl-lawfirm.com
mdelatorre@jcl-lawfirm.com

ZAKAY LAW GROUP, APLC

Shani O. Zakay (State Bar #277924)
Julieann Alvarado (State Bar #334727)
5440 Morehouse Dr., Ste 3600
San Diego, CA 92121
Telephone: (619)255-9047
Facsimile: (858) 404-9203
shani@zakaylaw.com
julieann@zakaylaw.com

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

JESUS AGUILAR, on behalf of the State of
California, as a private attorney general,

Plaintiff,

v.

B.I. INCORPORATED, a Corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No. MSC21-01170

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION TO APPROVE PAGA
SETTLEMENT**

Date:

Time:

Judge: Hon. Edward Weil

Dept.: 39

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PERTINENT FACTUAL AND PROCEDURAL BACKGROUND	2
	A. Plaintiff's Exhaustion of Administrative Remedies Under PAGA And Civil Action Against Defendant	2
III.	TERMS OF THE PAGA SETTLEMENT	4
	A. The Gross Settlement Amount	4
	B. Allocation of Individual PAGA Payments	4
	C. Funding and Distribution	5
	D. Release of Claims	5
IV.	THE COURT SHOULD APPROVE THE PAGA SETTLEMENT	6
	A. The Gross Settlement Amount is Fair and Reasonable	6
	i. Estimated Penalties for Rest Period Violations	7
	ii. Estimated Penalties for Meal Period Violations	9
	iii. Estimated Penalties for Defendant's Inaccurate Wage Statements	9
	iv. Estimated Liability for Unpaid Wages	10
	v. The Gross Settlement Compares Favorable To The Likely Recovery	10

///

1	B. The Remaining Settlement Terms Are Fair and Reasonable	13
2		
3	V. THE ATTORNEYS’ FEES AND EXPENSES FAIR AND REASONABLE	14
4		
5	A. The Requested Attorneys’ Fee is Fair and Reasonable	14
6		
7	B. Plaintiffs’ Counsel Are Entitled to Reimbursement of Actual and Reasonably Incurred Litigation Costs	15
8		
9	VI. CONCLUSION	16
10		

///

TABLE OF AUTHORITIES

CASES

<i>Adolph v. Uber Technologies, Inc.</i> Case No. S274671.....	10
<i>Amaral v. Cintas Corp. No. 2</i> (2008) 163 Cal.App.4th 1157, 1209.....	8
<i>Amiri v. Cox Communs. Cal., LLC</i> (C.D. Cal.) 272 F.Supp.3d 1187, 1194.....	11
<i>Bernstein v. Virgin America, Inc.</i> (2021) 3 F.4th 1127, 1144.....	7-8
<i>Boyd v. Bank of America,</i> 2014 WL 6473804, at *11 (C.D. Cal. 2014).....	15
<i>Cal-Air Conditioning v. Auburn Union School Dist.</i> 21 Cal.App.4th 655, 668 (1993).....	13
<i>Cardenas v. McLane Foodservice, Inc.</i> 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011).....	11
<i>Carrington v. Starbucks Corp.</i> 30 Cal. App. 5th 504, 529 (2018).....	8, 12
<i>Cf. Estrada v. Royalty Carpet Mills, Inc.</i> (Cal.App. 4th Dist. March 30, 2022).....	11-12
<i>County of Tulare v. Campbell</i> 50 Cal. App. 4th 847, 853 (1996).....	13
<i>Downtown Palo Alto v. City Council</i> 180 Cal.App.3d 384, 395 (1986).....	13
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794, 1800-1801.....	6
<i>Emmons v. Quest Diagnostics Clinical Labs., Inc.</i> 2017 U.S. Dist. LEXIS 27249 (E.D. Cal. 2017).....	15
<i>Fleming v. Covidien, Inc.</i> 2011 WL 7563047, *4 (C.D. Cal. 2011).....	12
<i>Gola v. University of San Francisco</i> San Francisco Superior Court Case No. CGC-18-5655018.....	12
<i>Harris v. Marhoefer</i> 24 F.3d 16, 19 (9th Cir. 1994).....	16
<i>Hartless</i> 273 F.R.D. at 645-46.....	16
<i>Hernandez v. BCI Coca-Cola Bottling Co.</i> 2012 WL 12272348, at *8 (C.D. Cal. Apr. 12, 2012), aff'd, 554 F. App'x 661 (9th Cir. 2014)...	13
<i>Hibbs-Rines v. Seagate Technologies</i> 2009 WL 513496, *4 (N.D. Cal. Mar. 2, 2009).....	11
<i>Hopkins v. Stryker Sales Corp.</i> No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013).....	15
<i>Iskanian v. CLS Transportation</i> 59 Cal. 4th 348, 381 (2014).....	1
<i>Kaanaana v. Barrett Bus. Servs., Inc.</i> 29 Cal App 5th 778, 788 (2018).....	12

///

1	<i>Kim v. Reins Int'l Cal., Inc.</i>	
2	(2020) 9 Cal.5th 73, 88.....	6
3	<i>Laffitte v. Robert Half Int'l Inc.</i>	
4	1 Cal.5th 480, 504, 506 (2016).....	14-15
5	<i>Lifty v. Merrill Lynch & Co.</i>	
6	(C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 160448.....	11
7	<i>Moniz v. Adecco USA, Inc.</i>	
8	(2021) 72 Cal.App.5th 56, 77, 88.....	6-7
9	<i>Naranjo v. Spectrum Security Services, Inc.</i>	
10	(2023) 88 Cal.App.5th 927.....	9
11	<i>Ordonez v. Radio Shack, Inc.</i>	
12	(C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11.....	8
13	<i>Ortiz v. CVS Caremark Corp.</i>	
14	(N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 36833.....	11
15	<i>Pellegrino v. Robert Half Intern., Inc.</i>	
16	182 Cal.App.4th 278 (2010).....	15
17	<i>Rider v. City of San Diego</i>	
18	11 Cal. App. 4th 1410, 1423 n.6 (1992).....	16
19	<i>Taylor v. FedEx Freight, Inc.</i>	
20	2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016).....	15
21	<i>Vandervort v. Balboa Capital Corp.</i>	
22	8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014).....	15
23	<i>Viking River Cruises v. Moriana,</i>	
24	(2022) 142 S.Ct. 1906.....	10, 13
25	<i>Villa v. United Site Servs. of California, Inc.</i>	
26	(N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8.....	8
27	<i>Wershba v. Apple Computer, Inc.</i>	
28	91 Cal.App.4th 224, 254 (2001).....	15
29	<i>Wesson v. Staples the Off. Superstore</i>	
30	2021 WL 4099059, *11 (Cal. Ct. App. Sept. 9, 2021).....	11
31	<i>Wesson v. Staples the Office Superstore</i>	
32	(2021) 68 Cal.App.5th 746.....	11-13
33	<i>Williams v. Superior Court</i>	
34	(2017) 3 Cal.5th 531, 549.....	6
35	<i>Zayerz v. Kiewit Infrastructure West</i>	
36	2018 U.S. Dist. LEXIS 14918, *14 (C.D. Cal. January 18, 2018).....	10
37	<i>ZB, N.A. v. Superior Court</i>	
38	8 Cal. 5th 175, 182, 196 (2019).....	1, 3-4

RULES, CODES & STATUTES

24	<i>Cal. Code of Civ. Proc. § 382</i>	13
25	<i>Cal. Lab. Code § 200</i>	5
26	<i>Cal. Lab. Code § 201</i>	2, 5
27	<i>Cal. Lab. Code § 202</i>	2, 5
28	<i>Cal. Lab. Code § 203</i>	2, 5
29	<i>Cal. Lab. Code § 204</i>	5
30	<i>Cal. Lab. Code § 210</i>	5
31	<i>Cal. Lab. Code § 226</i>	2, 5, 12-13

1	<i>Cal. Lab. Code</i> § 226.2.....	7
	<i>Cal. Lab. Code</i> § 226.3.....	5
2	<i>Cal. Lab. Code</i> § 226.7.....	2, 5
	<i>Cal. Lab. Code</i> § 226.7(c).....	7
3	<i>Cal. Lab. Code</i> § 351.....	5
	<i>Cal. Lab. Code</i> § 510, <i>et seq</i>	2, 5
4	<i>Cal. Lab. Code</i> § 512.....	2, 5
	<i>Cal. Lab. Code</i> § 558.....	5
5	<i>Cal. Lab. Code</i> § 558(a)(1).....	8-9
6	<i>Cal. Lab. Code</i> § 1194.....	5
	<i>Cal. Lab. Code</i> § 1197.....	5
7	<i>Cal. Lab. Code</i> § 1197.1.....	5
	<i>Cal. Lab. Code</i> § 1198.....	5
8	<i>Cal. Lab. Code</i> § 2698, <i>et seq</i>	2, 5
9	<i>Cal. Lab. Code</i> § 2699.....	4
	<i>Cal. Lab. Code</i> § 2699(1).....	3, 6, 13
10	<i>Cal. Lab. Code</i> § 2699(1)(2).....	4, 6
	<i>Cal. Lab. Code</i> § 2699(e)(2).....	12
11	<i>Cal. Lab. Code</i> § 2699(f)(2).....	6, 11
	<i>Cal. Lab. Code</i> § 2699(g)(1).....	1
12	<i>Cal. Lab. Code</i> § 2699.3(a)(2)(A).....	2
13	<i>Cal. Lab. Code</i> § 2802.....	5

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jesus Aguilar (“Plaintiff”) seeks approval of the Joint Stipulation of Settlement of
4 PAGA Action and Release of PAGA Claims (“Agreement”)¹, which if approved, would provide
5 valuable monetary relief for 207 “PAGA Members,” defined as all current and former non-exempt
6 employees employed by Defendant B.I. Incorporated in California between April 13, 2020, through
7 and including January 8, 2023 (“PAGA Period”). Agreement at § I(N). This is only a settlement of
8 the PAGA claim for civil penalties and is not a class settlement and does not release the individual
9 wage claims, if any, of the affected employees other than Plaintiff himself. Cal. Lab. Code §
10 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior*
11 *Court*, 8 Cal. 5th 175, 182 (2019) (unpaid wages are not recoverable under PAGA).

12 If approved, the PAGA Members and the California Labor Workforce and Development
13 Agency (“LWDA”) will share in a Gross Settlement Amount of Three Hundred Twenty Thousand
14 Dollars and Zero Cents (\$320,000.00). Agreement at § I(G). After deducting any Court-approved
15 Plaintiff’s Attorneys’ Fees and Costs and the Settlement Administration Expenses, the PAGA
16 Settlement Amount shall be distributed, 75% to the LWDA and 25% to the PAGA Members.
17 Agreement at § I(O).

18 An objective evaluation of the proposed settlement confirms that the relief negotiated on
19 behalf of the PAGA Members and the LWDA is fair, reasonable, and valuable. The Settlement is a
20 product of informed, adversarial, and non-collusive and mediated negotiations between experienced
21 counsel. As discussed below, the proposed Settlement satisfies all criteria for PAGA settlement
22 approval. Accordingly, Plaintiff and Plaintiff’s Counsel respectfully request this Court grant
23 approval of the Agreement. Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 9.

24
25
26 ///

27 ¹ The Agreement is attached as Ex “1” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to
28 the Agreement incorporate by this reference a citation to the JCL Dec., ¶ 3. Further, unless indicated otherwise,
capitalized terms used herein have the same meaning as those defined by the Agreement.

II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Exhaustion of Administrative Remedies Under PAGA And Civil Action Against Defendant

On February 11, 2021, Plaintiff on behalf of himself and on behalf of other PAGA Members served Defendant and the LWDA with a Notice of Violations ("PAGA Notice") and draft complaint memorializing claims against Defendant for alleged violations of the California Labor Code, including causes of action for failure to pay for all hours worked, including minimum and overtime wages in violation of Labor Code sections 510; failure to provide compliant meal and rest periods in violation of Labor Code sections 226.7 and 512; failure to provide accurate itemized wage statements in violation of Labor Code section 226; failure to pay at the correct regular rate of pay; failure to provide wages when due in violation of Labor Code sections 201, 202, and 203; and Violation of the Private Attorney General Act [Labor Code §§ 2698 et seq.; (LWDA Case No. 821632-21). JCL Dec., at ¶ 10.

The 65-day "waiting period" on Plaintiff's right to file a civil action under PAGA, *see* Cal. Lab. Code § 2699.3(a)(2)(A), lapsed without the LWDA notifying Plaintiff that they intended to investigate the claims in the PAGA Notice. To date, the LWDA still has not advised any of the Plaintiff of any intent to take action with respect to the claims in the PAGA Notice. JCL Dec., at ¶ 11.

On June 17, 2021, Plaintiff filed a class action complaint against Defendant in the Superior Court for Contra Costa, Case Number MSC21-01170. The complaint alleged a single cause of action for violation of the Private Attorneys General Act at Cal. Lab. Code §§2698, *et seq.* JCL Dec., ¶ 12.

On October 19, 2022, the Parties attended a full-day mediation with experienced wage and hour class and PAGA action mediator Jeffrey Krivis. In advance of the with the mediation, Defendant provided Plaintiff with sufficient information to properly evaluate Defendant's class wide liability exposure. Among the data and documents Defendant produced included, but was not limited to, the total number of PAGA Members, pay periods, written wage and hour policies, employee handbooks, and over 800,000 unique cells of time and payroll data. JCL Dec., ¶ 13.

1 Unfortunately, the mediation concluded without a settlement. Notwithstanding, Mediator
2 Krivis remained in communication with the Parties. After several months of continued backchannel
3 communication conducted through Mediator Krivis, the Parties finally reached an agreement to
4 resolve Plaintiff’s PAGA action. JCL Dec., ¶ 14.

5 The Parties subsequently executed a binding and enforceable Memorandum of
6 Understanding (“MOU”). After reaching an agreement in the principle, the Parties drafted and
7 negotiated a long-form settlement which is the subject of the instant motion. The Settlement was
8 negotiated in light of all known facts and circumstances and the uncertainty associated with litigation
9 – including the risk of Plaintiff not being able to maintain representative claims and establishing
10 manageability, the difficulty of proving Plaintiff’s claims in a manageable trial, the merits of
11 Defendant’s potential defenses, and the significant delay and potential appellate issues inherent to
12 litigation – and was reached after extensive arm’s length negotiations, with the assistance of
13 Mediator Krivis. JCL Dec., at ¶ 15.

14 The Settlement is intended to fully and finally resolve the Released PAGA Claims asserted
15 by Plaintiff on behalf of the PAGA Members and State of California. This is only a Settlement of
16 the PAGA claims for civil penalties and is not a class settlement and does not release the individual
17 claims, if any, of the PAGA Members. This Settlement does not release any claim that is not a
18 PAGA claim.² Nor does this Settlement waive Defendant’s right to assert *res judicata* or other
19 available defense to any asserted claim or lawsuit. JCL Dec., at ¶ 16.

20 Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of the
21 Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant
22 motion for settlement approval as set forth in the accompanying proof of service. Additionally,
23 Plaintiff will submit to the LWDA a copy of the Court’s judgment and order approving the
24 Settlement Agreement within ten (10) days after entry of judgment or order. JCL Dec., at ¶ 17;
25 Agreement § III(L).

26 ///

27 _____
28 ² As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th 175 at 196: “Nonparty employees are bound by the judgment in an action under the PAGA, but only with respect to recovery of civil penalties.”

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

2 **A. The Gross Settlement Amount**

3 The PAGA settlement is subject to Court approval consistent with Labor Code § 2699(1)(2).
4 The Settlement Agreement negotiated by the Parties provides for a Gross Settlement Amount
5 payment in the amount of Three Hundred Twenty Thousand Dollars and Zero Cents (\$320,000.00)
6 to resolve the PAGA claims. From the Gross Settlement Amount, there is a deduction of attorneys'
7 fees in the amount of \$106,666.67 (which is one-third of the Gross Settlement Amount),
8 reimbursement of incurred costs in an amount not to exceed \$20,000.00, and Settlement
9 Administration Expenses which will not exceed \$6,000.00. Agreement at §§ I(T); III(J)(9)-(10).
10 After these deductions, the amount remaining is the "PAGA Settlement Amount," which is
11 estimated to be \$187,333.33. JCL Dec., ¶ 18.

12 The Gross Settlement Amount will be used to satisfy the Plaintiff's Attorneys' Fees and
13 Costs, the LWDA Payment, the Payment to PAGA Members, and the Settlement Administration
14 Expenses. Agreement at § I(G).

15 Of the PAGA Settlement Amount, seventy-five percent (75%) shall be paid to the LWDA
16 ("LWDA Payment"), and the remaining twenty-five percent (25%) shall be paid to the PAGA
17 Members ("PAGA Member Payment"). Agreement at § I(O). This 75/25 allocation is required by
18 Labor Code § 2699 as explained by *ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019).

19 **B. Allocation of PAGA Member Payments**

20 The PAGA Member Payment shall be based on the number of pay periods each PAGA
21 Member worked during the PAGA Period as a percentage of the total pay periods worked by all
22 PAGA Members during the PAGA Period. Agreement at § III(J)(1). The PAGA Period is the period
23 between April 13, 2020, through and including January 8, 2023. Agreement at § I(N).

24 At the time of mediation, Defendant estimated that there were approximately 207 PAGA
25 Members who worked approximately 8,770 pay periods during the PAGA Period based on company
26 records. Agreement at § III(A)(2).

27
28 ///

1 **C. Funding and Distribution**

2 Provided that an order approving this Settlement is entered by the Court, Defendant shall
3 fund the Gross Settlement Amount within ten (10) business days of the Court's entry of the order
4 approving this Settlement. Agreement at § I(F). Within thirty (30) business days of its receipt of the
5 Gross Settlement Amount, the Settlement Administrator will transmit the LWDA Payment to the
6 LWDA as one lump sum payment. Agreement at § III(J)(8).

7 No later than five (5) calendar days after the Funding Date, the Settlement Administrator will
8 mail the Individual PAGA Member Payments by regular First-Class U.S. Mail to the PAGA
9 Members' last known mailing address. Agreement at § III(J)(4). Settlement checks issued to PAGA
10 Members will expire one hundred eighty (180) days from the date they are issued by the Settlement
11 Administrator. Agreement at § III(J)(6). If the check remains uncashed by the expiration of the 180-
12 day period, the Settlement Administrator shall cause the aggregate sum represented by those
13 uncashed checks to be sent to the State of California's Controller, to be held in the name of each
14 expired check payee. *Id.* The individual PAGA Member Payments are 100% penalties and shall be
15 reported using IRS Form 1099s. Agreement § III(A)(2). The individual PAGA Member Payments
16 are 100% penalties and interest and shall be reported using IRS Form 1099s. Agreement § III(J)(2).

17 **D. Release of Claims**

18 Upon entry of Judgment and funding of the Gross Settlement Amount, the State of
19 California, the PAGA Members and Plaintiff shall release the Released Parties from the Release
20 PAGA Claims which include all claims, demands, rights, liabilities, and causes of action for civil
21 penalties under PAGA alleged or that could have been alleged based on the facts alleged in February
22 11, 2021 letter to the LWDA, and the operative Complaint, that arose during the PAGA Period,
23 including claims for civil penalties under PAGA arising from alleged violations of *Labor Code*
24 sections 200, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 351, 510, 512, 558, 1194, 1197, 1197.1,
25 1198, 2802, and 2698 *et seq.*, applicable IWC Wage Orders, and all PAGA penalties arising from the
26 violations alleged. Agreement at § I(V).

27
28 ///

1 **IV. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT**

2 Labor Code § 2699(l) requires that the Court “shall review and approve any settlement of any
3 civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the
4 agency at the same time that it is submitted to the court.” Further, the Court in *Moniz v. Adecco*
5 *USA, Inc.* (2021) 72 Cal.App.5th 56, 77 stated that “the trial court must review and approve a PAGA
6 settlement (§ 2699, subd.(l)(2)), and the Supreme Court has in dictum referred to this review as a
7 safeguard.” (Citing *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 88; internal
8 quotations omitted.) “The Supreme Court has also observed that trial court approval ensures that
9 any negotiated resolution is fair to those affected,” leading the Court in *Moniz* to determine that
10 “adoption of a standard of review for settlements that prevents fraud, collusion or unfairness, and
11 protects the interests of the public and the LWDA in the enforcement of state labor laws is
12 warranted.” (*Moniz, supra*, 72 Cal.App.5th at 77; citing *Williams v. Superior Court* (2017) 3 Cal.5th
13 531, 549; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801; internal citations
14 omitted.) In other words, “[i]n review and approval of a proposed settlement under section 2699,
15 subd. (l)(2), a trial court thus must scrutinize whether, in resolving the action, a PAGA plaintiff has
16 adequately represented the state’s interests, and hence the public interest.” (*Moniz, supra*, 72
17 Cal.App.5th at 88.) Consequently, the Parties respectfully ask the Court to review and approve the
18 settlement of the PAGA claims and the PAGA Settlement Amount to be paid as part of the proposed
19 Settlement.

20 **A. The Gross Settlement Amount is Fair and Reasonable**

21 The Gross Settlement Amount of \$320,000.00 is fair and reasonable and, therefore, should be
22 approved. JCL Dec., ¶ 19. Here, *without stacking* the PAGA penalties, Defendant’s *maximum*
23 liability exposure is estimated at approximately \$811,500 in PAGA penalties (8,115 pay periods
24 multiplied by \$100 per pay period³). JCL Dec., ¶ 20. Assuming the Court permitted Plaintiff to stack
25 PAGA penalties, Plaintiff’s third-party damages consultant estimated Defendant’s maximum
26
27

28 ³ California Labor Code section 2699(f)(2) provides the default penalty for PAGA violations of \$100 for initial violations and \$200 for subsequent violations.

liability exposure at approximately \$1,848,000. Plaintiff's consultant estimated Defendant's exposure as follows:

Claim	Penalty Amount ⁴	Number of Pay Periods w/ Violation	Violation Rate	Total Penalties
<i>Rest Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	2,251	27.7% of PAGA Pay Periods	\$112,500
<i>Meal Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	2,251	27.7% of PAGA Pay Periods	\$112,500
<i>Wage Statement Violations</i> Cal. Labor Code §§ 226 and 226.2	\$100	8,115	100% of PAGA Pay Periods	\$811,500
<i>Unpaid Wages Violations</i> Cal. Labor Code §§ 201, 202, 203, 204, 1194, 1197, 1997.1, 1198 and 558	\$100	8,115	100% of PAGA Pay Periods	\$811,500

JCL Dec., ¶ 21.

i. Estimated Penalties for Rest Period Violations

Plaintiff also alleged that Defendants failed to provide compliant rest periods. Specifically, Plaintiff alleged that because of their rigorous work schedules, Plaintiff and PAGA Members were not able to take timely and duty-free rest periods. Specifically, Plaintiff argued that Defendant maintained a rest period policy that required employees to remain on premises during their rest periods. JCL Dec., ¶ 22. Lab. Code § 226.7(c) provides that “if an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including ... an ... order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest or recovery period is not provided.” Plaintiff’s expert identified a 27.7% violation rate for meal periods based upon the expert’s review of time and payroll records. Plaintiff’s expert analysis did not, however, consider instances where meal periods were non-compliant because an employee voluntarily waived

⁴ In *Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144, the court decided that “[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.” Therefore, Plaintiff used only penalties for initial violations.

1 a compliant break. Because rest periods are not recorded, Plaintiff's expert could not identify a
2 violation rate. Plaintiff therefore made the reasonable assumption that rest period violations were
3 committed at a rate similar to that of meal period violations. JCL Dec., ¶ 23.

4 Defendant argued that Plaintiff's rest break claim would have mainly relied on the testimony
5 of PAGA Members, making it a riskier claim. Establishing liability likely would have entailed
6 competing testimony stating either rest breaks were taken, or rest breaks were voluntarily waived.
7 *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because
8 of the competing testimony before the Court, plaintiff's evidence that defendant may have an illegal,
9 written rest break policy is insufficient for this Court to find that common issues predominate.");
10 *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8
11 ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform
12 practices."). JCL Dec., ¶ 24.

13 Based on an estimated 27.7% violation rate, Plaintiff contended that his claim for rest period
14 violations was potentially worth approximately \$405,700 dollars. This was calculated by multiplying
15 the number of total pay periods with a rest period violation by a violation rate of \$50 dollars. The
16 \$50 penalty rate was used for a number of reasons in this instance. First, Defendant argued that
17 increased civil penalties for subsequent violations do not apply unless the Plaintiff can present
18 evidence that the Labor Commission or a court notified the employer that it was in violation of the
19 Labor Code. *Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144 citing *Amaral v. Cintas*
20 *Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209 ["Until the employer has been notified that it is
21 violating a Labor Code provision ... the employer cannot be presumed to be aware that its
22 continuing underpayment of employees is a 'violation' subject to penalties."].) Separately,
23 Defendant also argued that courts have considerable discretion to reduce the penalty awards under
24 PAGA. *See, e.g. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (reducing the maximum
25 PAGA penalty amount by 90%, at \$5 per pay period). Accordingly, it is unlikely that Plaintiff
26 would recover full penalty amounts even if he prevailed in establishing the underlying Labor Code
27 violations. Pursuant to California Labor Code section 558(a)(1), an employer is subject to a penalty
28 of \$50 for violations of a Labor Code section regulating hours and days of work, including meal

1 period and rest period violations. Thus, because section 558(a)(1) specifically provides for a civil
2 penalty, Plaintiff used a \$50 penalty per violation for the meal and rest break claims. JCL Dec., ¶
3 25.

4 **ii. Estimated Penalties for Meal Period Violations**

5 Plaintiff also alleged that Defendant's time records reflected non-compliant meal periods,
6 and that Plaintiff and other PAGA Members were encouraged to work through their meal period.
7 Additionally, Plaintiff's expert found that 80.8% of shifts between 10 and 12 hours were without a
8 recorded second meal period. Conversely, Defendant asserted that it maintained facially compliant
9 meal period policies and practices throughout the PAGA Period. Thus, Defendant argued that there
10 was no potential liability for Plaintiff's alleged meal period violations. Plaintiff estimated the
11 damages for this claim at \$112,500. This number was calculated by multiplying the number of total
12 pay periods where there was a meal period violation by a violation rate of \$50 dollars. The \$50
13 penalty rate was used for the same reasons as stated above. JCL Dec., ¶ 26.

14 **iii. Estimated Penalties for Defendant's Inaccurate Wage Statements**

15 Plaintiff alleged derivative wage statement violations based Defendant's failure to provide
16 meal and rest periods. Plaintiff's expert estimated that Defendant's exposure for this claim was
17 approximately \$811,500 in penalties. This was calculated by multiplying the total number of pay
18 periods by a violation rate of \$100 per pay period. Plaintiff assumed a 100% violation rate for
19 inaccurate wage statements upon the derivative wage statement penalties as a result of Defendant's
20 failure to provide meal and rest periods. Plaintiff's Counsel considered the arguable presence of
21 various penalties and weighed the potential recoveries against probable defenses. Specifically,
22 Defendant could also argue that that meal and rest period violations do not entitle employees like
23 Plaintiff and the PAGA Members to pursue the derivative itemized wage statement penalties.
24 (*Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 927). Plaintiff could not give
25 the penalty claims great weight given that they depended on proving the underlying claims, which
26 had their own risks. JCL Dec., ¶ 27.

27
28 ///

1 **iv. Estimated Liability for Unpaid Wages**

2 Plaintiff also alleged that Defendant failed to pay its employees for all hours worked.
3 Specifically, Plaintiff asserts that Defendant failed to pay employees for time spent undergoing
4 COVID-19 questionnaires before being able to clock in for their shifts. Defendant vigorously denied
5 liability for this claim. Defendant argued, among other things, that all PAGA Members were
6 properly paid minimum and overtime compensation for all hours worked and that PAGA Members
7 were instructed not to work off-the-clock. Plaintiff's expert estimated that Defendant's exposure for
8 this claim was approximately \$811,500 in penalties. This number was calculated by multiplying the
9 number of pay periods with a violation by a violation rate of \$100 per pay period. JCL Dec., ¶ 28.

10 **v. The Gross Settlement Compares Favorably To The Likely Recovery**

11 In light of the above, the Gross Settlement Amount is approximately 17.3% of Defendant's
12 potential PAGA exposure. The Gross Settlement Amount compares favorably to the likely recovery
13 of PAGA penalties through continued litigation. JCL Dec., ¶ 29.

14 Defendant's maximum exposure to PAGA penalties is not a realistic outcome of the
15 litigation because it fails to account for the risks of continued litigation including, but not limited to,
16 Defendant's defenses. *See, Zayerz v. Kiewit Infrastructure West*, 2018 U.S. Dist. LEXIS 14918, *14
17 (C.D. Cal. January 18, 2018). For instance, Defendant contended that Plaintiff's PAGA claims
18 could be and likely would be wiped out in the light of the United States Supreme Court decision in
19 *Viking River Cruises v. Moriana*, (2022) 142 S.Ct. 1906. JCL Dec., ¶ 30.

20 In *Viking River*, the U.S. Supreme Court held that PAGA claims are preempted by the
21 Federal Arbitration Act, where, as here, arbitration agreements were signed by the employees. This
22 posed a very significant risk to Plaintiff's case which was ultimately realized. *See Viking River*
23 *Cruises v. Moriana*, (2022) 142 S.Ct. 1906. Therefore, Plaintiff was mindful that their case could be
24 potentially wiped because of the U.S. Supreme Court's adverse decision. Plaintiff's claims are
25 arguably worthless in the post-*Viking River* world. *Cf. Adolph v. Uber Technologies* (California
26 Supreme Court has agreed to examine if SCOTUS relied on an incorrect understanding of California
27 state law in *Viking River*. Specifically, whether the representative side of the PAGA claim can, under
28 state law, continue even if the individual portion of the claim, if any exists, is compelled to

1 arbitration). *Id.* JCL Dec., ¶ 31.

2 Second, Defendant argued that it can only be assessed civil penalties for actual violations of
3 the Labor Code. *See* Lab. Code § 2699(f)(2). In other words, to recover any civil penalties, Plaintiff
4 would be required to prove the underlying Labor Code violations. (*Cardenas v. McLane*
5 *Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) [“Given the statutory
6 language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not
7 proven suffered a violation of the Labor Code by the defendant.”].) To do this, Plaintiff would need
8 to prove each PAGA Member was subject to the alleged Labor Code violation, which would be
9 difficult to do, since Defendant denies any liability or wrongdoing of any kind associated with the
10 claims alleged in this action. JCL Dec., ¶ 32.

11 Thus, Defendant contended that Plaintiff would be required to “prove Labor Code violations
12 with respect to each and every individual on whose behalf Plaintiff seek to recover civil penalties
13 under PAGA.” *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2,
14 2009). When “determining whether the employer committed Labor Code violations with respect to
15 each employee” is impractical, the PAGA action can be dismissed. *Wesson v. Staples the Off.*
16 *Superstore*, 2021 WL 4099059, *11 (Cal. Ct. App. Sept. 9, 2021). JCL Dec., ¶ 33.

17 Third, Defendant contended that PAGA actions with numerous employees, many locations,
18 and different types of employees are not manageable and may be dismissed on that basis. *See*,
19 *Wesson v. Staples the Office Superstore*, (2021) 68 Cal.App.5th 746 (holding that courts can dismiss
20 PAGA claims if significant variation exists among aggrieved employees, who have unique factual
21 situations) *see also*, *Ortiz v. CVS Caremark Corp.* (N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 36833
22 (dismissing PAGA claim as unmanageable because “a multitude of individualized assessments
23 would be necessary”); *Lifty v. Merrill Lynch & Co.* (C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 160448
24 (striking PAGA claim as unmanageable because “individualized issues predominate in this action”
25 and a “multitude of individualized assessments would be necessary”); *Amiri v. Cox Communs. Cal.,*
26 *LLC* (C.D. Cal.) 272 F.Supp.3d 1187, 1194 (striking PAGA claim as unmanageable). Here, with
27 over 200 PAGA Members working in different types of jobs, Defendant asserted that Plaintiff’s
28 theories were unmanageable. *Cf. Estrada v. Royalty Carpet Mills, Inc.*, (Cal.App. 4th Dist. March

1 30, 2022) (disagreeing with *Wesson* and creating a split among the Courts of Appeal on whether
2 manageability is a prerequisite to bringing a PAGA claim). JCL Dec., ¶ 34.

3 Fourth, a ballot initiative to eliminate PAGA has qualified for the 2024 ballot.
4 See [https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-](https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-2024-ballot/)
5 [2024-ballot/](https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-2024-ballot/). If this initiative passes, it will effectively repeal PAGA by taking away the ability to
6 pursue civil penalties via a representative action. Plaintiff views this initiative as a significant
7 additional risk due to the potential limitation on their ability to recover penalties against Defendant
8 should litigation continue. JCL Dec., ¶ 35.

9 Finally, the maximum penalty figure does not consider that Courts have complete discretion
10 to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on
11 the facts and circumstances of the particular case, to do otherwise would result in an award that is
12 unjust, arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code § 2699(e)(2)). In fact, Courts
13 routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g. Carrington v.*
14 *Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (reducing PAGA penalties to \$5 per pay period;
15 “Although the trial court may have disagreed with Starbucks regarding the issue of liability, it
16 clearly took the circumstances proffered by Starbucks into consideration when it imposed the
17 penalty ... only \$5 per initial violation”); *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal App 5th 778,
18 788 (2018), review granted on other grounds (noting that the trial court “exercised its discretion to
19 reduce the [PAGA] penalties to 13 percent of the full amount [requested, because] [o]n average,
20 plaintiffs were deprived of 13 percent of the 30-minute meal period”); *Fleming v. Covidien, Inc.*,
21 2011 WL 7563047, *4 (C.D. Cal. 2011) (exercising discretion to reduce the maximum amount of
22 PAGA civil penalties for plaintiffs’ section 226 claims from \$2,800,000 to \$500,000 because the
23 employees suffered no injuries as a result of the erroneous wage statements and made no complaints
24 about the errors or omissions in the wage statements, thus reducing the maximum penalty by 82%);
25 *see also, Gola v. University of San Francisco*, San Francisco Superior Court Case No. CGC-18-
26 5655018, Proposed Statement of Decision, dated July 21, 2020, Judge Curtis A. Karnow of San
27 Francisco Complex (concluding after a full-blown bench trial that a penalty of 15% of the maximum
28 PAGA penalties was the appropriate penalty). The gross amount obtained by Plaintiff’s Counsel is

1 reasonable in light Defendant's arguments. Further, the adverse decisions in *Viking River Cruises*
2 and *Wesson* pose very significant, and even fatal, risk to Plaintiff's case. JCL Dec., ¶ 36

3 Defendant's substantial compliance could also operate to prevent the imposition of PAGA
4 penalties. JCL Dec., ¶ 37. A corollary of PAGA being an enforcement action is that "substantial
5 compliance with statutory directives will suffice if the purpose of the statute is thereby
6 satisfied." *Downtown Palo Alto v. City Council*, 180 Cal.App.3d 384, 395 (1986) (emphasis
7 supplied); *see also Hernandez v. BCI Coca-Cola Bottling Co.*, 2012 WL 12272348, at *8 (C.D. Cal.
8 Apr. 12, 2012), *aff'd*, 554 F. App'x 661 (9th Cir. 2014) (granting defendant's motion for summary
9 judgment based on defendant's "substantial compliance" with Labor Code section 226). In this
10 regard, "[t]he paramount consideration is the objective of the statute." *Id.* "Where there is
11 compliance as to all matters of substance[,] technical deviations are not to be given the stature of
12 noncompliance." *Cal-Air Conditioning v. Auburn Union School Dist.*, 21 Cal.App.4th 655, 668
13 (1993) (emphasis supplied). "Unless the intent of a statute can only be served by demanding strict
14 compliance with its terms, substantial compliance is the governing test." *County of Tulare v.*
15 *Campbell*, 50 Cal. App. 4th 847, 853 (1996) (emphasis supplied).

16 Given Defendant's defenses to the claimed Labor Code violations at issue, and the risks and
17 costs of continued litigation, Plaintiff and Plaintiff's Counsel believe that the Gross Settlement
18 Amount is fair and reasonable. This settlement was negotiated by experienced counsel at arm's
19 length. JCL Dec., ¶ 38. The LWDA has been provided notice of this motion and the PAGA
20 settlement, and the decision of LWDA to accept the PAGA settlement and not oppose the motion
21 should be given considerable weight. Moreover, the LWDA is a sophisticated government entity that
22 can assert and protect its own rights. JCL Dec., ¶¶ 5, 39.

23 **B. The Remaining Settlement Terms Are Fair and Reasonable**

24 Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code §
25 2699(1) does not require that a court approve any other elements of the proposed settlement.
26 Because there are no class allegations for which Plaintiff seeks approval, the approval provisions
27 applicable to class settlements under Cal. Code Civil Proc. § 382 do not apply. Accordingly, the
28

1 Court only needs to approve the settlement of the civil penalties sought in the PAGA claim.
2 Nevertheless, as explained herein, the settlement terms for attorneys' fees and costs are reasonable.

3 **V. THE ATTORNEYS' FEES AND EXPENSES FAIR AND REASONABLE**

4 Plaintiff's Counsel seeks approval of Attorneys' Fees in the amount of \$106,666.67 (one-
5 third of the Gross Settlement Amount) and Attorneys' Expenses not to exceed \$20,000.00⁵ for
6 reimbursement of actually incurred litigation expenses. PAGA does not have any requirements for
7 reviewing attorneys' fees, and Plaintiff's position is that the payment of attorneys' fees and costs in
8 this Settlement is a matter of contract for a contingent representation. Nevertheless, should this
9 Court review the requested attorneys' fees, the requested fees and costs are reasonable for
10 experience wage and hour counsel. JCL Dec., ¶ 40.

11 **A. The Requested Attorneys' Fee is Fair and Reasonable**

12 The requested Attorneys' Fee of \$106,666.67 and reimbursement of Attorneys' Expenses of
13 up to \$20,000.00 is fair, reasonable, and justified by the result achieved. Agreement at § III(J)(9);
14 JCL Dec., ¶ 41. Plaintiff's Counsel negotiated a recovery of \$320,000.00, and this result justifies the
15 requested fees equal to one third of this recovery. This percentage is within the standard contingent
16 recovery percentage of one-third, and this percentage is what was expressly approved by the
17 Supreme Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016). At the time this case
18 was brought, the result was far from certain. Defendant's defenses to the merits of the case created
19 difficulties with proof and complex legal issues for Plaintiff's Counsel to overcome. Here, several
20 defenses asserted by Defendant present serious threats to the claims of Plaintiff and the PAGA
21 Members. Defendant asserted that its employment practices complied with all applicable Labor laws.
22 If successful, Defendant's factual and legal defenses would eliminate *any recovery* to the PAGA
23 Members. While Plaintiff believes that these defenses could be overcome, Defendant maintains that
24 these defenses have merit and therefore present a serious risk to recovery. The Settlement was
25 possible because, in Plaintiff's Counsels' eyes, Plaintiff's Counsel was able to persuade Defendant
26
27

28 ⁵ As detailed *infra*, at the time of filing this motion, Plaintiff's Counsel incurred \$12,935.77 litigating this matter. Plaintiff will provide the Court with a final amount of litigation costs at the time of hearing on this motion.

1 that there was an appreciable risk that Plaintiff would prevail on the factual and legal issues
2 underlying liability and overcome difficulties in proof as to monetary relief. JCL Dec., ¶ 42.

3 Further, the fee award is justified by the work performed. Generally, the Ninth Circuit and
4 California Courts award multipliers between 2 to 4 times the lodestar to reward counsel for
5 accepting the contingent risks of the litigation or obtaining good results. See, e.g., *Laffitte*, 1 Cal. 5th
6 at 506 (approving one-third fee award with multiplier between 2.03 and 2.13); *Pellegrino v. Robert*
7 *Half Intern., Inc.*, 182 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0 are often
8 applied and affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254
9 (2001) (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa Capital Corp.*,
10 8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.52 multiplier
11 of lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-
12 third of fund, which was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-
13 02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented
14 a multiplier of 2.76 as falling within the "majority" range for risk multipliers).

15 As detailed in Plaintiff's Counsels' time and billing records submitted herewith, Plaintiff's
16 Counsels' current combined loadstar is \$90,165.00. JCL Dec., ¶¶ 43-53; Declaration of Shani
17 Zakay ("Zakay Dec.") at ¶¶ 3-5; Declaration of Norman B. Blumenthal ("BNBD Dec.") ¶ 3. Thus,
18 Plaintiff's Counsels' fee request is equal to Plaintiff's Counsel's loadstar with a negligible
19 multiplier of 1.18 – well below the 2.13 multiplier approved in *Laffitte* – and well within the
20 recognized multiplier range between 2 and 4. See also *Taylor v. FedEx Freight, Inc.*, 2016 U.S.
21 Dist. LEXIS 142202 (E.D. Cal. 2016) (following *Laffitte*, approved 30% fee award with cross-
22 check lodestar multiplier of 2.26); *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, 2017 U.S.
23 Dist. LEXIS 27249 (E.D. Cal. 2017) (following *Laffitte*, approved 33% fee award with cross-check
24 lodestar multiplier of 1.7).

25 **B. Plaintiff's Counsel Are Entitled to Reimbursement of Actual and Reasonably**
26 **Incurred Litigation Costs.**

27 Attorneys who create a common fund for the benefit of a class are entitled to payment from
28 the fund of reasonable litigation expenses and costs. Common fund fee and expense awards include

counsel's incurred expenses because those who benefit from their effort should share in the cost. *See Rider v. City of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992). The appropriate analysis in deciding if costs are compensable is whether the costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *see also Hartless*, 273 F.R.D. at 645-46 (common fund class action settlement where court awarded litigation costs for consultants, online legal research, copying, postage, long distance charges, travel expenses, filing fees, mediation fees and investigation fees). Prior to incurring costs for filing of this motion, PAGA Counsel collectively expended \$12,935.77 prosecuting this action (JCL Law Firm, APC - \$800.52, Zakay Law Group, APLC - \$735.79 and BNBD - \$11,399.46). JCL Dec. ¶¶ 7, 54; Zakay Dec., ¶¶ 6-7; BNBD Dec. ¶ 3. Plaintiff's Counsel's out-of-pocket expenses are the types of expenses normally charged to paying clients including the following: filing fees; copying; postage; factual and legal research charges; mediation fees; and expert costs which were all incurred during, and were necessary for the successful prosecution of, the litigation and, therefore, should be reimbursed. JCL Dec. ¶¶ 6, 55.

VI. CONCLUSION

Based on the foregoing, Plaintiff respectfully request this Court approve the PAGA Settlement as set forth in the Settlement Agreement and enter the proposed order and judgment submitted herewith.

Dated: June 20, 2023

JCL LAW FIRM, APC

By: 

Jean-Claude Lapuyade, Esq.