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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

STEPHEN CLEGG and MICHAEL EMMENS; individually, and on behalf of other aggrieved employees; PLAINTIFFS, v. BOB'S DISCOUNT FURNITURE, LLC, a Massachusetts Limited Liability Company; and DOES 1 thru 10, inclusive, DEFENDANTS.	Case No. 21STCV15281 [Case Assigned for All Purposes to Hon. Jon. R. Takasugi in Dept. 17] **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** *[Filed concurrently with Declarations of Kelsey M. Szamet; Michael D. Singer , Lisa Mullins of ILYM Group, Inc., Plaintiff STEPHEN CLEGG; Plaintiff MICHAEL EMMENS; [Proposed] Order, and Judgment]* Date: May 28, 2024 Time: 9:30 AM Dept.: 17 Complaint Filed: April 22, 2021 Trial Date: None Set **Reservation No. 950803998414**

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 28, 2024 at 9:30 AM in Department 17 of the above-entitled court, Plaintiffs STEPHEN CLEGG and MICHAEL EMMENS will move the Court for an Order Granting Approval of Representative Action Settlement.

The Motion will be made on the grounds that the proposed Settlement is fair, adequate, reasonable, and in the best interest of Plaintiffs, all aggrieved employees, and the Parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Kelsey M. Szamet, Michael D. Singer, the PAGA Settlement Agreement (Exhibit "1" to the concurrently filed Szamet Declaration), all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: April 19, 2024

KINGSLEY & KINGSLEY, APC

By: ______________________

Kelsey M. Szamet
Attorneys for Plaintiffs and all aggrieved employees

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs STEPHEN CLEGG and MICHAEL EMMENS ("Plaintiffs") submit this Memorandum of Points and Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiffs and Defendant BOB'S DISCOUNT FURNITURE, LLC ("Defendant") (collectively, the "Parties") have reached a proposed settlement documented in the PAGA Settlement Agreement ("Settlement Agreement" or "Agreement"), attached to the concurrently-filed declaration of Kelsey M. Szamet.

This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699, et seq. ("PAGA"). The Gross Settlement Amount is $900,000.00. After deduction of attorney's fees and litigation expenses, litigation enhancement to Plaintiffs, and settlement administration costs as discussed in the Agreement, the remaining amount to be divided between the Labor and Workforce Development Agency ("LWDA") and the aggrieved employees as required by Labor Code section 2699(i) is $562,222.68 with $421,667.01 (or 75%) going to the LWDA and $140,555.67 (or 25%) distributed to the aggrieved employees.[1]

Plaintiffs request that the Court "review and approve any settlement of any civil action filed pursuant to this part" (*See* Lab. Code § 2699(1)(2).) If the Court deems the Settlement fair and acceptable, Plaintiffs request that the Court: (1) enter an order approving the Settlement and ordering the Parties to carry the terms of the Settlement Agreement; and (2) and enter a Final Judgement thereon.[2]

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Litigation Overview and Procedural History

On January 12, 2021, and in compliance with Labor Code § 2699.3(a)(1), Plaintiff Clegg provided written notice to Defendant and the Labor and Workforce Development Agency

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[1] Pursuant to PAGA, civil penalties recovered by aggrieved employees shall be distributed 75 percent to the Labor and Workforce Development Agency ("LWDA") and 25 percent to the aggrieved employee(s). Lab. Code § 2699(i).

[2] Plaintiff's Motion for Approval of Representative Action Settlement will be concurrently uploaded to the LWDA's website on the date this Motion is filed. Proof of submission of Plaintiff's Motion for Approval of Representative Action Settlement, all related documents, and copy of the email from the LWDA confirming receipt can be provided to the Court upon request. (Szamet Decl. ¶170.)

("LWDA"), seeking civil penalties under PAGA for Defendant's violation of California Labor Code. (Declaration of Kelsey M. Szamet ("Szamet Decl.") ¶5.) On February 8, 2021, and in compliance with Labor Code § 2699.3(a)(1), Plaintiff Emmens provided written notice to Defendant and the LWDA, seeking civil penalties under PAGA for Defendant's violation of California Labor Code. (Szamet Decl. ¶6.) Plaintiffs have complied with all of the requirements set forth in Labor Code § 2699.3 to commence a representative action under PAGA. (Szamet Decl. ¶7.)

On April 22, 2021, Plaintiffs commenced this Action by filing a Complaint alleging causes of actions against Defendant for: 1) violation of California Labor Code sections 2800, 2802, 2804; 2) violation of California's unfair competition law ("UCL") Business and Professions Code section 17200, et seq.; 3) PAGA penalties for failure to reimburse expenses; 4) PAGA penalties for failure to provide meal periods or pay in lieu thereof; 5) PAGA penalties for failure to provide paid sick leave; and 6) PAGA penalties for failure to provide accurate itemized wage statements. (Szamet Decl. ¶8.)

On July 8, 2021, Defendant filed a notice of removal, removing this Action to the United States District Court for the Central District of California, Western Division, Case No. 2:21-cv-05552-SB-PD. (Szamet Decl. ¶9.) On August 4, 2021, Plaintiffs filed a motion for remand. On September 7, 2021, the Court issued an Order remanding this Action to the Superior Court of Los Angeles County. (*Id.*)

On October 5, 2023, Plaintiff Emmens submitted an Amended PAGA notice to the LWDA and to Defendant by certified U.S. Mail. (Szamet Decl. ¶10.) On October 24, 2023, Plaintiff Emmens submitted a second Amended PAGA notice to the LWDA and to Defendant by certified U.S. Mail, incorporating Plaintiff Clegg's representative claims, as a part of the settlement. (*Id.*)

On March 28, 2024, as a part of settlement, the Parties filed a First Amended Complaint for Damages and Restitution and Representative Action for Recovery of Civil Penalties Pursuant to the Private Attorneys General Act ("PAGA")("FAC"). (Szamet Decl. ¶11.) The First Amended Complaint is the operative complaint in the Action (the "Operative Complaint"). (*Id.*)

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B. The Discovery Process and Mediation

The Parties engaged in formal and informal discovery. On September 22, 2021, Plaintiff Clegg served his first set of Special Interrogatories, Requests for Production of Documents, Form Interrogatories – General, Form Interrogatories – Employment, and Requests for Admission. (Szamet Decl. ¶12.)

Prior to mediation, Plaintiff obtained, through formal discovery, the total number of pay periods and the number of Aggrieved Employees during the Expense Reimbursement PAGA Period and the PAGA Period, and timekeeping and payroll data for Aggrieved Employees indicating, among other things, time punch records for meal and rest breaks. (Szamet Decl. ¶13.)

On or about May 8, 2020, the parties in *Clarence Williams v. Bob's Discount Furniture, LLC et al.*, case number 19STCV03679, reached a settlement that was approved, which released PAGA claims from November 29, 2017, up through and including July 22, 2020, effectively shortening the period of liability for all the claims at issue by way of this Action, except for the expense reimbursement claim. (Szamet Decl. ¶14.)

On August 2, 2022, the Parties participated in a mediation presided over by mediator Kelly A. Knight, Esq. (Szamet Decl. ¶15.) The Parties did not reach a settlement at this mediation. (*Id.*) On October 18, 2023, the Parties participated in a second mediation presided over by mediator Kevin D. Barnes, Esq., which led to this Agreement to settle the Action, subject to the approval of the Court. (Szamet Decl. ¶16.)

Although Defendant denies that it violated any pertinent law, it recognized the risks and attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to finalization of a formal PAGA Settlement Agreement and the approval of the Court. (Szamet Decl. ¶17.) The Parties negotiated the terms and conditions of the Agreement and now present the agreed-upon Settlement to the Court for Approval. (*Id.*)

III. PAGA ACTIONS AND THE REQUIREMENTS

A. The PAGA Statutory Scheme

PAGA creates a means of "deputizing" citizens as private attorney generals to enforce the Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own behalf as an individual claim, but "as the proxy or agent of the state's labor law enforcement agencies." *Id.*, at 986; *see also Reyes v. Macy's, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011); *Iskanian v. CLS Transp. Los Angeles*, LLC, 59 Cal. 4th 348, 380).

When an aggrieved employee brings a PAGA claim, "the government is always the real party in interest." *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) ("[A] PAGA action is a dispute between an employer and the State agency."). Accordingly, a plaintiff that brings a PAGA claim represents "the same legal right and interest as state labor law enforcement agencies," in that the plaintiff is seeking to recover those civil penalties that otherwise would have been assessed and collected by the LWDA. *Arias*, *supra*, 46 Cal.4th at 986; Lab. Code § 2699 (a) & (f); *Securitas*, *supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 (holding "PAGA plaintiffs do not have property rights in their cases."). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties recovered; thus, recoveries are principally for the state and only secondarily for aggrieved employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a PAGA claim, he or she is properly conceived of as a private attorney general prosecuting violations of California's labor laws on behalf of the state.

An employee may commence a PAGA action by fulfilling the requirements of Cal. Lab. Code § 2699.3 (a)(1), which simply states:

> "The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation."

Lab. Code § 2699.3 (a)(1)

As explained above, Plaintiffs have complied with the notice requirements and has properly pled a PAGA cause of action.

B. <u>The Court Has Discretion When Awarding the Amount of Penalties</u>

PAGA provides for penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation. Lab. Code §2699(f)(2). "PAGA penalties...are mandatory, not discretionary" and must be awarded upon a showing that Defendant violated the Labor Code.[3] *Amaral v. Cintas Corp. No. 2* 163 Cal.App.4th 1157, 1213 (2008). However, PAGA provides the Court with discretion when it awards these penalties. Labor Code §2699(e)(2) states that "a court *may* award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (emphasis added). Here, as Defendant denies that it violated any law or that it engaged in any knowing or intentional conduct giving rise to liability and expressly deny that any employees suffered harm, it would certainly argue that if the Court were to find that any liability existed, the Court should exercise its discretion to significantly reduce any civil penalty.

In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, the Court exercised its discretion to reduce the PAGA penalty amount. There, the plaintiff brought a PAGA claim for violations of section 226(a) based on the following issues: (a) the statements did not show either an employee identification number or the last four digits of the social security number of the employee; (b) the statements did not show the beginning date of the pay period for which the employee was paid; (c) the statements identified Covidien as the employee's employer. (*Id*. At *2). There were approximately 28,000 wage statements at issue. (*Id*. at *3). The *Fleming* court calculated the maximum potential civil penalty exposure at $2.8 million ($100 per wage statement). (*Ibid*; *see also* Labor Code § 2699(f)(2)). After a bench trial, the Court elected to exercise its discretion to reduce the civil penalty per wage statement to $18 per wage statements, reflecting 18% of the potential exposure. (*Id*. at *4). The Court reasoned:

> Here, the aggrieved employees suffered no injury due to the erroneous wage statements, and made no complaint of the errors or omissions contained therein prior to filing suit. Also, Defendants were not aware that the wage

[3] *See also Willner v. Manpower Inc., supra. 35 F. Supp. 3d at 1136*; *McKenzie v. Federal Exp. Corp*, *supra*, 765 F.Supp.2d at 1232.

> statements violated the law and took prompt steps to correct all violations once notified. Given these circumstances, the Court finds a $2.8 million penalty unjust according to § 2699(e)(2). Accordingly, in its discretion, the Court reduces the penalty to $500,000.

Id. at *4. A court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence. *See e.g., Carrington v. Starbucks Corp*. (2018) 30 Cal. App. 5th 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbuck's "good faith attempts" to comply and because the violations were minimal).

Here, as explained above, Plaintiffs' counsel anticipated that, at trial, Counsel for Defendant would argue that: (1) the PAGA Members were properly paid and reimbursed in accordance with Defendant's lawful policies and practices, and that any alleged failure to compensate the PAGA Members was the result of inadvertence and clerical error; (2) the PAGA Members were provided with the opportunity to take meal and rest breaks in compliance with California law; (3) until this Action was filed, no employees had complained about any of the alleged Labor Code violations, and (4) most of the claims are hyper technical violations any the aggrieved employees cannot show any harm. All of which, Counsel for Defendant would argue, should mitigate in favor of significantly reducing any civil penalty.

After engaging in pertinent informal discovery in this Action, Plaintiffs' counsel determined that a settlement of $900,000.00 is reasonable given the above risks. (Szamet Decl. ¶18.)

C. <u>There is a Strong Risk the Higher $200 Civil Penalty Triggered for "Subsequent" Violations Will Not Apply</u>

Plaintiffs believe there is a strong risk that the Court will not award the $200 civil penalty triggered for "subsequent" violations. Labor Code section 2699(f)(2). If this case were to proceed to trial, Plaintiffs would argue that a "subsequent" violation simply means that Defendant violated section 226(a) more than once for a given employee. Plaintiffs are not aware of any case law that interprets "subsequent" in the context of section 2699. However, Defendant is likely to rely on *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157 (2008) because it rejected a purely temporal understanding of the term "subsequent" and interpreted its use in Labor Code sections 210 and 225.5 to require that "the employer has been notified that it is violated a Labor Code provision" before higher penalties are triggered. *Id*. at 1209. Defendant presumably will take the position that it has not been notified that it actually violated any provisions of the Labor Code until the Labor Commissioner has issued a formal citation or this Court made a finding that a violation existed.

D. Standards for Settlement Approval

When approving a settlement of a PAGA action, the statute simply requires the Court to "review and approve any settlement of any civil action filed pursuant to this part." (Lab. Code § 2699(*l*)(2).) PAGA does not set forth standards for evaluating such settlements, and the California appellate courts have not weighed in on the issue. However, trial courts have approved PAGA settlements where the penalties are "genuine and meaningful" and "consistent with the underlying purpose" of the statute. (See *O'Connor v. Uber Techs., Inc*. (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1113.) Additionally, as explained in *Arias v. Superior Court* (2009) 46 Cal.4th 969, class action procedural rules do not apply in PAGA cases, including the two-step preliminary and final approval process. Rather, the approval process consists of one step where the court decides if the settlement should go into effect.

IV. THE SETTLEMENT

Defendant will pay the total sum of $900,000.00 in full and final settlement of the PAGA claims alleged. (Szamet Decl. ¶19., Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount	$900,000.00
PAGA Counsel Fees Payment	$300,000.00
PAGA Counsel Litigation Expenses Payment	$19,077.32[4]
Administrator Expenses Payment	$8,700.00
Plaintiffs' Service Payments	$10,000.00
PAGA Penalties	**$562,222.68 *($421,667.01 to the LWDA; $140,555.67 to Aggrieved Employees)***

(Szamet Decl. ¶20., Exhibit 1, ¶¶1.25; 3.1-3.2.)

[4] The Agreement provided for counsel to receive cost reimbursement up to $22,000.00. However, counsel's final costs come to $19,077.32. (Szamet Decl. ¶21, Ex. 5) The extra $2,922.68 will remain in the net settlement fund, causing the net amount for distribution to the LWDA and Aggrieved Employees to be slightly higher than the $559,300.00 contemplated in the settlement agreement. (See Szamet Decl. ¶22, Ex. 1 ¶3.2.1)

For settlement purposes, the Aggrieved Employees are defined as: "all current and former non-exempt employees who worked for BOB'S DISCOUNT FURNITURE, LLC in the State of California at any time during the Expense Reimbursement PAGA Period or the PAGA Period" ("Aggrieved Employee"). (Szamet Decl. ¶23., Exhibit 1, ¶1.4.)

The PAGA Period is the period from July 23, 2020 to December 17, 2023. (Szamet Decl. ¶24, Exhibit 1, ¶1.20) The Expense Reimbursement PAGA Period means the period from January 12, 2020 to December 17, 2023. (Szamet Decl. ¶25, Exhibit 1, ¶1.10)

Each aggrieved employee shall receive a pro-rata portion of the remaining amount in PAGA penalties based by dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and/or Expense Reimbursement PAGA Period, and then multiplying the result by each Aggrieved employee's PAGA Period Pay Periods. (Szamet Decl. ¶26., Exhibit 1, ¶3.2.3.1.) Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment.

V. ARGUMENT

A. The Court Should Approve the Agreement

The Parties recognize that in accordance with Labor Code §2699(l), Court approval is required in the event of a settlement of a PAGA action on a representative basis. However, as explained in *Arias v. Superior Court* 46 Cal.4th 969 (2009), the Parties are not obligated to follow the class action procedural rules in PAGA cases and therefore need not obtain approval of the PAGA settlement through a motion for primary or final approval. Nonetheless, in order to comply with the requirements of Labor Code §2699, the Parties submit the instant Motion and the Agreement (Exhibit "1" to the Szamet Declaration) for Court approval.

B. The Risks of Moving Forward with Plaintiff's PAGA Claim

To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation and discount taken follows. (Szamet Decl. ¶27.) Plaintiffs believed that Defendant may persuasively argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether waive any penalties under PAGA. (Szamet Decl. ¶28.) Pursuant to Labor Code

§226.3, the Labor Commissioner has the discretion to "decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake." (Szamet Decl. ¶29.) And in accordance with PAGA, the court in a PAGA action has the same discretion "to assess a civil penalty" that the Labor Commissioner would have, as well as complete discretion to "award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Labor Code § 2699(e)(1) and (e)(2)). (Szamet Decl. ¶30.)

PAGA Counsel anticipated that, at trial, Counsel for Defendant could make a potentially persuasive argument that Defendant: (1) the Aggrieved Employees were properly paid and/or reimbursed in accordance with Defendant's lawful policies and practices, and that any alleged failure to compensate the Aggrieved Employees was the result of inadvertence and clerical error; (2) the Aggrieved Employees were provided with the opportunity to take meal and rest breaks in compliance with California law; (3) until this Action was filed, no employees had compliance about any alleged failure to pay wages, provide meal and/or rest breaks, reimburse expenses, issue accurate itemized wage statements; (4) none of Defendant's employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff's allegations. (Szamet Decl. ¶31.) All of which, Counsel for Defendant would argue, should mitigate in factor of significantly reducing or waiving any PAGA penalties. (*Id.*) While Plaintiffs disagree that this analysis is legal correct or persuasive, PAGA Counsel had to consider the foregoing facts and arguments and how they might impact any judgment ultimately awarded to Aggrieved Employees if the Court were persuaded by them. (Szamet Decl. ¶32.)

1. The Risks Associated with the Reimbursement Claim

Labor Code section 2802 provides that an employer must "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties . . . ." (Lab. Code, § 2802, subd. (a).)

Here, Plaintiff Clegg alleged that Defendant failed to reimburse the aggrieved employees for business-related expenses, including for use of their cell phone and vehicles, necessary in executing their duties under Defendant's employ. (Szamet Decl. ¶33.) Plaintiff Clegg alleged that he and aggrieved employees used their cell phones daily to communicate with their supervisors about their job assignments and work schedules. (Szamet Decl. ¶34.) Additionally, Plaintiff Clegg alleged that the aggrieved employees used their personal vehicles to travel between stores over the course of a work shift, which was necessary to perform their work tasks. (Szamet Decl. ¶35.) Pursuant to Labor Code section 2802, Plaintiff contends that Defendant is required to reimburse Plaintiff Clegg and the aggrieved employees for out-of-pocket expenses incurred by them in the performance of their job duties.

The main risk here is the factual dispute at hand. (Szamet Decl. ¶36.) Defendant argued that it had a compliant policy in place and practice of reimbursing employees for mileage and personal cellphones, among other things. (Szamet Decl. ¶37.) Specifically, Defendant argued that non-exempt managers received a $5.00 monthly cellphone stipend, while Associates and Distribution Center employees (aka warehouse employees) were prohibited from using their personal cellphones during and while at work. (Szamet Decl. ¶38.) Further, Defendant argued that it provided work phones that were readily available and computers for email usage within its brick-and-mortar retail stores. (Szamet Decl. ¶39.) Thus, Defendant argued that there was no need for any other non-exempt employees to use personal cellphones. (Szamet Decl. ¶40.) And to the extent there is travel between stores, Defendant argued that its records show that any mileage reimbursement requested, was paid. (Szamet Decl. ¶41.) Thus, the main risk taken into account here is that if Defendant were able to establish that all of its factual arguments above were true, there is certainly a distinct risk that a Court may find that there was no liability at all. (Szamet Decl. ¶42.)

Another risk Plaintiff considered was that Clegg was an assistant store manager. (Szamet Decl. ¶43.) Plaintiff Clegg anticipated that Defendant would argue primarily that it provided all necessary tools as set forth immediately above, but to the extent it did not, any exposure was limited to a very small group of assistant store managers who may have chosen to use their personal cellphones for work related purposes out of convenience. (Szamet Decl. ¶44.) As for travel, Defendant contends that inter-store travel was generally not required, but if for some reason Mr. Clegg did travel between stores, this was an isolated incident that affected a few pay periods at the most. (Szamet Decl. ¶45.)

If Defendant were able to establish such, there could be no recovery at all for this claim. (Szamet Decl. ¶46.) Based on these risks, Plaintiff Clegg determined that discounting this claim for settlement purposes was fair and reasonable. (Szamet Decl. ¶47.)

2. The Risks Associated with the Wages/Overtime Claim

"California employees are entitled to compensation for all hours worked, which means "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Title 8 Cal. Code of Regs., § 11080(2)(G); *See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified on denial of reh'g (Aug. 29, 2018).) Time is compensable if an employee is "*subject to the control* of an employer" even if not working, or if an employee "is *suffered or permitted to work*" even if not "under the employer's control, provided the employer has or should have knowledge of the employee's work." (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh'g denied (May 13, 2020) (citations omitted.) An employer controls an employee if the employer directs an employee and the employee is unable to use their time how they wish. (*Id.* at p. 1047.) Other factors courts may consider include whether the activity is required, "the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures." (*Id.* at p. 1056; *Cf. Gibbs v. TWC Administration, LLC* (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768, at *9 (denying Defendant's motion for summary judgment when plaintiff-employees conducted off-the-clock pre-shift activity in preparation to start work right when they clocked in).)

Additionally, California workers are statutorily entitled to overtime compensation, unless they are properly classified as falling within one of the narrow exemption categories. Under California law, "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek…shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." (Lab. Code, § 510, subd. (a).) Furthermore, "[a]ny work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee." (Lab. Code, § 510, subd. (a).) Labor Code §§ 510, 1194 and 1199 require an employer to compensate its employees at the rate of no less than one and one-half times the regular rate of pay for any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek.

Specifically, Plaintiff Emmens alleged that he and the aggrieved employees were not properly compensated at the appropriate rate of pay because Defendant adjustments to the wages and overtime wages during certain pay periods where an overpayment adjustment was made. (Szamet Decl. ¶48.) To the extent that a wage adjustment made the wages paid less than the applicable minimum wages and/or overtime wages due in a given pay period, Plaintiff Emmens alleged Defendant failed to pay all applicable minimum wages and/or overtime wages due to Plaintiff Emmens and the aggrieved employees. (Szamet Decl. ¶49.)

First, Defendant vehemently denied this claim and argued that its policies and practices are compliant. (Szamet Decl. ¶50.) Second, Defendant argued that Plaintiff's theory of liability would be extremely difficult to prove on a representative basis. (Szamet Decl. ¶51.) Defendant argued that if adjustments were ever made, it was very rare and limited to specific instances to correct mistakes, but never resulted in Plaintiff or aggrieved employees being denied wages owed to them. (Szamet Decl. ¶52.) Further, Defendant argued that this case would devolve into a series of mini-trials wherein each of the limited instances showing an adjustment to a Class Member's pay would have to be showing by Defendant that in fact all wages were correctly paid. (Szamet Decl. ¶53.) Plaintiff acknowledges that instances of adjustments appearing in the records are very limited (appearing only twice in the statistically significant data sampling) and this can be a highly difficult type of claim to prove on common or representative proof because each instance is arguably unique. (Szamet Decl. ¶54.) Based on this acute risk, Plaintiff and his Counsel believed it was appropriate to discount this claim for settlement purposes. (Szamet Decl. ¶55.)

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3. The Risks Associated with the Accurate Records Claim

Labor Code § 1174 requires employers to maintain a record showing the names and addresses of all employees and payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by, and any applicable piece rate paid to, employees employed at the respective plants or establishments for a minimum period of three years. Labor Code § 1174.5 further provides that an employer who fails to maintain these records is subject to a $500 civil penalty.

As a result of the unpaid wages claim, Plaintiffs alleged that Defendants fail to maintain accurate payroll records that maintain the daily hours worked and the wages paid for Plaintiff Emmens and other aggrieved employees. (Szamet Decl. ¶56.) This claim is derivative to the alleged unpaid wages/overtime claim discussed above and the risk will flow therefrom. (Szamet Decl. ¶57.) In addition to the potential defenses to the wage claim discussed above, Defendant denied this claim and insisted that it maintains accurate payroll records that maintain the daily hours worked and the wages paid. (Szamet Decl. ¶58.) Plaintiff also anticipated that in addition to argue this was a derivative claim with the attendant risks, it is a hyper technical claim, no aggrieved employees ever complained about this issue, and no aggrieved employees can show injury or that any harm was suffered. (Szamet Decl. ¶59.) Taking these risks into account, Plaintiff and his Counsel believes it is fair and reasonable to discount this claim for settlement purposes. (Szamet Decl. ¶60.)

4. The Risks Associated with the Unlawful Deduction Claim

Labor Code § 221 states that it is “unlawful for any employer to collect or receive from an employee any part of wages.” Moreover, Labor Code § 226.3 provides for heightened penalties where “the employer fails to provide the employee a wage deduction statement or fails to keep [required] records.”

Plaintiff Emmens alleged Defendants maintain a consistent policy of unlawfully deducting wages from Plaintiff Emmens and all aggrieved employees in violation of Labor Code § 221. (Szamet Decl. ¶61.) By making these unauthorized deductions from Plaintiff Emmens and all aggrieved employees’ earned wages, Plaintiff Emmens alleged that he and all aggrieved employees were paid less than the applicable minimum wage required under California law. (Szamet Decl. ¶62.) This claim is also derivative to the underlying unpaid wages claim discussed above. (Szamet Decl. ¶63.) Again, Defendant vehemently denied that it ever withheld wages and at most there may have been a handful of pay periods where adjustments were reflected on Emmens' and other aggrieved employees' itemized wage statements, but that wages were never withheld. (Szamet Decl. ¶64.) Taking this argument into account, Plaintiff and his Counsel believes it is fair and reasonable to discount this claim for settlement purposes. (Szamet Decl. ¶65.)

5. The Risks Associated with the Labor Code Section 223 Claim

Labor Code § 223 requires an employer to maintain a designated wage scale and that "it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract."

Plaintiff Emmens alleged that Defendants violate Labor Code § 223 maintaining wages lower than the lawful wage scale according to California law. (Szamet Decl. ¶66.) Again, this claim is derivative to the underlying unpaid wages claim discussed above. (Szamet Decl. ¶67.) Defendant vehemently denied that it ever withheld wages and at most there may have been a handful of pay periods where adjustments were reflected on Emmens' and other aggrieved employees' itemized wage statements, but that lower wages were never secretly paid. (Szamet Decl. ¶68.) Plaintiff and his Counsel believes it is fair and reasonable to discount this claim for settlement purposes. (Szamet Decl. ¶69.)

6. The Risks Associated with the Meal Period Claim

California law requires employers to provide employees a duty-free, uninterrupted thirty (30) minute meal period when an employee works more than five (5) hours in a workday, and it must be provided within the first five (5) hours the employee works. Lab. Code 512; IWC Wage Order 4-2001, §11(A) and (C); *Brinker Restaurant Corp. v. Sup. Court* (2012) 53 Cal.4th 1004.

Here, Plaintiff Clegg alleged that Defendant violated California's meal break laws by not allowing aggrieved employees to take actual daily meal breaks. (Szamet Decl. ¶70.) Indeed, due to the hectic nature of their job, Plaintiff Clegg alleged that he and other aggrieved employees were rarely able to ever take a meal break. (Szamet Decl. ¶71.) Because Plaintiff Clegg and aggrieved employees were required to communicate with and assist customers and schedule appointments for customers throughout their shifts, they had no time to take lawful uninterrupted meal periods if they were to complete their required assignments. (*Id*.) If Plaintiff Clegg or aggrieved employees ever failed to complete their assignments, they would be subject to potential discipline up to and including termination. (*Id*.) Thus, Plaintiff Clegg alleged that he and aggrieved employees were routinely discouraged and prevented from taking uninterrupted meal periods in order to complete their assignments and avoid the imposition of potential disciplinary measures. (Szamet Decl. ¶72.) Plaintiff also alleged that Defendant violated California's meal period laws by not paying Plaintiff Clegg and aggrieved employees an extra hour of wages for each missed or improper meal period. (Szamet Decl. ¶73.)

In response, first and foremost, Defendant argued that aggrieved employees were provided with legally compliant meal periods. (Szamet Decl. ¶74.) As with the wage claim, Defendant argued that Plaintiff's theory of liability would be extremely difficult to prove on a representative basis because the time records largely showed compliant meal periods, so Defendant would argue that it would be entitled to inquire of each aggrieved employee, on each day whether or not they were provided with compliant meal periods. (Szamet Decl. ¶75.) Defendant would also have argued that it has no obligation to "guarantee" or "ensure" that meal periods are taken by all employees at all times. *Brinker, supra*, 53 Cal. 4th at 1040 (employers are "not obligated to police meal breaks and ensure no work thereafter is performed"). Rather, an employer satisfies (as Defendant would argue) its obligation to provide meal periods if "it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." (*Id*.)

Plaintiff was confident that Defendant would attempt to gather testimonial evidence from aggrieved employees indicating that the records were accurate and either they took compliant meal breaks as reflected in the records or were paid a meal period premium in lieu thereof. (Szamet Decl. ¶76.) In fact, Defendant argued that analysis of the data showed that the potential meal period violation rate was just 7.19% when accounting for waivable meal periods and that when offsetting for meal period premiums paid, the potential violation rate falls to 5.20%, which Plaintiff had to concede is a remarkably low potential violation rate. (Szamet Decl. ¶77.)

Though Plaintiff doubts that Defendant will be able to gather strong testimonial evidence, Plaintiff must acknowledge it poses risks at trial especially in light of the data analysis. (Szamet Decl. ¶78.) There is risk as to both sides as to what declarations and depositions of aggrieved employees might reveal. (Szamet Decl. ¶79.) Indeed, Plaintiff had to consider that Defendant could secure several declarations from aggrieved employees that all complaint breaks were "provided", but that they chose to take late breaks or forego breaks on occasion. (Szamet Decl. ¶80.) Taken together, Plaintiff acknowledged there was significant risk as to establishing liability on the meal period claim on a representative basis. (Szamet Decl. ¶81.) Considering these risks, Plaintiff believes it is fair and reasonable to discount the meal period claim for settlement purposes. (Szamet Decl. ¶82.)

7. The Risks Associated with the Rest Period Claim

Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour of compensation for each workday the employer fails to provide a rest period according to law. Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11070, subd. 12(A).)

Plaintiff Emmen's rest period claim arises from an allegedly common course of conduct wherein Defendant failed to provide employees with the opportunity to take 10-minute rest breaks in compliance with California law because the nature of the job was so hectic. (Szamet Decl. ¶83.) The California Supreme Court has held: "Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours and so on." (*Brinker, supra*, 53 Cal.4th at 1029.)

Here, Plaintiff contends that Defendant failed to provide Plaintiff and the aggrieved employees with rest breaks of not less than ten (10) minutes per four (4) hour work period, or major fraction thereof. Plaintiff alleged that his workload was so heavy that he was consistently and regularly denied rest breaks. (Szamet Decl. ¶84.) If the sales floor was busy, Plaintiff contends that Defendant required him to miss rest breaks to help with the workload. (*Id.*).

In its defense, Defendant argued that Plaintiff's rest period claim cannot readily be proven as to all aggrieved employees because California law does not require employees to record rest periods. (Szamet Decl. ¶85.) Absent a shift-by-shift, break-by-break, employee-by-employee inquiry, Defendant would have argued that there was simply no way to know (1) whether a break was taken on any given day; and (2) if not, why not. (Szamet Decl. ¶86.) For each instance where an employee contends that she did not take a 10-minute rest period by the end of the fourth hour of work, the trier of fact would still have to determine why that particular employee had less than their full allotment of rest time. (Szamet Decl. ¶87.) Defendant accordingly would have argued that rest break claims are inherently individualized in nature because employers only need to "authorize and permit" breaks; they need not ensure that rest breaks are taken. (*Id.*) *Brinker*, 53 Cal. 4th at 1004. To succeed, "[a]n employee must show that the employer prevented the employee from taking breaks; mere proof of knowledge that the employee was forgoing breaks is insufficient." As such, Plaintiff had to acknowledge that it could potentially be easy for Defendant to defeat this claim if it was able to gather testimonial evidence from aggrieved employees indicating that they were provided the opportunity to take all required rest breaks each day. (Szamet Decl. ¶88.) Though Plaintiff does not believe this was the case, Plaintiff must acknowledge it poses serious risks as to establishing liability. (Szamet Decl. ¶89.) Just as with meal periods, there is risk as to both sides as to what declarations and depositions of aggrieved employees might reveal. (Szamet Decl. ¶90.)

Thus, Plaintiff believes discounting this claim for Settlement purposes was appropriate periods. (Szamet Decl. ¶91.)

8. The Risks Associated with the Sick Leave Claim

Labor Code § 246(a)(1) provides "[a]n employee who, on or after July 1, 2015, works in California for the same employer for 30 or more days within a year from the commencement of employment is entitled to paid sick days as specified in this section." Subsection (l) further states:

> For the purposes of this section, an employer shall calculate paid sick leave using any of the following calculations:
> (1) Paid sick time for nonexempt employees shall be calculated in the

> same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.
> (2) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
> (3) Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Labor Code § 246(l)(1)-(3)

In discussing Section 246, the California Supreme Court has held that the "regular rate of pay is a weighted average reflecting work done at varying times, under varying circumstances, and at varying rates. Alvarado v. Dart Container Corp. of California (2018) 4 Cal.5th 542, 569, as modified (Apr. 25, 2018).

Here, Plaintiff Clegg alleged that Defendant failed to provide paid sick leave in accordance with Section 246 above. By failing to accurately record all hours actually worked and failing to pay for all hours worked as described above, Defendant failed to provide all paid sick leave. (Szamet Decl. ¶92.) Specifically, Plaintiff Clegg alleged that Defendant provided less paid sick leave than actually owed since the hours used to accrue sick leave were allegedly inaccurate during meal periods and thus providing less paid sick leave than actually owed since the hours used to accrue sick leave were inaccurate. (Szamet Decl. ¶93.) In response, Defendant denied this claim and argued that it provided compliant sick leave at all times during the liability period and that it did itemize the sick pay correctly. (Szamet Decl. ¶94.) A review of the itemized wage statements suggests defendant is correct and the likelihood of success of the merits was not strong. (Szamet Decl. ¶95.) Accordingly, Plaintiff believes it was reasonable to dramatically discount this claim for settlement purposes. (Szamet Decl. ¶96.)

9. The Risks Associated with the Wage Statement Claims

California Labor Code §226(a) requires Defendant to provide its employees with an accurate, itemized written wage statement that shows, in relevant part, total hours worked by the employee, their name and address of the legal entity that is the employer, and all applicable hourly rates and the corresponding number of hours worked. Labor Code §226(a) specifically requires employers to furnish accurate itemized wage statements in writing that show total hours worked by the employee and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Here, Plaintiff Emmens alleged that Defendant provides aggrieved employees itemized wage statements that do not accurately show total hours worked or all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate in violation of the Labor Code. (Szamet Decl. ¶97.) Further, Plaintiff alleged that he and the aggrieved employees are furnished wage statements that do not include meal and rest period premiums as a result of the claims alleged above. (Szamet Decl. ¶98.)

Again the risks flow from the underlying unpaid wages and meal/rest claims, but the main risk taken into account is that wage statement claims are vulnerable to an argument that aggrieved employees did not suffer any harm. (Szamet Decl. ¶99.) Defendants commonly argue that, without more, wage statement claims are nothing but technical violations for which a court should award a dramatically reduced civil penalty, if anything at all. (Szamet Decl. ¶100.)

10. The Risks Associated with the Waiting Time Penalties Claim

Under Labor Code section 203, if an employer fails to provide wages at the time of an employee's termination or within seventy-two (72) hours of resignation, then the employee's wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g., *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.)

Here, Plaintiff Emmens and numerous Aggrieved Employees are no longer employed by Defendant. Plaintiff contends that Defendant failed to properly pay overtime for any work in excess of eight (8) hours per day and/or any work in excess of forty (40) hours per week. (Szamet Decl. ¶101.) The risk analysis for the section 203 claim flows from the risk analysis for the underlying wage claim discussed above as derivative waiting-time penalties are only as strong as the underlying predicate claims and are subject to good faith defenses. (Szamet Decl. ¶102.) If Defendant could prove, as it contends, that class members were properly paid for all hours worked and any meal/rest periods actually owed, there would be no recovery of wages and no waiting time penalties that flow therefrom. (Szamet Decl. ¶103.)[5]

The other significant risk that Plaintiff analyzed, however, is that to establish liability for waiting time penalties, Plaintiff would have to establish not only that the underlying violations occurred, but also that Defendant's conduct was "willful." (Labor Code § 203; Szamet Decl. ¶104.) If Defendant could establish that any alleged failure was the result of mistake or oversight and not "willful", then it is possible that Plaintiff would not be able to recover penalties for this claim. (Szamet Decl. ¶105.) Because of this risk, Plaintiff determined that accepting a discount for settlement purposes was appropriate. (Szamet Decl. ¶106.)

In light of all these significant risks and given that PAGA gives the Court broad discretion to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement Amount of $900,000.00 was fair and reasonable. (Szamet Decl. ¶107, Exhibit 1, ¶3.1.)

C. <u>Based on the Risks Above and the Analysis of the Maximum Penalties Available, Plaintiffs Believe this Settlement is Fair and Reasonable</u>

Based on the data, the maximum potential exposure for the PAGA claims for the PAGA Members is $9,548,100 (95,481 pay periods at issue multiplied by $100 a pay period). (Szamet Decl. ¶108.) While there is no authority available on this issue, a court could conceivably "stack" per pay periods violations, and the full potential value could balloon up to over $95,000,00.00 ($95,481 x 10 distinct claims alleged), but in light of the immense discretion available, Plaintiffs believe the Settlement is reasonable. (Szamet Decl. ¶109.) Indeed, were the Court to award 10% of maximum civil penalty as occurred in *Carrington, supra*, 30 Cal. App. 5th 504, the result here is well within that range (10% of the maximum $9,548,100 = $954,810). (Szamet Decl. ¶110.)

Given that this Settlement is within the range of awards in other trial courts, Plaintiffs believe this settlement of $900,000 is a very fair and reasonable settlement. (Szamet Decl. ¶111.).

VI. THE REQUEST FOR ATTORNEYS' FEES AND COSTS

As detailed fully in the Settlement, the settlement provides for Defendant to create a Gross Settlement Amount of $900,000.00. (Szamet Decl. ¶116; Ex. 1 at ¶3.1.) From that fund, Plaintiffs

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[5] Plaintiff also alleged that Defendant owes waiting time penalties by not paying former alleged employees all wages owed and all premium payments for non-compliant meal or rest periods, Labor Code § 226.7

request an award of attorneys' fees for PAGA Counsel in the amount of $300,000.00, or 33.33% of the Gross Settlement Amount, and $19,077.32 in reimbursement for litigation costs. (*Id*; Ex. 1 at ¶3.2.1.)

A. Plaintiffs' Counsel are Entitled to a Fee from the Common Fund

On August 11, 2016, the California Supreme Court decided *Laffitte v. Robert Half International,* which addressed the correct methodology for awarding fees in a class action settlement. (*Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 205 Cal.Rptr.3d 555, 573.) The *Laffitte* Court approved awarding fees as a percentage of the settlement fund in cases like the present one, where a settlement results in the creation of a common fund on behalf of a class:

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards Class Counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.

(*Id.* at 573.) The Court then set out several reasons why the percentage-of-the-fund method is preferred over the alternative lodestar-multiplier approach in California courts:

> The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek 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.

(*Id.* at 573.)

An award of 33.33% of the common fund is appropriate here under the "substantial benefit" theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a representative capacity to recover fees when the litigant's efforts have created a substantial, actual, and concrete benefit for members of an ascertainable class and the court's jurisdiction over the subject matter makes possible an award which spreads the cost proportionately among the members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th 563, 578.)

This doctrine rests on the understanding that attorneys should normally be paid by their clients, and that unless attorneys' fees are paid out of the common fund, those who benefitted from the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 943; *Save El Toro Ass'n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent this unfair result, courts exercise their inherent equitable powers to assess attorneys' fees against the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano III*, 20 Cal.3d at p. 35.) "A court, in the exercise of its equitable discretion, may decree that those receiving the benefit should contribute to the costs of its production." (*Save El Toro Assn., supra*, 98 Cal.App.3d at 548.) As this approach "better approximates the workings of the marketplace than the lodestar approach," there is "a greater judicial willingness to evaluate a fee award as a percentage of the recovery" in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82 Cal.App.4th 19, 31, 48.)

B. <u>The Attorneys' Fees Request Are Well Within the Range of Fees in Comparable Cases</u>

Courts historically award fees in the twenty-to-fifty percent range, depending on the circumstances of the case. As stated in Newberg:

> No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the Class, although somewhat larger percentages are not unprecedented.

(Newberg on Class Actions, 3rd Ed., 1992, § 14.03; *and see Chavez v. Netflix, Inc*. (2008) 162 Cal.App.4th 43, 66, fn 11 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."].) Thus, PAGA Counsel's requested fee of 33.33% is not only well within the range of reasonableness, but lower than the average fee award of 35% and is fair compensation for undertaking this complex, risky, expensive, and time-consuming litigation on a contingent basis.

C. <u>PAGA Counsel's Fee Request is Reasonable Under a Lodestar Crosscheck</u>

Courts may "cross-check" the results of the common fund method against the lodestar method. (*See In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.) The lodestar is calculated by multiplying the reasonable hours expended by a reasonable hourly rate. (*Serrano v. Priest,* 20 Cal.3d 25, 48-49 (1977) *("Serrano III").*) Those rates reflect "the general local hourly rate for a fee-bearing case" and do "not include any compensation for contingent risk, extraordinary skill, or any other factors." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138.) The court may then enhance the lodestar with a multiplier. (*Wershba, supra*, 91 Cal.App.4th at 254; *Serrano III, supra*, 20 Cal.3d at 49.)

i. Requested Multiplier

The purpose of using the lodestar/multiplier method is to mirror the legal marketplace. Counsel will not handle cases for straight hourly fees payable only if they win; therefore, an enhancement is often awarded so that the fee received is commensurate with what attorneys could expect to be compensated for services in similar circumstances. (*See Tulare Valley Audubon Soc., Inc. v. County of Tulare* (1984) 155 Cal.App.3d 738, 755 [an award must be large enough "to entice competent counsel to undertake difficult public interest cases"].) No specific findings reflecting the court's calculations are required. (*Wershba*, *supra*, 91 Cal.App.4th at 254; *Rebney*, *supra*, 232 Cal.App.3d at p. 1349.) "The record need only show that the attorney fees were awarded according to the 'lodestar' or 'touchstone' approach." (*Ibid.*)

Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Szamet Decl. ¶125.) PAGA Counsel have an aggregate lodestar in the amount of $216,282.50 which represents 284.10 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiff's instant Motion. (*Id.*) As such, PAGA Counsel is asking for a lodestar multiplier of 1.39. (Szamet Decl. ¶126.) Typically, the lodestar is merely the starting point of the calculation of a reasonable fee, and courts often multiply the lodestar by a factor to account for the risk of non-payment, delay in payment, the quality of work, and the novelty and difficulty of the issues involved. (*See Radar v. Thrasher,*(1962) 57 Cal.2d 244, 253; *Beasley v. Wells Fargo Bank,* (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of Supervisors,* (1997) 76 Cal.App.3d 24 1, 251.)

This case dealt with difficult legal and factual questions. (Szamet Decl. ¶127.)

Significantly, the risk attendant to the underlying claims in this matter was great considering Defendant's defenses as discussed in detail above. *(Ibid.)* Were this case to proceed, Defendant would have a strong incentive to litigate tenaciously. *(Ibid.)* There are genuine issues in dispute. *(Ibid.)* Furthermore, PAGA Counsel was able to obtain close to the full value for this case. (Szamet Decl. ¶128.)

As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades of experience who diligently prepared and litigated this matter. (Szamet Decl. ¶¶112-113; ¶129.) To achieve the ultimate result in this case, my firm had to incur substantial risk and expense, and were precluded from taking other fee generating employment for 284.10 hours of attorney time. (Szamet Decl. ¶130.) This matter had been handled purely on a contingency fee basis and my firm has advanced many thousands of dollars in costs while deferring all payment of fees, with no guarantee that any of the fees incurred or costs advanced would ever be recovered and diverting significant firm resources to prosecution of this matter. (Szamet Decl. ¶131.) PAGA Counsel believe this is an exceptional result that has been well received by the Aggrieved Employees. (Szamet Decl. ¶132.)

VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

In addition to their request for fees, PAGA Counsel further request reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this litigation, in the amount of $22,000.00. (Szamet Decl. ¶159.) To date, PAGA Counsel has incurred $18,477.32 in costs. (Szamet Decl. ¶160.) PAGA Counsel anticipates incurring an additional $600.00 in costs to file and serve this motion. (Szamet Decl. ¶161.) As such, counsel is requesting a cost reimbursement of $19,077.32. (Szamet Decl. ¶162.)

All of the requested costs are reasonable in amount and were necessarily incurred by PAGA Counsel in prosecuting this litigation. (Szamet Decl. ¶163.); Exhibit 5 [Cost Report].) Expenses in this matter to date include costs for filing fees, research, mediation, and additional costs for the prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Kelsey M. Szamet. All of these costs have been incurred in the course of this litigation, and all costs advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of filing the present motion. (Szamet Decl. ¶164.)

Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court should approve the request for reimbursement in the amount of $19,077.32. (Szamet Decl. ¶165.)

VIII. ENHANCEMENT TO PLAINTIFF

The Settlement calls for an enhancement payment of $5,000.00 each to the named Plaintiffs, Stephen Clegg and Michael Emmens, to be paid from the Gross Settlement Amount. (Szamet Decl. ¶166; Ex. 1 at ¶1.25.) Incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. "[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

Here, the enhancement takes into consideration the time, effort, and expense incurred by Plaintiffs in coming forward to litigate this matter on behalf of the Aggrieved Employees. The time spent by STEPHEN CLEGG and MICHAEL EMMENS includes identifying competent counsel, providing information to PAGA Counsel regarding Plaintiffs' relevant employment experiences, compiling documents, meeting with PAGA Counsel frequently to discuss the status of the case and the theories of liability, reviewing settlement documents, and making themselves available for the two full days of mediations in this case. (Szamet Decl. ¶167.)

PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶168.) The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiffs in coming forward to litigate this matter on behalf of the Aggrieved Employees. (Szamet Decl. ¶169.) Accordingly, Plaintiffs should be awarded the agreed-upon enhancement of $5,000.00

each, for a total of $10,000.00 total.

IX. CONCLUSION

Plaintiffs' Counsel submit that the proposed Settlement as documented in the Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiffs respectfully request that the Court approve the Settlement and Order that the Settlement is carried out according to the terms of the Agreement.

DATED: April 19, 2024

KINGSLEY & KINGSLEY, APC

By: ______________________________

Kelsey M. Szamet
Attorneys for Plaintiff MICHAEL EMMENS and all aggrieved employees

(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On April 19, 2024, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Counsel for Defendant Kathy E. Le, Esq. Kelli Dreger, Esq. **JACKSON LEWIS P.C.** 200 Spectrum Center Drive, Suite 500 Irvine, CA 92618 Kathy.Le@jacksonlewis.com Kelli.Dreger@jacksonlewis.com	*Counsel for Plaintiffs* Brad Nakase, Esq. Jared Peterson, Esq. **NAKASE LAW FIRM, INC**. 2221 Camino Del Rio South, Suite 300 San Diego, CA 92108 brad@NakaseLawFirm.com jared@NakaseLawfirm.com **COHELAN KHOURY & SINGER** Michael D. Singer msinger@ckslaw.com Marta Manus mmanus@ckslaw.com 605 C Street, Suite 200 San Diego, California 92101

[XX] **BY ELECTRONIC SERVICE:** I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (https://dir.tfaforms.net/315) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] **(BY ELECTRONIC MAIL TRANSMISSION)**: I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[XX] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 19, 2024, at Woodland Hills, California.

Michelle Tanzer

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Make a Reservation

STEPHEN CLEGG, et al. vs BOB'S DISCOUNT FURNITURE, LLC, A MASSACHUSETTS LIMITED LIABILITY COMPANY

Case Number: 21STCV15281 Case Type: Civil Unlimited Category: Other Employment Complaint Case
Date Filed: 2021-04-22 Location: Stanley Mosk Courthouse - Department 17

Reservation

Case Name: STEPHEN CLEGG, et al. vs BOB'S DISCOUNT FURNITURE, LLC, A MASSACHUSETTS LIMITED LIABILITY COMPANY	Case Number: 21STCV15281
Type: Motion re: (Motion Re: Approval of Representative Action Settlement)	Status: RESERVED
Filing Party: Stephen Clegg (Plaintiff)	Location: Stanley Mosk Courthouse - Department 17
Date/Time: 05/28/2024 9:30 AM	Number of Motions: 1
Reservation ID: 950803998414	Confirmation Code: CR-JNDPMKAIHGXMAOGZG

Fees

Description	Fee	Qty	Amount
Motion re: (name extension)	0.00	1	0.00
TOTAL			**$0.00**

Payment

Amount: $0.00	Type: NOFEE
Account Number: n/a	Authorization: n/a
Payment Date: 1969-12-31	

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