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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TULARE

LUIS SANTOS, an individual, on behalf of the
State of California, as a private attorney
general,

PLAINTIFF,

v.

REPLANET PACKAGING, LLC; and DOES
1 thru 50, inclusive,

DEFENDANTS.

Case No. VCU285878

[Case Assigned for All Purposes to Hon.
David Mathias in Dept. 1]

**NOTICE OF MOTION AND MOTION
FOR APPROVAL OF
REPRESENTATIVE ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

*[Filed concurrently with Declaration of Liane
Katzenstein Ly In Support of Plaintiff's Motion
for Approval of Representative Action
Settlement; [Proposed] Order, and Judgment]*

Date: November 30, 2023

Time: 8:30 a.m.

Dept.: 1

Complaint Filed: February 5, 2021

Trial Date: None Set

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

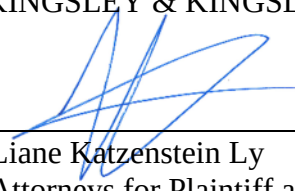
2 **PLEASE TAKE NOTICE** on November 30, 2023 at 8:30 a.m. in Department 1 of the
3 above-entitled Court, Plaintiff Luis Santos will move the Court for an Order Granting Approval of
4 Representative Action Settlement.

5 The Motion will be made on the grounds that the proposed Settlement is fair, adequate,
6 reasonable, and in the best interest of Plaintiff, all Aggrieved Employees, and the Parties.

7 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
8 and Authorities, the Declaration of Liane Katzenstein Ly, the PAGA Settlement Agreement, which
9 is attached to the concurrently filed Ly Declaration as Exhibit "1", all other papers and records on
10 file in this action, and on such oral and documentary evidence as may be presented at the hearing
11 on this Motion.

12
13 DATED: October 30, 2023

KINGSLEY & KINGSLEY, APC

14
15 By: 

Liane Katzenstein Ly

Attorneys for Plaintiff and all Aggrieved Employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Luis Santos (“Plaintiff”) submits this Memorandum of Points and Authorities in
4 support of Motion for Approval of Representative Action Settlement. Plaintiff and Defendant
5 Replanet Packaging, LLC (“Defendant”) (collectively, the “Parties”) have reached a proposed
6 settlement documented in the PAGA Settlement Agreement (“Agreement”) attached to the
7 concurrently-filed declaration of Liane Katzenstein Ly.

8 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699,
9 et seq. (“PAGA”). The Gross Settlement Amount is \$250,000.00. After deduction of attorneys’
10 fees and litigation expenses and settlement administration costs as discussed in the Agreement, the
11 remaining amount to be divided between the Labor and Workforce Development Agency
12 (“LWDA”) and the Aggrieved Employees (as defined in Section 1.4 of the Agreement and below)
13 as required by Labor Code section 2699(i) is \$135,666.67, with \$101,750.00 (or 75%) going to
14 the LWDA and \$33,916.67 (or 25%) distributed to the Aggrieved Employees.¹

15 Plaintiff requests that the Court “review and approve any settlement of any civil action
16 filed pursuant to [PAGA].” (Lab. Code § 2699(l)(2).) If the Court deems the Settlement fair and
17 acceptable, Plaintiff requests that the Court enter an order approving the Settlement and ordering
18 the Parties to carry out the terms of the Agreement and enter a Final Judgment thereon.²

19 **II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY**

20 A. Litigation Overview and Procedural History

21 On February 4, 2021, and in compliance with Labor Code § 2699.3(a)(1), Plaintiff gave
22 written notice to Defendant and the Labor and Workforce Development Agency (“LWDA”)
23 regarding his intent to seek civil penalties under PAGA for violation of Labor Code § 201, 202,
24 203, 226.7, and 512. (Declaration of Liane Katzenstein Ly (“Ly Decl.”) ¶15.)

25 ¹ Pursuant to PAGA, civil penalties recovered by Aggrieved Employees shall be distributed 75 percent to the
26 Labor and Workforce Development Agency (“LWDA”) and 25 percent to the aggrieved employee(s). Lab.
Code § 2699(i).

27 ² Plaintiff’s Motion for Approval of Representative Action Settlement will be concurrently uploaded to the
28 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.

1 On February 5, 2021, Plaintiff commenced this Action by filing a Class Action Complaint
2 alleging causes of action for: (1) Failure to provide meal period; (2) waiting time penalties; and
3 (3) unfair business competition. (Ly Decl. ¶6.) Subsequently, on April 12, 2021, Plaintiff amended
4 his Class Action Complaint to be a Representative Action pursuant to PAGA against Defendant
5 for penalties pursuant to Labor Code §§ 201-203, 226.7, and 512. (Hereafter, the “Action”). (*Id.*)
6 Pursuant to Labor Code § 2699.3(a)(2)(A), the sixty-five-day waiting period to commence a civil
7 action as though the LWDA has chosen not to investigate lapsed on April 12, 2021, allowing
8 Plaintiff to file his representative action complaint. (Ly Decl. ¶7.)

9 Initially, the Parties began litigating the PAGA action, and Defendant formally produced
10 time and pay data and policy documents for the aggrieved employees. However, after the decision
11 in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), Defendant opted to file a motion
12 to compel arbitration.

13 On November 3, 2022, after thorough briefing, the Court granted Defendant’s Motion to
14 Compel the individual claims in this Action to arbitration and stayed the representative PAGA
15 claims until after completion of the arbitration.

16 Plaintiff filed a demand for arbitration in the American Arbitration Association (“AAA”) on
17 December 21, 2022. An arbitrator was selected and the Parties conducted formal discovery on
18 Plaintiff’s individual claims, including Plaintiff’s individual PAGA claim. Defendant also
19 produced discovery relevant to Plaintiff’s individual claims.

20 B. The Discovery Process and Mediation

21 The Parties engaged in extensive pre-mediation discovery. This included discovery
22 pertinent to the aggrieved employees and individual discovery. (Ly Decl. ¶8.) Based on
23 Defendant’s records, the data reveals that the number of Aggrieved Employees is no more than
24 134 (including Plaintiff) and there are a total of 6,619 Covered PAGA Pay Periods at issue. (Ly
25 Decl. ¶9.)

26 On August 16, 2023, the Parties participated in an all-day mediation presided over by
27 respected wage-and-hour mediator Hon. David R. Lampe (Ret.), which led to this formal PAGA
28 Settlement Agreement that is subject to approval of the Court. (Ly Decl. ¶10.) The Parties

1 negotiated the terms and conditions of the Settlement and now present the agreed-upon Settlement
2 to the Court for Approval. (Ly Decl. ¶11.) The Parties also settled Plaintiff’s individual claims in
3 a separate settlement that is not contingent on the outcome of this Action. (Ly Decl. ¶12.)

4 **III. PAGA ACTIONS AND THE REQUIREMENTS**

5 A. The PAGA Statutory Scheme

6 PAGA creates a means of “deputizing” citizens as private attorneys general to enforce the
7 Labor Code on behalf of the LWDA. (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489,
8 501, *review den.* (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910.) A
9 Plaintiff may not — and Plaintiff here do not — bring a PAGA claim simply on his or her own
10 behalf as an individual claim, but “as the proxy or agent of the state’s labor law enforcement
11 agencies.” (*Id.* at p. 986; *see also Reyes v. Macy’s, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124;
12 *Iskanian v. CLS Transp. Los Angeles, LLC* (2014), 59 Cal. 4th 348, 380.)

13 When an aggrieved employee brings a PAGA claim, “the government is always the real
14 party in interest.” (*Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.* (2015) 234
15 Cal.App.4th 1109, 1119; *Montano v. The Wet Seal Retail, Inc.* (2015) 232 Cal.App.4th 1214, 1222
16 “[A] PAGA action is a dispute between an employer and the State agency.”.) Accordingly, a
17 Plaintiff that brings a PAGA claim represents “the same legal right and interest as state labor law
18 enforcement agencies,” in that the Plaintiff is seeking to recover those civil penalties that
19 otherwise would have been assessed and collected by the LWDA. (*Arias v. Superior Court* (2009)
20 46 Cal.4th 969, 986; Lab. Code § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at p. 1119;
21 *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 [“PAGA Plaintiff do not
22 have property rights in their cases.”].) This is borne out by the fact that the LWDA receives 75
23 percent of any civil penalties recovered; thus, recoveries are principally for the state and only
24 secondarily for Aggrieved Employees. (Lab. Code § 2699(i).) Therefore, when a Plaintiff brings
25 a PAGA claim, he or she is properly conceived of as a private attorney general prosecuting
26 violations of California’s labor laws on behalf of the state.

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

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

5 (Lab. Code § 2699.3(a)(1).)

6 As explained above, Plaintiff has complied with the notice requirements and has properly
7 pled a PAGA cause of action. (*Id at* Ly Decl. ¶¶6-7.)

8 **B. The Court Has Discretion When Awarding the Amount of Penalties**

9 PAGA provides for penalties in the amount of one hundred dollars (\$100) for each
10 aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for
11 each aggrieved employee per pay period for each subsequent violation. (Lab. Code § 2699(f)(2).)
12 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that
13 Defendant violated the Labor Code.³ (*Amaral v. Cintas Corp. No. 2* (2008), 163 Cal.App.4th
14 1157163 Cal.App.4th 1157, 1213.) However, PAGA does provide the Court with discretion
15 regarding the penalty amount. Labor Code §2699(e)(2) states that “a court may award a lesser
16 amount than the maximum civil penalty amount specified by this part if, based on the facts and
17 circumstances of the particular case, to do otherwise would result in an award that is unjust,
18 arbitrary and oppressive, or confiscatory.” Here, Defendant denies that it violated any law or that
19 it engaged in any knowing or intentional conduct giving rise to liability, and that any employees
20 suffered harm.

21 **C. Standards for Settlement Approval**

22 When approving a settlement of a PAGA action, the statute simply requires the Court to
23 “review and approve any settlement of any civil action filed pursuant to this part.” (Lab. Code §
24 2699(l)(2).) PAGA does not set forth standards for evaluating such settlements, and the California
25 appellate courts have not weighed in on the issue. However, trial courts have approved PAGA
26 settlements where the penalties are “genuine and meaningful” and “consistent with the underlying
27 purpose” of the statute. (See *O’Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110,
28 1113.) Additionally, as explained in *Arias, supra*, 46 Cal.4th 969, class action procedural rules do

³ See also *Willner v. Manpower Inc.* (N.D. Cal. 2014) 35 F.Supp.3d 1116, 1136; *McKenzie v. Federal Exp. Corp.* (C.D. Cal. 2011) 765 F.Supp.2d 1222, 1232

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 \$250,000.00 in full and final settlement of the PAGA claims. (Ly Decl. ¶13, Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount: \$250,000.00

PAGA Counsel Fees Payment (1/3): \$83,333.33

PAGA Counsel Litigation Expenses Payment: \$11,362.54⁴

Administrator Expenses Payment: \$4,500.00

PAGA Penalties: \$135,666.67

(\$101,750.00 to the LWDA; \$49,054.12 to Aggrieved Employees)

(Ly Decl. ¶14, Exhibit 1, ¶¶3.1-3.2.)

Each Aggrieved Employee shall receive a pro-rata portion of employees' share of PAGA penalties based on the number of PAGA Pay Periods worked by all Aggrieved Employees for Defendant during the Covered Period.⁵ (Ly Decl. ¶15, Exhibit 1, ¶3.2.3.1.)

For settlement purposes, the Aggrieved Employees are defined as "all persons who are employed or have been employed as an hourly employee by REPLANET PACKAGING, LLC, in the State of California who worked one or more pay periods during the Covered Period." (Ly Decl. ¶17, Exhibit 1, ¶1.4.)

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⁴ The settlement agreement provides for counsel to receive cost reimbursement of \$15,000.00. However, counsel's final costs come to \$11,362.54. (Ly Decl., Ex. 5 [Cost Report].) The extra \$3,637.46 will remain in the net settlement fund. Additionally, the settlement agreement provides for administrator expenses not to exceed \$11,000.00. The administrator's actual costs are \$4,500.00. (See Ly Decl., Ex. 6 [Admin Bid].) As such, the remaining \$6,500.00 will remain in the net settlement fund. These allocations will cause the net amount for distribution to the LWDA and Aggrieved Employees to be higher than the \$33,916.67 contemplated in the settlement agreement. (See Ly Decl., Ex. 1 ¶3.2.3.)

⁵ The PAGA Period or Covered Period means the period from April 12, 2020 to June 30, 2021. (Ly Decl. ¶16., Exhibit 1, ¶1.7.)

1 **V. ARGUMENT**

2 A. The Court Should Approve the Agreement

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

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

11 To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation
12 and discount taken follows. (Ly Decl. ¶18.) Plaintiff believed that Defendant may persuasively
13 argue that the Court should exercise its discretion under PAGA to significantly reduce any
14 penalties. (Ly Decl. ¶19.) The court in a PAGA action has the same discretion “to assess a civil
15 penalty” that the Labor Commissioner would have, as well as complete discretion to “award a
16 lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts
17 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
18 arbitrary and oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)).

19 PAGA Counsel anticipated that, at trial, Counsel for Defendant would argue: (1) all
20 Aggrieved Employees were provided with the opportunity to take meal breaks in compliance with
21 California law; (2) until this Action was filed, no employees had complained about any alleged failure
22 to provide meal breaks; (3) none of Defendant’s employees suffered any harm from or actual damage
23 as a result of the conduct that forms the basis for Plaintiff’s allegations. (Ly Decl., ¶20.) While Plaintiff
24 disagrees that this analysis is legally correct or persuasive, PAGA Counsel had to consider the
25 foregoing facts and arguments and how they might impact any judgment ultimately awarded to
26 Aggrieved Employees if the Court were persuaded by them. (Ly Decl. ¶21.)

27 In light of all these significant risks and the fact that PAGA gives the Court broad discretion
28 to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement

1 Amount of \$250,000.00 was fair and reasonable. (Ly Decl. ¶22, Exhibit 1, ¶3.1.)

2 C. There is a Strong Risk the Higher \$200 Civil Penalty Triggered for “Subsequent”
3 Violations Will Not Apply

4 Plaintiff believes there is a strong risk that the Court will not award the \$200 civil penalty
5 triggered for “subsequent” violations. (Lab. Code § 2699(f)(2).) If this case were to proceed to
6 trial, Plaintiff would argue that a “subsequent” violation simply means that Defendant violated
7 sections 201-203, 226.7 and 512 more than once for a given employee. Plaintiff is not aware of
8 any case law that interprets “subsequent” in the context of section 2699. However, Defendant is
9 likely to rely on *Amaral*, which rejected a purely temporal understanding of the term “subsequent”
10 and interpreted its use in Labor Code sections 210 and 225.5 to require that “the employer has
11 been notified that it is violating a Labor Code provision” before higher penalties are triggered. (
12 *Amaral, supra*, 163 Cal.App.4th at 1209; *see also Bernstein v. Virgin America, Inc.* (2021) 3 F.4th
13 1127, 1144.) Defendant presumably will take the position that it has not been notified that it
14 actually violated a Wage Order until the Labor Commissioner issues a formal citation or the Court
15 makes a finding that a violation existed. Even if the Court would agree with Plaintiff that
16 Defendant was put on notice on February 4, 2021, the date Defendant was served with Plaintiff’s
17 PAGA letter, the \$200 civil penalty would only apply to violations for a period of 3 months,
18 occurring between February 4, 2021 and June 30, 2021 (the end of the Release Period).

19 D. A Court May Exercise Discretion to Reduce the Maximum Civil Penalty Award

20 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a
21 showing that Defendant violated the Labor Code. (*Amaral, supra*, 163 Cal.App.4th at 1213;
22 *Moreno, supra*, 2007 WL 1650942, at *3.) However, PAGA does provide the Court with discretion
23 when it awards these penalties. Labor Code section 2699(e)(2) states that “a court may award a
24 lesser amount than the maximum civil penalty amount specified by this part if, based on the facts
25 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
26 arbitrary and oppressive, or confiscatory.”

27 In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, the
28 Court exercised its discretion to reduce the PAGA penalty amount. There, the Plaintiff brought a

1 PAGA claim for violations of section 226(a) based on the following issues: (a) the statements did
2 not show either an employee identification number or the last four digits of the social security
3 number of the employee; (b) the statements did not show the beginning date of the pay period for
4 which the employee was paid; (c) the statements identified Covidien as the employee's employer.
5 (*Id.* at *2). There were approximately 28,000 wage statements at issue. (*Id.* at *3). The *Fleming*
6 court calculated the maximum potential civil penalty exposure at \$2.8 million (\$100 per wage
7 statement). (*Ibid*; see also Labor Code § 2699(f)(2)). After a bench trial, the court reduced the
8 civil penalty per wage statement to \$18 per wage statement, reflecting 18% of the potential
9 exposure. (*Fleming, supra*, 2011 WL 7563047, at *4). The Court reasoned:

10 Here, the Aggrieved Employees suffered no injury due to the erroneous
11 wage statements, and made no complaint of the errors or omissions
12 contained therein prior to filing suit. Also, Defendants were not aware that
13 the wage statements violated the law and took prompt steps to correct all
14 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.

15 (*Id.* at *4.) A court exercising its discretion to significantly reduce the civil penalty awarded under
16 PAGA is not a rare occurrence. (See *e.g., Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th
17 504, 529 [awarding 10% of maximum civil penalty for meal break claims in light of Starbucks's
18 "good faith attempts" to comply and because the violations were minimal].)

19 Here, as explained above, Plaintiff's counsel anticipated that, at trial, Counsel for
20 Defendant would argue that: 1) all Aggrieved Employees were provided with the opportunity to
21 take meal breaks in compliance with California law; 2) until this Action was filed, no employees
22 had complained about any alleged failure to provide meal breaks; 3) none of Defendant's
23 employees suffered any harm from or actual damage as a result of the conduct that forms the basis
24 for Plaintiff's allegations. After significant discovery in this action, Plaintiff's counsel determined
25 that a settlement of \$250,000.00 is reasonable given the above risks.

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1 E. Based on the Risks Above and the Analysis of the Maximum Penalties Available,
2 Plaintiff Believes this Settlement is Fair and Reasonable.

3 Based on these figures, the maximum potential exposure for the PAGA claims for Aggrieved
4 Employees is \$661,900.00 (6,619 pay periods at issue × \$100 = \$661,900.00). Given that this
5 Settlement is for \$250,000.00, Plaintiff believes this is a very fair and reasonable settlement.

6 **VI. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEES**

7 As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to
8 create a Gross Settlement Amount of \$250,000.00. (Ly Decl. ¶26; Ex. 1 at ¶3.1.) From that fund,
9 Plaintiff requests an award of attorneys' fees for PAGA Counsel in the amount of \$83,333.33, or
10 33.33% of the Gross Settlement Amount, and \$11,362.54 in reimbursement for litigation costs.
11 (*Id.*; Ex. 1 at ¶3.2.1.)

12 A. Plaintiff's Counsel are Entitled to a Fee from the Common Fund

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

18 We join the overwhelming majority of federal and state courts in
19 holding that when class action litigation establishes a monetary fund
20 for the benefit of the class members, and the trial court in its
21 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.

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

24 The recognized advantages of the percentage method—including relative ease of
25 calculation, alignment of incentives between counsel and the class, a better
26 approximation of market conditions in a contingency case, and the encouragement
27 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.

28 (*Id.* at 573.)

1 An award of 33.33% of the common fund is appropriate here under the “substantial benefit”
2 theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer,*
3 *Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a
4 representative capacity to recover fees when the litigant’s efforts have created a substantial, actual,
5 and concrete benefit for members of an ascertainable class and the court’s jurisdiction over the
6 subject matter makes possible an award which spreads the cost proportionately among the
7 members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th
8 563, 578.)

9 This doctrine rests on the understanding that attorneys should normally be paid by their
10 clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from
11 the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979)
12 23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent
13 this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees against
14 the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano*
15 *III*, 20 Cal.3d at p. 35.) “A court, in the exercise of its equitable discretion, may decree that those
16 receiving the benefit should contribute to the costs of its production.” (*Save El Toro Assn., supra*,
17 98 Cal.App.3d at 548.) As this approach “better approximates the workings of the marketplace
18 than the lodestar approach,” there is “a greater judicial willingness to evaluate a fee award as a
19 percentage of the recovery” in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82
20 Cal.App.4th 19, 31, 48.)

21 B. The Attorneys’ Fees Request Are Well Within the Range of Fees in Comparable
22 Cases

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

25 No general rule can be articulated on what is a reasonable percentage
26 of a common fund. Usually 50% of the fund is the upper limit on a
27 reasonable fee award from a common fund in order to assure that
28 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. PAGA Counsel’s Fee Request is Reasonable Under a Lodestar Crosscheck

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. (Ly Decl. ¶35.) PAGA Counsel have an aggregate lodestar in the amount of \$70,391.00 (with future hours) which represents 101.40 hours of attorney work on this litigation from its inception and continuing

1 through completion of the case. (*Id.*) As such, PAGA Counsel is asking for a lodestar multiplier
2 of 1.18. (Ly Decl. ¶37.) Typically, the lodestar is merely the starting point of the calculation of a
3 reasonable fee, and courts often multiply the lodestar by a factor to account for the risk of non-
4 payment, delay in payment, the quality of work, and the novelty and difficulty of the issues
5 involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253; *Beasley v. Wells Fargo Bank*, (1991)
6 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of Supervisors*, (1997) 76
7 Cal.App.3d 241, 251.)

8 This case dealt with difficult legal and factual questions. (Ly Decl. ¶57.) Significantly,
9 the risk attendant to the underlying claims in this matter was great considering Defendant's
10 defenses as discussed in detail above. (*Ibid.*) Were this case to proceed, Defendant would have a
11 strong incentive to litigate tenaciously. (*Ibid.*) There are genuine issues in dispute. (*Ibid.*)
12 Furthermore, PAGA Counsel was able to obtain close to the full value for this case. (Ly Decl.
13 ¶58.)

14 As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades
15 of experience who diligently prepared and litigated this matter. (Ly Decl. ¶59.) To achieve the
16 ultimate result in this case, my firm had to incur substantial risk and expense, and were precluded
17 from taking other fee generating employment for over 100 hours of attorney time. (Ly Decl. ¶60.)
18 This matter had been handled purely on a contingency fee basis and my firm has advanced many
19 thousands of dollars in costs while deferring all payment of fees, with no guarantee that any of the
20 fees incurred or costs advanced would ever be recovered, and diverting significant firm resources
21 to prosecution of this matter. (Ly Decl. ¶61.) PAGA Counsel believe this is an exceptional result
22 that has been well received by the Aggrieved Employees. (Ly Decl. ¶62.)

23 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF** 24 **COSTS**

25 In addition to their request for fees, PAGA Counsel further request reimbursement of the
26 reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this
27 litigation, in the amount of \$11,362.54. (Ly Decl. ¶63.) To date, Kingsley and Kingsley has
28 incurred \$11,103.54 in costs. (Ly Decl. ¶64.) PAGA Counsel anticipates incurring an additional

1 \$259.00 in costs to file and serve this motion. (Ly Decl. ¶65.) As such, counsel is requesting a
2 cost reimbursement of \$11,362.54. (Ly Decl. ¶66.)

3 All of the requested costs are reasonable in amount and were necessarily incurred by Class
4 Counsel in prosecuting this litigation. (Ly Decl. ¶67; Exhibit 5 [Cost Report].) Expenses in this
5 matter to date include costs for filing fees, research, mediation, and additional costs for the
6 prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Liane
7 Katzenstein Ly. All of these costs have been incurred in the course of this litigation, and all costs
8 advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of
9 filing the present motion. (Ly Decl. ¶68.)

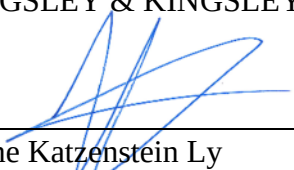
10 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
11 advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court
12 should approve the request for reimbursement in the amount of \$11,362.54. (Ly Decl. ¶69.)

13 **VIII. CONCLUSION**

14 Plaintiff submits that the proposed Settlement as documented in the Agreement is fair,
15 adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiff
16 respectfully requests that the Court approve the Settlement and Order that the Settlement is carried
17 out according to the terms of the Agreement.

18
19 DATED: October 30, 2023

KINGSLEY & KINGSLEY, APC

20
21 By: 

Liane Katzenstein Ly

Attorneys for Plaintiff 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 October 30, 2023, 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:

HERR PEDERSON & BERGLUND LLP

Rachele Berglund
rberglund@hpblaw.net
100 Willow Plaza, Suite 300
Visalia, CA 93291

[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 October 30, 2023, at Woodland Hills, California.



Michelle Tanzer