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SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA COUNTY
UNLIMITED JURISDICTION

OSCAR CORONA, FAVIAN G GOMEZ,
JOSE B GONZALEZ and ALBERTO
LOYA,

Plaintiffs,

vs.

ROBERT ROSS HAZARD DBA
HAZARD CONCRETE
CONSTRUCTION; HAZARD
CONCRETE, INC.; SAUSAL
CORPORATION; JAMES E. WARD;
LESLIE L. WARD; JOSHUA L. WARD;
KEVIN HALLAS AND DOES 1
THROUGH 50

Case No: **MSC21-00637**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR APPROVAL OF
PAGA SETTLEMENT AND MOTION FOR
ATTORNEYS' FEES AND COSTS**

Date: TBD
Time: TBD
Dept. Dept. TBD

Complaint Filed: April 2, 2021

1 **INTRODUCTION**

2 Plaintiffs OSCAR CORONA, FAVIAN G GOMEZ, JOSE B GONZALEZ and ALBERTO
3 LOYA ("PLAINTIFFS") seek Court approval, pursuant to *Labor Code* § 2699(l), of a \$139,213.92
4 settlement of penalty claims under the Private Attorney General Act of 2004 (*Labor Code* § 2698 *et seq.*
5 ("PAGA")). They also seek approval of reasonable attorneys' fees and costs in the amount of \$46,
6 213.91 in fees, a one third contingency, and costs not to exceed \$5,000.00.

7 The settlement was reached in conjunction with a confidential individual settlement. Upon
8 request by the Court, the confidential individual settlement can be lodged with the Court for an *in*
9 *camera* review if required.

10 This matter is not a Class Action. Only a PAGA claim is at issue in this Approval Hearing. A
11 true and correct copy of the PAGA settlement agreement is attached as Exhibit A to the *Declaration of*
12 *Tomas E. Margain*.

13 The proposed settlement agreement creates a non-reversionary fund of \$139,213.92 to be
14 distributed as follows:

- 15 (a) Eighty-Five Thousand Dollars and Zero Cents (\$85,000.00) as payment to the LWDA to be split
16 among the LWDA (75%) and PAGA aggrieved employees (25%);
17 (b) Administration Costs of \$3,000.00; and
18 (c) Attorneys' fees not to exceed Forty-Six Thousand Two Hundred Thirteen Dollars and Ninety-
19 One Cents (\$46, 213.91) and costs not to exceed \$5,000.00.

20 The parties mediated the matter before Mark LeHocky, Esq, of ADR services. After the
21 mediation- and using Mr. LeHocky's mediator's proposal- Plaintiffs and SETTLING DEFENDANTS
22 were able to reach a resolution of individual and PAGA claims.

23 The settling Defendants are SAUSAL CORPORATION; JAMES E. WARD; LESLIE L.
24 WARD; JOSHUA L. WARD; and KEVIN HALLAS ("SETTLING DEFENDANTS"). SETTLING
25 DEFENDANTS are alleged to have employed Plaintiffs after Defendant SAUSAL hired a
26 subcontractor, non-settling Defendants ROBERT ROSS HAZARD and HAZARD CONCRETE, INC.
27 ("HAZARD DEFENDANTS" or "NON-SETTLING DEFENDANTS"), and brought PLAINTIFFS and
28

eleven (11) other workers employed by HAZARD onto their payroll in order to finish various construction projects.

This motion can be approved, and the claims of the SETTLING DEFENDANTS adjudicated via a PAGA Fairness Hearing, without the participation of the HAZARD DEFENDANTS. As to the HAZARD DEFENDANTS, the individual and PAGA Settlement excludes a release as to Defendant HAZARD but extinguishes individual claims Plaintiffs have during the period of time they were on Defendant Sausal's Corporation's payroll.

With respect to the lawsuit, the Second Amended Complaint alleges various individual wage and hour claims, retaliation claims, and claims under the Fair Employment and Housing Act. These claims were settled by a confidential Settlement Agreement with SETTLING DEFENDANTS. This brief will describe the individual claims and Plaintiffs' valuation.

The PAGA claim, the Thirteenth Cause of Action, was laid out in an LWDA Charging Notice/Letter plead as Exhibit E of the Second Amended Complaint ("SAC") and will also be laid out both as to the claims, exposure and opinion of the settlement reached.

While the SETTLING DEFENDANTS have agreed to settle the matter, they vigorously contested liability and did not concede or admit liability.

Compliance with Labor Code section 2699(1)(2)

One of the Complex Court's guidelines indicated that the Court wanted to ensure compliance with Labor Code section 2699(1)(2) that states:

(1) No action may be brought under this section by an aggrieved employee if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person within the timeframes set forth in Section 2699.3 for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of the employee or others or initiates a proceeding pursuant to Section 98.3.

As of the date of the filing of this motion, Plaintiffs' counsel is unaware of any other PAGA claim against Defendants. (*Declaration of Alexander S. Rusnak in Support of Plaintiffs' Motion for Approval of PAGA Settlement* ("Rusnak Decl.") ¶ 3)

Plaintiffs' counsel also lodged a copy of the PAGA Settlement Agreement and these papers with

1 the LWDA on the date of the filing of this motion as indicated in the Proof of Service. (Declaration of
2 Tomas E. Margain in Support of Plaintiffs' Motion for Approval of PAGA Settlement ("*Margain*
3 *Decl.*") ¶ 8)

4 5 **II. FACTS AND PROCEDURAL HISTORY**

6 Defendants SAUSAL CORPORATION; JAMES E. WARD; LESLIE L. WARD; JOSHUA L.
7 WARD; KEVIN HALLAS ("SETTLING DEFENDANTS") are a California State Licensed
8 construction contractor, three corporate owners or managing agents, and a supervisory employee
9 accused of racial harassment.

10 Defendant SAUSAL CORPORATION hired Defendant HAZARD as a subcontractor to perform
11 concrete construction on public works construction projects subject to the payment of prevailing wages.
12 (*Margain Decl.* at ¶ 12.) SAUSAL CORPORATION holds a B license as a general contractor and
13 typically subcontracts out work other than carpentry and project management. (*Margain Decl.* at ¶¶12-
14 13.) At some point during a large park renovation project in Hayward California, SAUSAL
15 CORPORATION put HAZARD's employees, including Plaintiffs, on their payroll and started paying
16 them directly. (*Margain Decl.* at ¶¶14-15.)

17 **A. Claims Made In the Second Amended Complaint**

18 **I. Individual Claims**

19 The Second Amended Complaint alleges claims for earned but unpaid wages, various penalties
20 and premium wages for the failure to provide meal and rest breaks, and claims for racial harassment
21 both by alleged acts by Defendants HALLAS and HAZARD. See SAC 1st through 12th Causes of
22 Action.

23 As to the SETTLING DEFENDANTS, the wage and hour claims center around allegations that
24 they did not paying Plaintiffs for all hours worked, including overtime hours, denied meal and rest
25 breaks, and misclassifying Plaintiffs on public works and paying them as "Cement Masons" or
26 "Laborers" despite having Plaintiffs also perform the work of Iron Workers, Operating Engineers and
27 Carpenters - which has a higher corresponding prevailing wage rate. (*Margain Decl.* at ¶¶16-17.)
28 Specific to this, Plaintiffs alleged that they began installing rebar because of problems with a

1 subcontractor used to do this work and also performed the carpentry to build forms on structural
2 concrete work of concrete structures that were significantly more than 4 inches in depth or used as
3 retaining walls. (*Margain Decl.* at ¶¶12, 16-17.) At Kennedy Park, there were areas in the parking lot
4 where deep concrete retaining walls were used to surround trees or green spaces, a retaining wall where
5 garbage dumpsters were going to be stored, and areas in the sidewalk where a train was going to
6 intersect the sidewalk, and a patio area where BBQs and a large pergola were going to be installed.
7 (*Margain Decl.* at ¶ 12.) On these areas, the Cement work was at times deep enough to necessitate that
8 carpenters set the forms and ironworkers tie the rebar. (*Margain Decl.* at ¶ 12.) The failure to pay all
9 wages centered around the fact that time was kept on the field in an informal manner and there was
10 rounding to the nearest 30 minutes. (*Margain Decl.* at ¶ 21.) Plaintiffs, who lived in the Hayward area,
11 would show up early to work prior to the start time to begin getting their tools and setting up the jobsite
12 both from tools they brought and stored at the job site. (*Margain Decl.* at ¶ 21.) Finally, Plaintiff
13 Corona, who was a foreman, also alleged the failure to reimburse expenses primarily fees for using his
14 construction trailer to dump trash and some construction debris. (*Margain Decl.* at ¶ 21.)

15 As to the racial harassment claims, Defendant HALLAS, a supervisor, is alleged to have racially
16 disparaged an African American co-worker behind his back but in front of Plaintiffs thereby creating a
17 hostile work environment. Defendant HALLAS is also alleged to have called Plaintiffs, who are Latino,
18 racial epithets both by calling them “fucking Mexicans,” referencing that the Federal Government was
19 going to arrest them on immigration charges, and disparaging the new Kennedy Park in Hayward with
20 various picnic, barbeque areas and a train for families was “too nice” as it would just be used by
21 Mexicans. (See SAC at ¶¶ 37-40; Exhibit A through D, DFEH Charging letters.) Plaintiff CORONA
22 also alleges that after he complained about Defendant HALLAS, Defendant HALLAS used the same
23 epithets and statements by mockingly saying he would not say those things again while using the same
24 disparaging words.

25 Defendants vigorously denied the Plaintiffs’ claims. The facts as described were allegations
26 made which SETTLING DEFENDANTS settled but were not conceded or admitted.

27 ///

The following individual exposure was computed by Plaintiffs:

<u>Claim</u>	<u>Oscar Corona</u>	<u>Jose Gonzalez</u>	<u>Favian Gomez</u>	<u>Alberto Loya</u>
Off Clock Wages	\$73,721.22	\$34,094.03	\$4,760.15	\$4,719.46
Misclassification Wages	\$13,356.32	\$11,209.12	\$4,631.28	\$4,631.28
Missing Hours Not Paid	\$2,441.10	\$1,627.40	\$1,981.56	\$2,211.33
Liquidated Damages 1194.2	\$56,914.92	\$26,572.86	\$3,674.97	\$3,643.56
Meal Periods	\$29,562.78	\$27,604.98	\$7,635.42	\$7,570.16
Rest Breaks	\$29,562.78	\$27,604.98	\$7,635.42	\$7,570.16
Sausal 203 Penalty	\$15,076.80	\$15,076.80	\$15,076.80	\$15,076.80
Hazard 203 Penalty	\$15,076.80	\$15,076.80	\$15,076.80	\$15,076.80
Hazard 203 Penalty (2nd Term)	\$15,076.80	0	0	0
LC 226 Penalty	\$4,000	\$4,000	\$4,000	\$4,000
Labor Code 98.6	\$20,000	\$10,000	\$10,000	\$10,000
FEHA Damages	\$75,408.00	\$20,000.00	\$20,000.00	\$20,000.00
LC 2802 Reimbursement	\$14,543.04	0 0	0	0
Interest	\$20,810.19	\$14,299.67	\$3,730.14	\$3,738.33
TOTAL	\$385,550.75	\$192,866.97	\$94,472.40	\$94,499.55

The total valuation of the individual claims as posited by Plaintiffs was \$767,389.67. (*Rusnak Decl.* at ¶¶ 9-10.)

II. PAGA CLAIMS

The PAGA claim and nine-page charging letter focuses on SETTLING DEFENDANTS and their time and payroll practices. This ranged from issues with how time was recorded at jobsites, from employing workers “off the clock” or prior to and after the recorded work hours. Claims were also made for the denial of meal and rest breaks and the failure to provide compliant wage stubs. A penalty claim was also made based on retaliatory conduct under *Labor Code* section 98.6. (See SAC at ¶¶ 148-160, Ex E, LWDA charging letter.)

Plaintiffs posited the following PAGA exposure based on 3,830 pay periods and a total of 87 employees:

<i>Labor Code</i> §	Sausal Violations	Sausal Total
204	3,830 pay periods x \$200	\$766,000.00
226	3,830 pay periods x \$100	\$383,000.00
226.7	3,830 pay periods x \$100	\$383,000.00
256	26 employees x \$13,497.60 per employee	\$350,937.60
510	3,830 pay periods x \$100	\$383,000.00
512	3,830 pay periods x \$100	\$383,000.00

558	3,830 pay periods x \$50	\$191,500.00
1174	80 employees x \$500	\$40,000.00
1198	3,830 pay periods x \$100	\$383,000.00
1774	3,830 pay periods x \$100	\$383,000.00
2802	9 pay periods x \$100	\$900.00
2810.5	3,830 pay periods x \$100	\$383,000.00
Total		\$4,030,337.60

(*Rusnak Decl.* at ¶ 11.)

The above accounting was used at mediation. However, a formal settlement agreement was executed on November 2024 by which time SETTLING DEFENDANTS had 89 aggrieved employees and 5,771 pay periods for a PAGA exposure period to include March 2, 2020, to May 14, 2024, See Settlement agreement at A.18 definition of “PAGA Pay period.”

The PAGA civil penalties exposure and PAGA settlement reached was calculated for all of Defendant SAUSAL’s employees and not just Plaintiffs or the crew hired from HAZARD.¹ (*Margain Decl.* at ¶ 22, 27-28.) Based on the data, 3,830 pay periods based on reviewing and coding over 9,000 documents. (*Margain Decl.* at ¶¶ 22, 28 , *Rusnak Decl.* at ¶11.) The smaller 224 pay periods of the 15 HAZARD employees who were onboarded by the SETTLING DEFENDANTS was not used. Moreover, the damages model assumed liability on each and every pay period. (*Id.*) The best evidence found was SAUSAL’s handbook which contains language that indicates workers are instructed: (1) not to record their time getting their tools ready for work and in storing their tools at the end of a workday; (2) that they would be docked 30 minutes if labor if they show up late to work; and (3) that all overtime has to be approved. (*Margain Decl.* at ¶¶ 23-27.) However, there exists problems of individualized proof to show that there were violations in each pay periods. (*Margain Decl.* at ¶ 27.)

B. Procedural History

PLAINTIFFS filed their Complaint on April 2, 2021. PLAINTIFFS filed a PAGA Notice letter with the State of California on March 2, 2021. A First Amended Complaint was filed alleging the PAGA violation and including the PAGA letter to the LWDA and Defendants on May 17, 2021. The

¹ HAZARD had been using a company that runs payroll for workers, called Barrett Business Servies, prior to this change. In an email produced in the litigation, Defendant WARD- the president of SAUSAL, stated that Hazard’s employees were paid directly by Sausal because “Hazard was unable to make payroll.” (*Margain Decl.* at ¶ 15.)

operative pleading, the Second Amended Complaint, was filed on September 9, 2021, via stipulation.

During the Discovery phase on this case, PLAINTIFFS propounded Form Interrogatories, Special Interrogatories and a Demand for Inspection of documents on the SETTLING DEFENDANTS. SETTLING DEFENDANTS produced over 9,000 pages of documents. (*Margain Decl.* ¶ 18). Among the documents produced were PLAINTIFFS' time and pay records as well as the time and pay records workers in the PAGA claim. The time and pay records were used to produce a PAGA audit based on 87 workers and 3,830 pay periods. The time records did show that time was always rounded to the hour or half hour, meals were always 30 minutes in length and some records used actual start and end times and others used block times such as an 8-hour day as opposed to working from 7:00 am to 3:30 pm.

SETTLING DEFENDANTS took the deposition of Plaintiff Oscar Corona over two days. Plaintiffs noticed the PMQ deposition of Defendants and then used that notice to get the 9,000 documents and go to mediation prior to taking the deposition. As the PAGA exposure that led to the settlement assumed all workers were employed in a similar manner than the inhered HAZARD workers, the mediation and settlement proceeded with that understanding.

C. Mediation

On September 19, 2023, the parties attended a mediation session with Mark LeHocky, Esq. of ADR services, an experienced litigator and mediator. (*Margain Decl.* ¶¶ 33-36, *Rusnak Decl.* at ¶ 8). Mediator LeHocky worked with the parties to propose a global settlement which was rejected by Plaintiffs. (*Id.*) However, Plaintiffs' counsel and counsel for the SETTLING DEFENDANTS used that proposal as a means to reach the settlement by carving out Defendant HAZARD. (*Id.*)

D. PAGA Settlement

A settlement was finally reached after protracted negotiations in 2024. The parties agreed to a PAGA period of March 2, 2020, to May 14, 2024 that included 89 aggrieved employees and 5,771 pay periods, See Settlement agreement at A.18 definition of "PAGA Payperiod." The formal agreement was executed by the parties beginning in October 2024 and was fully executed on November 12, 2024. It calls for a gross settlement of \$139,213.92.

III. THE PAGA SETTLEMENT NOTICE OF LWDA

A copy of the moving papers, including the Settlement Agreement, were e-filed with the State of California's Labor and Workforce Development Agency LWDA. (*Margain Decl.* ¶ 10).

IV. THE PAGA SETTLEMENT

A. PAGA Settlement Fund

The proposed settlement agreement creates a non- reversionary fund of \$139,213.92 to be distributed as follows:

- (a) Eighty-Five Thousand Dollars and Zero Cents (\$85,000.00) as payment to the LWDA that will be split among the LWDA (75%) and PAGA aggrieved employees (25%);
- (b) Administration Costs of \$3,000.00; and
- (c) Attorneys' fees not to exceed Forty-Six Thousand Two Hundred Thirteen Dollars and Ninety One Cents (\$46, 213.91) and costs not to exceed \$5,000.00.

B. Timing of Payment

Pursuant to the settlement agreement the funding of the settlement is to be made within 30 days of the effective date defined in the agreement as the date of the entry of a judgment. It is anticipated that it will take no more than 90 days to issue checks and address any issues of distributing those checks including uncashed checks. As such, the proposed Order seeks a compliance hearing set for 120 days after the hearing date and a Status Report with a Final accounting due two weeks before the Status Hearing.

C. Released Claims

The PAGA agreement will release SETTLING DEFENDANTS from the PAGA claim for the period of March 2, 2020 to May 14, 2024. The PAGA release is defined at section E of the agreement as a general release buy the four Plaintiffs. However, the 89 PAGA Pool workers are only releasing their PAGA claims, and not individual claims, based on the following language:

Release by Aggrieved Employees: All Aggrieved Employees and the State of California are deemed to release, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors, and assigns, the Released

1 Parties from all claims they may have for civil penalties under the California Labor Code § 2698
2 *et seq.* California Labor Code Private Attorneys General Act of 2004 (“PAGA”) alleged in the
3 Action and that reasonably could have been alleged in the Action based on the allegations
4 contained in the LWDA Letter and the Operative Complaint and any amendments thereto,
5 including, without limitation, all claims for civil penalties under PAGA related to off-the-clock
6 work, unpaid minimum and overtime wages, unpaid regular and prevailing wages, meal periods
7 and meal period premiums, rest breaks and rest break premiums, wage statements, timely
8 payment of wages during and after employment, business expense reimbursements, and any
9 other Labor Code violations that were alleged in the Action, or that could have been alleged in
10 the Action based on the facts alleged in the Action, which includes, but is not limited to, alleged
11 violations of Labor Code sections 200- 204, 210, 211, 223, 226, 247.5, 226.3, 226.7, 256, 510,
12 511, 512, 558, 558.1, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 1452, 1772, 1774, 1174.5, 1176,
13 2802, 2810.5, during the PAGA Period.

14
15 The Confidential Individual Settlement Agreement provides for a release of individual claims by
16 PLAINTIFFS. The agreement can be submitted *in camera* upon request by the Court.

17 **D. Excluded Claims**

18 Again, the settlement does not release any individual claims any of the unnamed aggrieved
19 employees may have against any of the SETTLING DEFENDANTS. Furthermore, the Settlement
20 Agreement does not address any claims against Defendant NON SETTLING DEFENDANTS.

21 **E. Administration Process**

22 The Settlement Agreement provides that Phoenix Class Action Administration Solutions will
23 administer the collecting of funds and disbursement of funds to the LWDA, PAGA aggrieved
24 employees, and PLAINTIFFS’ counsel.

25 Individual PAGA aggrieved employees’ checks shall remain valid and negotiable for one
26 hundred eighty (180) calendar days after the date of their issuance. In the event that the Administrator
27 mails a check to a PAGA member that remains uncashed after one hundred twenty (180) days, such
28 payment shall be sent to the State of California, Controller’s Office, Unclaimed Property Division, for

1 further handling on behalf of the PAGA member(s). There will be no reversion of funds to SETTLING
2 DEFENDANTS.

3 V. **ARGUMENT SUPPORTING APPROVAL OF THE PAGA SETTLEMENT**
4 **TERMS**

5 A. **Standard of Review**

6 *Labor Code* § 2699(1)(2) states that “[t]he superior court shall review and approve any settlement
7 of any civil action filed pursuant to this part.”

8 PAGA does not specify a standard of review for PAGA settlements. Existing law does, however,
9 provide some guidance as to the appropriate standard of review. Plaintiff contends that the Court should
10 look to: (1) the standard of review used in analogous statutory schemes; (2) the purposes and policies of
11 PAGA.

12 A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd.
13 (1)(2).) The court’s review “ensur[es] that any negotiated resolution is fair to those affected.” (*Williams*
14 *v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA
15 at the same time it is submitted to the court. (*Ibid.*)

16 Public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3
17 Cal.4th 273.) As discussed by one court:

18 PAGA does not establish a clear standard for evaluating PAGA settlements.

19 ...

20 Accordingly, certain courts have been willing to approve PAGA settlements only if (1) the
21 statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement
is fair, reasonable, and adequate in view of PAGA’s public policy goals.

22 (*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061 at *2.)

23 As part of this analysis, these courts have evaluated proposed PAGA settlements under the
24 relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel v. Nike*
25 *Retail Services, Inc., supra*, 2019 WL 2029061 at *2.) “Of the *Hanlon* factors, the following are relevant
26 to evaluating [a] PAGA settlement: (1) the strength of the plaintiff’s case; (2) the risk, expense,
27 complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent
28 of discovery completed and the stage of the proceedings; (5) the presence of government participation;

1 and (6) the expertise and views of counsel. (*Ibid.*)

2 “[W]hen a PAGA claim is settled, the relief provided ... [should] be genuine and meaningful,
3 consistent with the underlying purpose of the statute to benefit the public ...” (*Villalobos v. Calandri*
4 *Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *13.)
5 The settlement must be reasonable in light of the potential verdict value. (See *O’Connor v. Uber*
6 *Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 (*O’Connor*) [rejecting settlement of less
7 than one percent of the potential verdict].) But a permissible settlement may be substantially discounted,
8 given that courts often exercise their discretion to award PAGA penalties below the statutory maximum
9 even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No.
10 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

11 **B. Purposes and Polices of PAGA**

12 “The Legislature’s sole purpose in enacting PAGA was to augment the limited enforcement
13 capability of the [LWDA] by empowering employees to enforce the *Labor Code* as representatives of
14 the Agency.” (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 86.) The California
15 Legislature passed PAGA because they believed it is necessary “to achieve maximum compliance with
16 state labor laws” and “to ensure an effective disincentive for employers to engage in unlawful and
17 anticompetitive business practices.” (2003 Cal. Legis. Serv. Ch. 906 § 1(a).) While self-policing efforts
18 have had some success, the California Legislature found that “in other cases the only meaningful
19 deterrent to unlawful conduct is the vigorous assessment and collection of civil penalties as provided in
20 the *Labor Code*.” (*Id.* at § 1(b).) Through PAGA, the Legislature thus: (1) sought to “enlist[] willing
21 citizens in the task of private enforcement,” (*Iskanian*, 59 Cal.4th at 390); (2) “deputized” aggrieved
22 employees to sue on behalf of the State to enforce state labor laws; and (3) authorized them to recover
23 civil penalties, attorneys’ fees, and costs. (2003 Cal. Legis Serv. Ch. 906 (Legislative Counsel’s
24 Digest).) In bringing a PAGA action, “[t]he employee-plaintiff acts as the proxy or agent of the state
25 labor enforcement agencies, representing the same legal right and interest as those agencies”
26 (*Iskanian*, 59 Cal.4th at 394.) As for the interests of the LWDA, whom the plaintiff acts as an agent of,
27 its top enforcement priorities are “to vigorously enforce minimum labor standards in order to ensure
28 employees are not required or permitted to work under substandard unlawful conditions . . .” and to

1 “protect employers who comply with the law from those who attempt to gain a competitive advantage at
2 the expense of their workers by failing to comply with minimum labor standards.” (*Labor Code*
3 §90.5(a).)

4 In light of the above law, as well as the policies and purposes of PAGA, Plaintiff proposes that
5 the Court consider the following factors in determining whether to approve the PAGA settlement: (1)
6 Whether the settlement is otherwise “just” and “in the public interest”, (2) The extent to which the
7 settlement achieves compliance with state labor laws, and (3) The extent to which the settlement deters
8 violations of the state labor laws.

9 **C. Settlement Should be Approved as it is “Just” and “In the Public Interest”.**

10 The SETTLING DEFENDANTS, a small employer, have agreed to pay a significant amount,
11 \$139,213.92, in civil penalties to the LWDA from which claim administration expenses will be paid and
12 a projected \$85,000.00 will be split among the LWDA (75%) and PAGA aggrieved employees (25%).

13 The settlement amount of PAGA penalties here provides an even bigger benefit to the LWDA and
14 PAGA aggrieved employees than allocations that have been approved in other PAGA settlements. (See,
15 e.g., *Viceral v. Mistras Grp. Inc.* (N.D. Cal. Oct. 11, 2016, No. 15-CV-02198- EMC) 2016 WL 5907869,
16 at *8 [approving an allocation of \$20,000 of a \$6,000,000 settlement to the PAGA civil penalties]); In *re*
17 *Uber FCRA Litig.* (N.D. Cal. June 29, 2017, No. 14-CV-05200) 2017 WL 2806698, at *2 [approving an
18 allocation of \$7,500 of a \$7,500,000 settlement to the PAGA civil penalties].)

19 Here counsel took into consideration the value of SETTLING DEFENDANTS’ exposure and
20 reached a settlement for less than the full value. The PAGA claim was settled for \$139,213.92 because it
21 was not going to be used as a token amount. However, during arm’s length adversarial negotiations,
22 including the consideration of a mediator’s proposal, PLAINTIFFS were also not going to further waive
23 the value of their individual claims to settlement matter. The \$139,213.92 allocation to PAGA civil
24 penalties, is “just” and “in the public interest” as SETTLING DEFENDANTS 1) changed their
25 employment practices, 2) substantially compensated PLAINTIFFS for their individual claims, and 3) does
26 not financially ruin SETTLING DEFENDANTS so that, as a small business, continue to operate and
27 employ their workers. As such, reaching a settlement of \$139,213.92 for PAGA liability is fair and
28 reasonable.

1 **D. Counsel's Opinion on Settlement**

2 The PAGA settlement was reached after protracted arm's length non collusive negotiations. (*Margain*
3 *Decl.* at ¶ 31; *Rusnak Decl.* at ¶18-20.) The PAGA valuation assumed both that every worker of
4 SETTLING DEFENDANTS suffered the alleged violations on every pay period worked. (*Id.*) It also
5 "stacked" penalties based on the same unpaid wage, non-complaint meal and rest break, or record keeping
6 violations. (*Id.*) In viewing the \$139,213.91 PAGA settlement, again, it should be noted that it is
7 dependent on oral testimony from other workers as to the off the clock and rounding claims made and is
8 a result of applying various penalties to what can essentially be seen as off the clock, meal and rest break
9 and derivative wage stub non-compliance claims. Finally, counsel took into consideration the fact that
10 no other PAGA claim has been filed. (*Margain Decl.* at ¶ 31)

11 **E. Attorney's Fees and Costs as Part of Settlement**

12 **1. Attorneys' Fees and Costs Are Recoverable Under PAGA.**

13 The right of PLAINTIFFS' counsel to attorneys' fees and costs is mandatory under the PAGA.
14 (See *Labor Code* § 2699(g)(1).) The court also has an independent right and responsibility to review the
15 requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los*
16 *Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128; see also *Lab. Code* § 2699(g)
17 ["Any employee who prevails in any [PAGA] action shall be entitled to an award of reasonable
18 attorneys' fees and costs."].) They are also discretionary under *California Code of Civil Procedure*
19 § 1021.5 (codifying the private attorney general doctrine adopted in *Serrano v Priest* (1977) 20 Cal.3d
20 25), which states: "a court may award attorneys' fees to a successful party against one or more opposing
21 parties in any action which has resulted in the enforcement of an important right affecting the public
22 interest if [among other things] a significant benefit, whether pecuniary or nonpecuniary, has been
23 conferred on the general public or a large class of persons." Here, while there was no trial on the merits,
24 the parties entered into a settlement agreement which allows Plaintiffs' counsel to seek one third in fees,
25 or Forty-Six Thousand Two Hundred Thirteen Dollars and Ninety-Two Cents (\$46,213.92) and costs
26 not to exceed \$5,000.00.

27 **2. Attorneys' Fees and Costs Can be Paid by The Common Fund**

28 The court can award fees under what is called a "common fund" or "common benefit" doctrine

1 under which attorneys who create a common fund or benefit for a group of persons may be awarded their
2 fees and costs to be paid out of a settlement fund. (*Serrano* 20 Cal.3d at 34, quoting *D'Amico v. Board*
3 *of Medical Examiners* (1974) 11 Cal.3d 1.) When the prosecution of a matter results in the creation of a
4 common fund, a court can and should award attorney fees and costs from that fund. The reason is "that
5 persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the
6 successful litigant's expense. In *Glendale City Employees' Association v. City of Glendale* (1975) 15
7 Cal.3d 328, 341 fn.19, the California Supreme Court upheld an attorneys' fee award based on a percentage
8 of the common benefit obtained in a lawsuit by a city employees' association for retroactive wages.

9 The PAGA penalty fund was created for the benefit of the State of California and all aggrieved
10 employees.

11 The recognized advantages of the percentage method—including relative ease of calculation,
12 alignment of incentives between counsel and the class, a better approximation of market conditions
13 in a contingency case, and the encouragement it provides counsel to seek an early settlement and
14 avoid unnecessarily prolonging the litigation convince us the percentage method is a valuable tool
that should not be denied our trial courts. *Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480,
561. (approving percentage of recovery method in wage and hour class action)

15 In light of the above law, there is no principled reason that a fee application arising from a
16 PAGA-only common fund settlement should be treated differently than other common fund
17 settlements. Accordingly, Plaintiffs' counsels' fees and costs are properly paid from that common
18 fund and the requested amount is a one third contingency amount of the overall PAGA settlement.

19 **3. A Lodestar Cross Check Supports the Fee Award from the Common Fund.**

20 If the Court chooses to perform a lodestar cross-check in this case, such a cross-check will
21 confirm the reasonableness of PLAINTIFFS' fee request. In calculating an initial lodestar figure, a court
22 considers: (1) the reasonable hours spent; and (2) the prevailing hourly rates for "private attorneys in the
23 community conducting *non- contingent* litigation of the same type." (*Ketchum v. Moses* (2001) 24
24 Cal.4th 1122, 1134 (emphasis in original).) These facts may be established through a declaration by
25 counsel. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254-55 (relying on Plaintiffs'
26 counsel's declarations as sufficient evidence to demonstrate the appropriate hourly rate).)

27 In calculating attorneys' fees, the Court should follow the lodestar approach adopted by the
28 California Supreme Court in *Serrano v. Priest* (*Serrano III*) (1977) 20 Cal.3d 25. This lodestar method

1 of determining attorney's fees awards – including discretion to award fee enhancements – is “well
2 established under California law.” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1137.) Under
3 California's lodestar method, the court obtains the lodestar amount by multiplying the hours worked by
4 a reasonable hourly rate. (*Serrano III, supra*, 20 Cal.3d at 48; *Press v. Lucky Stores, Inc.* (1983) 34
5 Cal.3d 311, 321-322.)

6 Here, attorney Alexander Rusnak expended 268.8 hours at his hourly rate of \$535 per hour in the
7 matter to reach this settlement with SETTLEING DEFEDANTS for a total of \$143,808.00. (*Rusnak*
8 *Decl.* at ¶¶ 12-17, 21-23). Attorney Tomas Margain expended 225.5 hours at his hourly rate of \$819.00
9 per hour in this this matter for a total of \$184,684.50. (*Margain Decl.* at ¶¶51-62). The total fees,
10 expended in this matter are \$328,492.50. The requested fees of \$46,213.92 are approximately 14% of
11 the fees spent. While the individual settlement is confidential, the fees charged in that settlement are
12 significantly less than the fees billed based on the lodestar method. (*Margain Decl.* at ¶ 64)

13 14 **4. PLAINTIFFS Should Be Reimbursed Costs from the Common Fund.**

15 PLAINTIFFS' counsel seeks costs of \$5,000.00 based on service costs of \$721.25 on the five
16 SETTLING DEFENDANTS, the mediation fee of \$4,550.00 and \$492.00 for one deposition transcript
17 of CORONA which totals \$5,763.25. (*Margain Decl.* ¶ 63.) This does not include the first appearance
18 fee of \$435 or the complex fee of \$1,000.00.

19 Costs are available in fee shifting settlements including PAGA. See *Labor Code* § 2699(g)
20 (allowing recovery of costs); *In re Omnivision Technologies, Inc.* (N.D. Cal. 2008) 559 F.Supp.2d 1036
21 ("Attorneys may recover their reasonable expenses that would typically be billed to paying clients in
22 non-contingency matters."); *In re Media Vision Tech. Sec. Litig.* (N.D. Cal. 1996) 913 F.Supp. 1362,
23 1366 ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund
24 are reimbursed proportionally by those class members who benefit by the settlement.").

25 26 **CONCLUSION**

27 For the above reasons, the Court should approve the proposed PAGA Settlement Agreement as
28

1 the terms are “just”, are “in the public interest” and achieve the objects sought by the California
2 Legislature in enacting PAGA.

3 Respectfully Submitted,

4
5 *Tomas Margain*

Dated: March 7, 2025

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Tomas E. Margain
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