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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA

WILLIAM GIRARD, an individual, on behalf
of himself and others similarly situated,

PLAINTIFF,

v.

OFFICE DEPOT, INC.; and DOES 1 thru 50,
inclusive,

DEFENDANTS.

Case No. 19CV351584

[Case Assigned for All Purposes to Hon.
Socrates Manoukian in Dept. 20]

**MOTION FOR APPROVAL OF
REPRESENTATIVE ACTION
SETTLEMENT**

*[Filed concurrently with Declaration of Ari J.
Stiller In Support of Plaintiffs' Motion for
Approval of Representative Action Settlement;
[Proposed] Order, and Judgment]*

Date: TBD
Time: TBD
Dept.: 20

Complaint Filed: July 18, 2019
FAC Filed: January 6, 2022
Trial Date: None Set

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

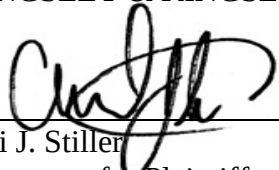
2 **PLEASE TAKE NOTICE** that Plaintiffs William Girard and Shira Burns will move the
3 Court for an Order Granting Approval of Representative Action Settlement at a date and time to
4 be determined by the Court, in Department 20 of the above-entitled court.

5 The Motion will be made on the grounds that the proposed Settlement is fair, adequate,
6 reasonable, and in the best interest of Plaintiffs, 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 Ari J. Stiller, the PAGA Settlement Agreement, which is
9 attached to the concurrently filed Stiller Declaration as Exhibit "1", all other papers and records
10 on 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: January 31, 2023

KINGSLEY & KINGSLEY, APC

14
15 By: 

16 Ari J. Stiller
17 Attorneys for Plaintiffs and all Aggrieved
18 Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs William Girard and Shira Burns (collectively, “Plaintiffs”) submit this
4 Memorandum of Points and Authorities in support of Motion for Approval of Representative
5 Action Settlement. Plaintiffs and Defendant Office Depot, LLC. (“Defendant”) (collectively, the
6 “Parties”) have reached a proposed settlement documented in the PAGA Settlement Agreement
7 (“Agreement”) attached to the concurrently-filed declaration of Ari J. Stiller.

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 \$830,000.00. After deduction of attorneys’
10 fees and litigation expenses, litigation enhancement to Plaintiffs, and settlement administration
11 costs as discussed in the Agreement, the remaining amount to be divided between the Labor and
12 Workforce Development Agency (“LWDA”) and the aggrieved employees as required by Labor
13 Code section 2699(i) is \$486,154.31, with \$364,615.74 (or 75%) going to the LWDA and
14 \$121,538.58 (or 25%) distributed to the aggrieved employees.¹

15 Plaintiffs request 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, Plaintiffs request 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 Judgement thereon.²

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

20 A. Litigation Overview and Procedural History

21 On May 14, 2019, Plaintiff William Girard gave timely written notice to Defendant and
22 the LWDA of the facts and theories underlying the present action pursuant to Labor Code section
23 2699.3. (Stiller Decl. ¶4.) After exhausting administrative remedies, Plaintiff Girard commenced
24 this Action on July 18, 2019, alleging a cause of action against Office Depot for penalties pursuant

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.
27 Code § 2699(i).

28 ² Plaintiffs’ 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 Plaintiffs’ 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 to Labor Code § 2699, et seq. for violations of Labor Code §§ 1198 and 1199 and California's
2 suitable seating law. (Declaration of Ari J. Stiller [“Stiller Decl.”] ¶5.) The court granted Plaintiff’s
3 motion for leave to file a First Amended Complaint after the parties failed to reach an agreement
4 on a stipulation. (Stiller Decl., ¶6.) On January 6, 2022, Plaintiffs filed a First Amended Complaint
5 adding Plaintiff Shira Bums as a named Plaintiff. The First Amended Complaint is the operative
6 complaint in the Action. (Stiller Decl. ¶7.)

7 B. The Discovery Process and Mediation

8 The case has been heavily litigated. Prior to mediation, Plaintiffs’ counsel served several
9 rounds of discovery, filed a motion to compel, obtained the employee list and thousands of pages
10 of documents, received a sample of store video, and received documents showing Office Depot’s
11 store layouts and cut sheets of its check stands. (Stiller Decl. ¶8.) Plaintiffs’ counsel also
12 subpoenaed documents from Killion Industries, the manufacturer of certain of Office Depot’s
13 check stands. (Stiller Decl. ¶9.) Plaintiffs’ counsel took multiple PMK depositions, performed site
14 inspections at three of Defendant’s California stores, defended the depositions of the named
15 Plaintiffs, and retained an expert to opine on the feasibility of Office Depot offering employees
16 the opportunity to sit while working as cashiers. (Stiller Decl. ¶10.)

17 Prior to mediation, Plaintiffs also obtained updated data showing that the number of
18 Aggrieved Employees is no more than 6,515 (including Plaintiffs) and there is a maximum of
19 165,739 PAGA Pay Periods at issue. (Stiller Decl. ¶11.) Based on these figures, the maximum
20 potential exposure for the PAGA claims for Aggrieved Employees is \$16,573,900 (165,739 PAGA
21 Pay Periods at issue × \$100 = \$16,573,900).

22 On August 11, 2022, the Parties participated in an all-day mediation presided over by
23 respected wage-and-hour mediator Lisa Klerman, which led to the present settlement. (Stiller Decl.
24 ¶12.) The Parties engaged in good faith, arms-length negotiations concerning possible resolution
25 of Plaintiffs’ claims. (Stiller Decl. ¶13.) The Parties were able to reach a tentative settlement
26 subject to finalization of a formal PAGA Settlement Agreement and approval of the Court. (*Id.*)
27 The Parties negotiated the terms and conditions of the Settlement and now present the agreed-upon
28 Settlement to the Court for Approval. (Stiller Decl. ¶14.)

III. PAGA ACTIONS AND THE REQUIREMENTS

A. The PAGA Statutory Scheme

PAGA creates a means of “deputizing” citizens as private attorneys general 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 Plaintiffs here do 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 p. 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.* (2015) 234 Cal.App.4th 1109, 1119; *Montano v. The Wet Seal Retail, Inc.* (2015) 232 Cal.App.4th 1214, 1222 [“[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 p. 986; Lab. Code § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at p. 1119; *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 [“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.”

1 (Lab. Code § 2699.3(a)(1).)

2 As explained above, Plaintiffs have complied with the notice requirements and has properly
3 pled a PAGA cause of action. (Ex. 1, ¶ 3.3.)

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

5 PAGA provides for penalties in the amount of one hundred dollars (\$100) for each
6 aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for
7 each aggrieved employee per pay period for each subsequent violation. (Lab. Code § 2699(f)(2).)
8 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that
9 Defendant violated the Labor Code.³ (*Amaral, supra*, 163 Cal.App.4th at p. 1213.) However,
10 PAGA does provide the Court with discretion regarding the penalty amount. Labor Code
11 §2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty amount
12 specified by this part if, based on the facts and circumstances of the particular case, to do otherwise
13 would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Here, Defendant
14 denies that it violated any law or that it engaged in any knowing or intentional conduct giving rise
15 to liability, and that any employees suffered harm.

16 C. Standards for Settlement Approval

17 When approving a settlement of a PAGA action, the statute simply requires the Court to
18 “review and approve any settlement of any civil action filed pursuant to this part.” (Lab. Code §
19 2699(l)(2).) PAGA does not set forth standards for evaluating such settlements, and the California
20 appellate courts have not weighed in on the issue. However, trial courts have approved PAGA
21 settlements where the penalties are “genuine and meaningful” and “consistent with the underlying
22 purpose” of the statute. (See *O’Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F. Supp. 3d
23 1110, 1113.) Additionally, as explained in *Arias v. Superior Court* (2009) 46 Cal.4th 969, class
24 action procedural rules do not apply in PAGA cases, including the two-step preliminary and final
25 approval process. Rather, the approval process consists of one step where the court decides if the
26 settlement should go into effect.

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³ See also *Willner, supra*. 35 F. Supp. 3d at 1136; *McKenzie, supra*, 765 F.Supp.2d at 1232.

IV. THE SETTLEMENT

Defendant will pay the total sum of \$830,000.00 in full and final settlement of the PAGA claims. (Stiller Decl. ¶16., Exhibit 1, ¶4.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount:	\$830,00.00
PAGA Counsel Fees Payment (33.33%):	\$276,666.66
PAGA Counsel Litigation Expenses Payment:	\$42,179.02 ⁴
Administrator Expenses Payment:	\$15,000.00
Named Plaintiff Service Payment:	\$10,000.00 (with \$5,000 being allocated to each Plaintiff)

PAGA Penalties: \$486,154.31
(\$364,615.74 to the LWDA; \$121,538.58 to Aggrieved Employees)
(Stiller Decl. ¶17., Exhibit 1, ¶4.2.)

Each aggrieved employee shall receive a pro-rata portion of employees' share of PAGA penalties based on the number of Pay Periods worked for Defendant during the PAGA Period.⁵ (Stiller Decl. ¶18., Exhibit 1, ¶4.2.4.1.)

For settlement purposes, the Aggrieved Employees are defined as all "non-management employees who could have performed or have performed work as a cashier for Office Depot, LLC, in California during the PAGA Period, with the following job titles: 'Sales Advisor,' 'Sales Consultant,' 'Sales Consultant-Print Serv,' 'Service Advisor,' 'Print and Client Services Supervisor,' 'Print Services Supervisor,' 'Sales Advisor M,' 'Product Consultant-Technology,' 'Meal/Break Key Carrier - Tech,' 'Solutions Advisor - Meal Break (FT) - KC,' 'Solutions Advisor,' 'Sr. Sales Consultant - Tech,' 'Sr. Sales Consultant - Furn,' 'Meal/Break Key Carrier - Furn,' 'Meal/Break Key Carrier - SC,' 'Service Consultant (Gen Line) - PR,' 'Retail Sales Conslt-Seasonal,' 'Sales Advisor (Seasonal),' 'Seasonal Retail Sales Conslt,' 'Sales Consultant - Services,' 'Sales Supervisor,' 'Services Sales Supervisor,' 'Solutions Advisor - KC.'" (Stiller

⁴ The settlement agreement provides for counsel to receive cost reimbursement of \$43,000.00. However, counsel's final costs come to \$42,179.02. (Stiller Decl., Ex. 2.) The extra \$820.98 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 \$485,333.33 contemplated in the settlement agreement. (See Stiller Decl., Ex. 1 ¶4.2.4.)

⁵ The PAGA Period means the period from May 14, 2018 through October 10, 2022. (Stiller Decl. ¶20., Exhibit 1, ¶1.19.)

Decl. ¶20., Exhibit 1, ¶1.4.)

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 Stiller Declaration) for Court approval.

B. The Risks of Moving Forward with Plaintiffs’ PAGA Claim

To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation and discount taken follows. (Stiller Decl. ¶21.) Plaintiffs believed that Defendant may persuasively argue that the Court should exercise its discretion under PAGA to significantly reduce any penalties. (Stiller Decl. ¶22.) 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)).

PAGA Counsel anticipated that, at trial, Counsel for Defendant would argue that employees were expected not to be stationary for long periods in the cash register area, and instead to quickly check out customers before moving to different parts of the store. (Stiller Decl., ¶23.) If the Court determined that this was the policy, Defendant could argue that it had adopted legally compliant seating policies in which it allowed seating in certain areas and only refused to do so in the cashiering area due to the active nature of work in that location. (Stiller Decl., ¶24; see *LaFace v. Ralphs Grocery Company* (2022) 75 Cal.App.5th 388, 407 [Court of Appeal upheld a defense verdict in a suitable seating case against Ralph’s, finding that the grocery store expected front-end associates to be either actively checking out customers or moving around the store].) If the Court determined that there is

1 liability, Defendant would argue that its good faith belief that seating was not feasible at the check
2 stands mitigates in favor of significantly reducing any penalties. (*Id.*) While Plaintiffs disagree that
3 this analysis is legally correct or persuasive, PAGA Counsel had to consider the foregoing facts and
4 arguments and how they might impact any judgment ultimately awarded to Aggrieved Employees if
5 the Court were persuaded by them. (Stiller Decl. ¶25.)

6 In light of all these significant risks and the fact that PAGA gives the Court broad discretion
7 to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement
8 Amount of \$830,000.00 was fair and reasonable. (Stiller Decl. ¶26., Exhibit 1, ¶1.11.)

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

11 Plaintiffs believe there is a strong risk that the Court will not award the \$200 civil penalty
12 triggered for “subsequent” violations. (Lab. Code § 2699(f)(2).) If this case were to proceed to
13 trial, Plaintiffs would argue that a “subsequent” violation simply means that Defendant engaged
14 in suitable seating violations more than once for a given employee. Defendant is likely to rely on
15 *Amaral*, which rejected a purely temporal understanding of the term “subsequent” and interpreted
16 its use in Labor Code sections 210 and 225.5 to require that “the employer has been notified that
17 it is violating a Labor Code provision” before higher penalties are triggered. (*Id.* at p. 1209; see
18 also *Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144.) Defendant presumably will
19 take the position that it has not been notified that it actually violated a Wage Order until the Labor
20 Commissioner issues a formal citation or the Court makes a finding that a violation existed.

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

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

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

12 Here, the aggrieved employees suffered no injury due to the erroneous wage
13 statements, and made no complaint of the errors or omissions contained
14 therein prior to filing suit. Also, Defendants were not aware that the wage
15 statements violated the law and took prompt steps to correct all violations
16 once notified. Given these circumstances, the Court finds a \$2.8 million
17 penalty unjust according to § 2699(e)(2). Accordingly, in its discretion, the
18 Court reduces the penalty to \$500,000.

19 (*Id.* at *4.) A court exercising its discretion to significantly reduce the civil penalty awarded under
20 PAGA is not a rare occurrence. (See *e.g.*, *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th
21 504, 529 [awarding 10% of maximum civil penalty for meal break claims in light of Starbuck’s
22 “good faith attempts” to comply and because the violations were minimal]; *LaFace v. Ralphs*
23 *Grocery Company* (2022) 75 Cal.App.5th 388, 407 [affirming defense verdict on case for suitable
24 seating violations in checkstand area of grocery stores].)

25 Here, as explained above, Plaintiffs’ counsel anticipated that, at trial, Counsel for
26 Defendant would argue that: (1) there are material differences between its properties that make a
27 representative trial unmanageable; (2) even if a representative trial were held, Defendant would
28 prevail because it maintained a policy making seating available at areas in its store where seating
is feasible; (3) the “nature of the work” in the cashier area requires constant movement so that
seating while performing the job is not feasible; (4) Office Depot expected employees to move to
other areas of the store when not actively engaged in cashiering work at the checkstand; and (5)

even if a trial were held and a liability determination made, the Court could exercise discretion under PAGA to reduce penalties. After significant discovery in this action, Plaintiff's counsel determined that a settlement of \$830,000.00 is reasonable given the above risks.

VI. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEES

As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to create a Gross Settlement Amount of \$830,000.00. (Stiller Decl. ¶30; Ex. 1 at ¶4.1.) From that fund, Plaintiff requests an award of attorneys' fees for PAGA Counsel in the amount of \$276,666.66, or 33.33% of the Gross Settlement Amount, and \$42,179.02 in reimbursement for litigation costs. (*Id.*; Ex. 1 at ¶4.2.1.)

A. Plaintiff's 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 p. 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 p. 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*,

1 *Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a
2 representative capacity to recover fees when the litigant’s efforts have created a substantial, actual,
3 and concrete benefit for members of an ascertainable class and the court’s jurisdiction over the
4 subject matter makes possible an award which spreads the cost proportionately among the
5 members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th
6 563, 578.)

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

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

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

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

27 (Newberg on Class Actions, 3rd Ed., 1992, § 14.03; and see *Chavez v. Netflix, Inc.* (2008) 162
28 Cal.App.4th 43, 66, fn 11 [“Empirical studies show that, regardless whether the percentage method

1 or the lodestar method is used, fee awards in class actions average around one-third of the
2 recovery.”].) Thus, PAGA Counsel’s requested fee of 33.33% is not only well within the range of
3 reasonableness, but lower than the average fee award of 1/3 and is fair compensation for
4 undertaking this complex, risky, expensive, and time-consuming litigation on a contingent basis.

5 C. PAGA Counsel’s Fee Request is Reasonable Under a Lodestar Crosscheck

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

14 (i) Requested Multiplier

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

24 Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Stiller
25 Decl. ¶31.) PAGA Counsel have an aggregate lodestar in the amount of \$202,945.40, which
26 represents 429.2 hours of attorney work on this litigation from its inception through the date of
27 this filing of Plaintiffs’ instant Motion. (*Id.*) As such, PAGA Counsel is asking for a lodestar
28 multiplier of 1.36, not including any estimate for time likely to be spent in the future appearing at
the hearing and monitoring the settlement. (Stiller Decl. ¶32.) Typically, the lodestar is merely

1 the starting point of the calculation of a reasonable fee, and courts often multiply the lodestar by a
2 factor to account for the risk of non-payment, delay in payment, the quality of work, and the
3 novelty and difficulty of the issues involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253;
4 *Beasley v. Wells Fargo Bank*, (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning*
5 *v. Bd. of Supervisors*, (1997) 76 Cal.App.3d 24 1, 251.)

6 This case dealt with difficult legal and factual questions. (Stiller Decl. ¶33.) Significantly,
7 the risk attendant to the underlying claims in this matter was great considering Defendant's
8 defenses as discussed in detail above. (*Ibid.*) Were this case to proceed, Defendant would have a
9 strong incentive to litigate tenaciously. (*Ibid.*) There are genuine issues in dispute. (*Ibid.*)

10 As discussed above and in the Motion, PAGA Counsel are skilled wage and hour
11 practitioners with decades of experience who diligently prepared and litigated this matter. (Stiller
12 Decl. ¶34.) To achieve the ultimate result in this case, my firm had to incur substantial risk and
13 expense, and were precluded from taking other fee generating employment for over 420 hours of
14 attorney time. (Stiller Decl. ¶35.) This matter had been handled purely on a contingency fee basis
15 and my firm has advanced many thousands of dollars in costs while deferring all payment of fees,
16 with no guarantee that any of the fees incurred or costs advanced would ever be recovered, and
17 diverting significant firm resources to prosecution of this matter. (Stiller Decl. ¶36.) PAGA
18 Counsel believe this is an exceptional result that has been well received by the Aggrieved
19 Employees. (Stiller Decl. ¶37.)

20 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF** 21 **COSTS**

22 In addition to their request for fees, PAGA Counsel further request reimbursement of the
23 reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this
24 litigation, in the amount of \$42,179.02. (Stiller Decl. ¶38.) To date, Kingsley and Kingsley has
25 incurred \$42,023.02 in costs. (Stiller Decl. ¶39.) PAGA Counsel anticipates incurring an
26 additional \$156.00 in costs to file and serve this motion. (Stiller Decl. ¶40.) As such, counsel is
27 requesting a cost reimbursement of \$42,179.02. (Stiller Decl. ¶41.)

28 All of the requested costs are reasonable in amount and were necessarily incurred by Class
Counsel in prosecuting this litigation. (Stiller Decl. ¶42; Exhibit 2 [Cost Report].) Expenses in this

1 matter to date include costs for filing fees, research, mediation, employment of an ergonomics
2 expert to evaluate Defendants' stores and prepare a report on the feasibility of providing seating,
3 and additional costs for the prosecution of this case evidenced in the costs spreadsheet attached to
4 the Declaration of Ari J. Stiller. All of these costs have been incurred in the course of this litigation,
5 and all costs advanced have already been paid by PAGA Counsel, with the exception of the
6 anticipated cost of filing the present motion. (Stiller Decl. ¶43.)

7 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
8 advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court
9 should approve the request for reimbursement in the amount of \$42,179.02.

10 **VIII. THE COURT SHOULD AWARD ENHANCEMENTS TO THE NAMED** 11 **PLAINTIFFS**

12 The Settlement Agreement calls for a service payment of \$5,000.00 each to the two named
13 Plaintiffs, to be paid from the Gross Settlement Amount. (Stiller Decl. ¶42; Ex. 1 at ¶4.2.3.)
14 Incentive awards "are intended to compensate class representatives for work done on behalf of the
15 class, to make up for financial or reputational risk undertaken in bringing the action, and
16 sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez v. West*
17 *Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. "[I]t is established that named plaintiffs
18 are eligible for reasonable incentive payments to compensate them for the expense or risk they
19 have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola*
20 *Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential*
21 *Services LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d
22 938, 977)).

23 Here, the enhancement takes into consideration the time, effort, and expense incurred by
24 Plaintiffs in coming forward to litigate this matter on behalf of all Aggrieved Employees. The
25 time spent by William Girard and Shira Burns includes identifying competent counsel, providing
26 information to PAGA Counsel regarding their relevant employment experience, compiling
27 documents, conducting several meetings and conferences with PAGA Counsel to discuss the status
28 of the case and the theories of liability, having their depositions taken, and reviewing settlement
documents. (Stiller Decl. ¶43.) Plaintiffs have also agreed to a broader release than the Aggrieved

1 Employees and expressly waived the rights provided under California Civil Code section 1542.
2 (Ex. 1 at ¶6.1.)

3 PAGA Counsel considers this to be a fair and reasonable enhancement. (Stiller Decl. ¶44.)
4 The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiffs
5 in coming forward to litigate this matter on behalf of all Aggrieved Employees. (Stiller Decl. ¶45.)
6 Accordingly, Plaintiffs should be awarded the agreed-upon enhancement of \$5,000.00 each. (*Id.*)

7 **IX. CONCLUSION**

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

12
13 DATED: January 31, 2023

KINGSLEY & KINGSLEY, APC

14
15 By: _____

16 Ari J. Stiller
17 Attorneys for Plaintiffs and all Aggrieved
18 Employees
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(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 January 31, 2023, I served all interested parties in this action the following documents described as: **MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

MORGAN, LEWIS & BOCKIUS LLP

Barbara J. Miller

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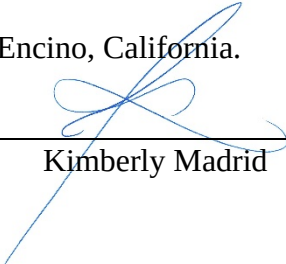
sheryl.horwtiz@morganlewis.com

[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 January 31, 2023, at Encino, California.



Kimberly Madrid