

OCT 27 2022

Sheri R. G...
By: Roxanne Arraiga, Deputy
Clerk of Court

FINAL RULINGS/ORDERS RE: MOTION FOR APPROVAL OF PAGA SETTLEMENT

Morales et al. v. Northgate Gonzalez Markets, Inc., Case No.:
21STCV19587

The Parties' Motion for Approval of PAGA Settlement is **GRANTED** as the settlement is fair, adequate, and reasonable.

The essential terms are:

- A. The Gross Settlement Amount ("GSA") is \$950,000.
- B. The Net Settlement Amount ("Net") (\$141,316.73) is the GSA minus the following:

- \$316,666.67 (33%) for attorney fees to PAGA Counsel, Melmed Law Group P.C.;
 - \$23,069.00 for litigation costs to PAGA Counsel;
 - \$20,000 for settlement administration costs to ILYM Group;
 - \$5,000 for enhancement award to named plaintiffs, Angel Caballero Morales and Fernando Torres (\$2,500 each);
 - \$438,947.60 (75% PAGA penalty) to the LWDA.

- C. Plaintiffs release of Defendants from claims described herein.

By **November 29, 2022**, Plaintiffs must:

- a. serve this Order on the LWDA pursuant to Labor Code section 2699 (1)(3);
- b. file and serve a [Proposed] Judgment consistent with this ruling containing among other things, the PAGA aggrieved employee definition; PAGA period; and full release language; and
- c. email the [Proposed] Judgment in Word format to Dept. 9 staff at sscdept9@lacourt.org.

Non-Appearence Case Review is set for December 6, 2022, 8:30 a.m., Department 9.

By **July 27, 2023**, Plaintiffs must file and serve a final accounting.

Non-Appearence Case Review is set for August 3, 2023, 8:30 a.m., Department 9.

I.
INTRODUCTION

A. Background

This is a putative wage and hour class action. Plaintiffs Angel Caballero Morales and Fernando Torres allege that they and the putative class members are and were non-exempt employees of Defendant Northgate Gonzalez Markets, Inc. Plaintiff also alleges that Defendant violated the Labor Code, Industrial Welfare Commission wage orders, and the Business and Professions Code.

On May 24, 2021, Plaintiffs filed their complaint and, pursuant to Labor Code § 2699.3(a)(1), sent a letter to the Labor and Workforce Development Agency (LWDA) regarding Defendant's alleged Labor Code violations. Sixty-five days elapsed after Plaintiffs provided such notice, but the LWDA did not indicate that it intends to investigate the alleged violations.

On August 18, 2021, Plaintiffs filed their first amended complaint (FAC). In the FAC, Plaintiffs asserts the following causes of action: (1) failure to pay all minimum wages; (2) failure to pay all overtime wages; (3) failure to provide rest periods and pay missed rest period premiums; (4) failure to provide meal periods and pay missed meal period premiums; (5) failure to maintain accurate employment records; (6) failure to pay wages timely during employment; (7) failure to pay all wages earned and unpaid at separation; (8) failure to indemnify all necessary business expenses; (9) failure to furnish accurate itemized wage statements; (10) violation of the Unfair Competition Law; and (11) civil penalties under the Private Attorneys General Act (PAGA).

On May 6, 2022, Plaintiffs filed the pending motion to approve PAGA settlement. On May 26, 2022, the court continued the motion and asked for supplemental briefing.

In September, 2022, plaintiffs filed supplemental briefing and a revised settlement agreement.

B. Terms of Settlement Agreement

The essential terms of the PAGA settlement are as follows:

“Aggrieved Employees” definition	• “Aggrieved Employees” are defined as “all current and former hourly non-exempt employees of Defendant in California at any time during the PAGA Period.” Settlement Agreement, ¶ 8. • “PAGA Period” is defined as “the period from May 24, 2020, through either April 15, 2022, or the date that the Court grants approval this Settlement, whichever occurs earlier.” Settlement Agreement, ¶ 7. • There are approximately 9,385 Aggrieved Employees. Melmed Decl., ¶ 7.																		
Total Settlement Payment (TSP)	\$950,000. Settlement Agreement, ¶ 16.																		
Escalator Clause	Defendant represents that there are approximately 467,000 pay periods in the PAGA Period. If the actual number of pay periods during the PAGA Period is more than five percent (5%) greater than 23,350 pay periods (i.e., greater than 490,350), the Total Settlement Payment will be increased by the percentage difference between the 5% increase and the actual number of pay periods (i.e., if there is a 12% difference, the Total Settlement Payment will increase by 7%). Settlement Agreement, ¶ 28.																		
TSP allocation	<table><tr><td></td><td>Maximum</td><td>Requested</td></tr><tr><td>PAGA counsel fees</td><td>\$316,666.67</td><td>\$316,666.67</td></tr><tr><td>Reasonable litigation costs</td><td>\$25,000.00</td><td>\$23,069.87</td></tr><tr><td>Plaintiffs’ enhancement awards</td><td>\$5,000.00</td><td>\$5,000.00</td></tr><tr><td>Settlement administration costs</td><td>\$20,000.00</td><td>\$20,000.00</td></tr><tr><td>PAGA Payment</td><td>—</td><td>\$585,263.46</td></tr></table> Settlement Agreement, ¶¶ 16, 25, 29, 32, 37. Under the Settlement Agreement, the remainder of the TSP (PAGA Payment) after deducting the requested amounts is \$585,263.46, and is the Net Settlement Amount to be allocated between the LWDA and the Aggrieved Employees pursuant to Labor Code § 2699(i), with 75% paid to the LWDA and 25% paid to the PAGA Settlement Members on a pro rata basis. Thus, the LWDA will receive \$438,947.60 and Aggrieved Employees will receive \$146,315.87.		Maximum	Requested	PAGA counsel fees	\$316,666.67	\$316,666.67	Reasonable litigation costs	\$25,000.00	\$23,069.87	Plaintiffs’ enhancement awards	\$5,000.00	\$5,000.00	Settlement administration costs	\$20,000.00	\$20,000.00	PAGA Payment	—	\$585,263.46
	Maximum	Requested																	
PAGA counsel fees	\$316,666.67	\$316,666.67																	
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Plaintiffs’ enhancement awards	\$5,000.00	\$5,000.00																	
Settlement administration costs	\$20,000.00	\$20,000.00																	
PAGA Payment	—	\$585,263.46																	
Allocation and Calculation of PAGA Penalties	The payments to the Aggrieved Employees shall be paid on a pro rata basis as calculated by the Settlement Administrator. Settlement Agreement, ¶ 41.																		
Tax Treatment of PAGA Penalties	Aggrieved Employee payments shall be reported as 1099-MISC income. <i>Id.</i> , ¶¶ 50–51.																		
Payment Procedures	• Within 30 days of the Effective Date, Defendant shall provide the list of Aggrieved Employees and their contact information to the Settlement Administrator. <i>Id.</i>, ¶ 42. • Within 60 days of the Effective Date, Defendant shall provide the TSP to the Settlement Administrator. <i>Id.</i>, ¶ 27. • Within 30 days of the Effective Date or the TSP is fully funded, whichever is later, the Settlement Administrator shall (1) pay to the LWDA 75% of the Net Settlement Amount; (2) distribute to Aggrieved Employees their individual payments, along with an explanatory letter; (3) distribute the Plaintiffs’ Enhancement Awards; (4) distribute Plaintiffs’ counsel’s payment; and (5) deduct an amount equal to the Settlement Administrator Costs. <i>Id.</i>, ¶¶ 43–46, 53.																		
Unclaimed Funds	• Checks will remain negotiable for 180 days. <i>Id.</i>, ¶ 50. • After 180 days, uncashed checks shall be transferred to the California State Controller’s Unclaimed Property Fund. <i>Id.</i>																		
Settlement Administrator	ILYM Group. Melmed Decl., ¶ 73, Exh. B.																		

Settlement Submitted to LWDA	Submitted to the LWDA at the same time as the filing of the motion for settlement approval, per Labor Code § 2699(1)(1). Settlement Agreement, ¶ 70; Melmed Decl., ¶ 74, Exh. C.
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II. DISCUSSION

A. Does a Presumption of Fairness Exist?

1. Was the settlement reached through arm's-length bargaining? Yes. After arms-length negotiation, the parties agreed to a settlement of Plaintiffs' PAGA claim. Settlement Agreement, ¶ 64; Melmed Decl., ¶¶ 15-20.

2. Were investigation and discovery sufficient to allow counsel and the court to act intelligently? Yes. In preparation for mediation, the Parties exchanged various documents and information that allowed both sides to evaluate the potential exposure and potential risk, such as a review of Defendant's employee handbook, policies and procedures related to the claims alleged in the operative complaint, both Plaintiffs' personnel files, payroll and time records, and a sample of time and pay records for the alleged Aggrieved Employees. Plaintiffs' counsel analyzed, researched, and investigated the potential issues, including matters related to the calculation of PAGA damages, interviews of Plaintiffs, trial management, and appellate issues and risks. Plaintiffs' counsel also retained an expert for analysis of the relevant data produced by Defendant. Melmed Decl., ¶ 15.

3. Is counsel experienced in similar litigation? Yes. Bokhour Decl., ¶¶ 5-14; Melmed Decl., ¶¶ 7-10.

4. What percentage of the class has objected? Not applicable.

The Court concludes that the settlement is entitled to a presumption of fairness.

B. Is the Settlement Fair, Adequate, and Reasonable?

1. Strength of Plaintiffs' case. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." (Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal.App.4th 116, 130.)

Plaintiffs' counsel provides a detailed factual basis for the claims asserted in the complaint. Melmed Decl., ¶¶ 21-34.

Plaintiffs filed the supplemental briefing showing the claim-by-claim maximum exposure analysis on September 12, 2022. This briefing shows the following:

Labor Code Section	# of Employees	Amount of Penalty	# of Pay Periods	Violation Rate	Total Max. Exposure
§§ 201, 202	3,474	\$100 initial violation/ \$200 subsequent	3,474	100%	\$347,400
§ 203	3,474	\$100 initial/ \$200 subsequent	3,474	100%	\$347,400
§ 204	9,385	\$100 initial/\$200 subsequent	465,132	99.6%	\$92,087,900
§ 210 (employee can only recover under either § 204 or § 210)	N/A	N/A	N/A	N/A	N/A
§ 221	3,474	\$100 initial/\$200 subsequent	3,474	100%	\$347,400
§ 226	9,385	\$100 initial/\$200 subsequent	465,132	99.6%	\$92,087,900
§ 226.3	9,385	\$250 per employee	465,132	99.6%	\$116,283,000
§ 226.7	9,385	\$100 initial/\$200 subsequent	465,132	99.6%	\$92,087,900
§ 510	2,964	\$100 initial/\$200 subsequent	3,269	0.7%	\$357,400
§ 512	8,439	\$100 initial/\$200 subsequent	139,633	29.9%	\$27,082,700
§ 558	8,439	\$50 initial/\$100 subsequent	142,902	30.6%	\$13,868,250
§ 1194	2,964	\$100 initial/ \$200 subsequent	3,269	0.7%	\$357,400
§ 1197.1	9,385	\$100 initial/\$250 subsequent	465,132	99.6%	\$115,344,500
§ 1199	9,385	\$100 initial/ \$200 subsequent	467,000	100%	\$92,461,500
§ 2802	939	\$100 initial/ \$200 subsequent	46,700	10%	\$9,246,100

Plaintiffs concede that recovery of the maximum exposure amount is unlikely given Defendant's defenses, the risk of

losing at trial, and the risk that the Court would reduce the amount of civil penalties, the risk of reversal on appeal, and the difficulty of collecting on any judgment. After discounting for such defenses, Plaintiffs provide the following risk-adjusted exposure analysis: 467,000 pay periods x 50% violation rate x \$5.00 per pay period = \$1,167,500. Melmed Decl., ¶ 39.

Here, the PAGA Payment of \$585,263.46 represents approximately 50.1% of the maximum risk-adjusted PAGA exposure of \$1,167,500. Thus, the PAGA settlement amount compares reasonably to the realistic, risk-adjusted potential recovery in this case.

2. Risk, expense, complexity and likely duration of further litigation. The discounted settlement takes into consideration the significant risks inherent in moving forward, such as the possibility that the Court would refuse to award significant penalties, or any penalties at all, for many of the alleged violations, as well as the delay occasioned by continuing with the litigation. Melmed Decl., ¶¶ 20, 35-38.

3. Risk of maintaining class action status through trial. Not applicable.

4. Amount offered in settlement. Defendant will pay a maximum settlement amount of \$950,000. This amounts to approximately 81.4% of Defendant's maximum risk-adjusted exposure of \$1,167,500 for the claims alleged. Given the uncertain outcomes, and the discretionary nature of PAGA penalties, this settlement appears to be within the "ballpark of reasonableness."

Assuming the deductions are taken in full, \$146,315.87 will remain for distribution to Aggrieved Employees. The payments to Aggrieved Employees will average \$15.59 ($\$146,315.87 / 9,385$ Aggrieved Employees = \$15.59).

5. Extent of discovery completed and stage of the proceedings. As indicated above, at the time of the settlement, Plaintiff's Counsel had conducted sufficient discovery.

6. Experience and views of counsel. The settlement was negotiated and endorsed by Plaintiff's Counsel who, as indicated above, is experienced in PAGA litigation.

The Court concludes that the settlement is fair, adequate, and reasonable.

C. Scope of the Release

"Released Claims" shall mean any and all claims, whether known or unknown, that were asserted or could have been asserted based on the facts set forth in the operative pleading in the Action and/or notice submitted to the LWDA in connection with the Action, to recover civil penalties pursuant to PAGA for any alleged violations by Defendant, including without limitation California Labor Code §§ 201-203, 204, 210, 221, 226, 226(a), 226(e), 226.3, 226.7, 510, 512, 515, 558, 1194, 1197.1, 1199, 2802, California Industrial Commission Wage Orders, and California Code of Regulations Title 8, section 11050, 11000 et seq. which arose during the PAGA Period. Settlement Agreement, ¶ 13.

"Released Parties" shall mean Defendant Northgate Gonzalez Markets, Inc., including its subsidiaries, affiliates, shareholders, members, agents, predecessors, successors, and assigns. Id., ¶ 14.

Named Plaintiffs agree to waive Civil Code § 1542 protection and to release any and all claims against Defendant. Id., ¶ 31.

Aggrieved Employees are not releasing their individual Labor Code claims against Defendant. Melmed Decl., ¶ 42. The Revised Settlement Agreement expressly provides that "The PAGA Members do not release their individual Labor Code claims against Defendant." Settlement Agreement ¶ 13.

D. Is the Notice Proper?

PAGA has no notice requirements for unnamed aggrieved employee members, nor may such employees opt out of a PAGA action. Hernandez v. DMSI Staffing, LLC. (N.D. Cal. 2015) 79 F.Supp.3d 1054, 1063, aff'd sub nom. Hernandez v. DMSI Staffing, LLC (9th Cir. 2017) 677 Fed.Appx. 359.

A letter to Aggrieved Employees will accompany settlement checks. Settlement Agreement, ¶ 44. A copy of the proposed letter is attached to the Melmed Declaration as Exhibit D. Its content appears acceptable.

E. Attorney Fees and Costs

An aggrieved employee who prevails in a PAGA action may recover reasonable attorney's fees and costs. (Labor Code

§2699(g)(1)) Whether a plaintiff established entitlement to an award of fees under PAGA is a question best decided by the trial court. (San Diego Municipal Employees Association v. City of San Diego (2016) 244 Cal.App.4th 906.)

PAGA Counsel requests attorneys' fees of \$316,666.67 and costs of \$23,069.87. Bokhour Decl., ¶¶ 21, 29; Melmed Decl., ¶¶ 44, 66. The Settlement Agreement provides for fees up to \$316,666.67 and actual litigation costs up to \$25,000. Settlement Agreement, ¶ 32.

"Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 254, disapproved on other grounds in Hernandez v. Restoration Hardware, Inc. (2018) 4 Cal.5th 260. Here, Plaintiffs' counsel requests attorney fees using the percentage method. Motion at 21.

In common fund cases, the Court may employ a percentage of the benefit method, as cross-checked against the lodestar. Laffitte v. Robert Half Int'l, Inc. (2016) 1 Cal.5th 480, 503. Here, the fee request of \$316,666.67 represents 33% of the maximum settlement amount, which is equal to the 33% average generally awarded in class actions. See In re Consumer Privacy Cases (2009) 175 Cal.App.4th 545, 558, fn.13 ("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.")

Regarding lodestar, Plaintiffs' counsel provided the supplemental briefing justifying counsel fees:

Timekeeper	Experience	Rate Per Hour	Hours	Total
Jonathan Melmed, Esq.	9 Years	\$500.00	36.2	\$18,100.00
Kyle D. Smith, Esq.	10 Years	\$525.00	58.5	\$30,712.50
Joanne H. Kim, Esq.	0.5 Years	\$381.00	15.0	\$5,715.00
Lorie Gutierrez, Paralegal	6 Years	\$205.00	6.6	\$1,353.00
Mehrdad Bokhour, Esq.	10 Years	\$550.00	112	\$61,600.00
Total				\$117,480.50

Plaintiffs' counsel's percentage-based fee request is higher than the unadjusted lodestar of \$117,480.50 and would represent application of a 2.695 multiplier. Plaintiffs' counsel contends that their fee request is thus also reasonable under the lodestar method. In the supplemental briefing, Plaintiffs' counsel argues that historically courts in California have approved multipliers of 1.5 to 4. Plaintiffs'

counsel asserts that it is appropriate for courts to consider factors such as the novelty and difficulty of the questions involved, the contingent nature of the fee award, and the level of risk involved. Melmed Decl. ¶ 27-28. Plaintiffs also state that this multiplier is appropriate considering the significant new risk with the U.S. Supreme Court granting certiorari in Viking River Cruises v. Moriana. Melmed Decl. ¶ 28.

As for costs, Plaintiffs' counsel is requesting \$23,069.87. Bokhour Decl., ¶ 29; Melmed Decl., ¶ 66. This is less than the \$25,000 maximum stated in the Settlement Agreement. Plaintiffs' counsel incurred actual costs as follows:

Melmed Law Group P.C.		
Type	Description	Amount
Postage	Mailing Fee Records Request	\$1.02
Legal Work	Berger Consulting Group Invoice Analysis	\$468.75
Court Filing Fees	First Legal Invoice Filing – FAC	\$45.75
Purchased Documents	Case Anywhere Invoice System Access Fee 7/16 - 9/30/21	\$106.80
Legal Work	Berger Consulting Group Invoice Analysis	\$2,137.50
Mediation	Serratore Law Invoice Mediation Fees (2nd Mediation)	\$3,750.00
Purchased Documents	Case Anywhere Invoice System Access Fee 10/1 - 12/31/21	\$120.00
Legal Research	First Legal Invoice Legal Research	\$93.00
Purchased Documents	Case Anywhere Invoice System Access Fee 1/1 - 3/31/22	\$120.00
Anticipated Costs	Anticipated Costs: Filing of motion, future case anywhere, post judgment filings and/or appearances	\$250.00
Total		\$7,092.82

Bokhour Law Group P.C.		
Type	Description	Amount
Mediation	Mediation Fees	\$12,750.00
Expert Fees	Review and analysis of time and payroll records	\$1,406.25
Filing Fees	PAGA Complaint & other filings	\$1,657.95
LWDA Filing	PAGA Filing	\$75.00
Process Service	Process Server Fee	\$87.85
Total		\$15,977.05

The costs incurred appear to be reasonable in amount and reasonably necessary to this litigation.

Based on the above, the court awards \$316,666.67 for attorneys' fees and \$23,069.87 for costs.

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F. Enhancement Award

The named plaintiffs in this action, Angel Caballero Morales and Fernando Torres, initially requested \$7,500 each as a payment for settlement and general release of all claims against Defendant. Settlement Agreement, ¶ 29. Defendant does not oppose the service award. Id., ¶ 30. However, as noted above, the requested enhancement awards are excessive and the Court reduces them to \$2,500 each.

The revised Settlement Agreement reflects this change. Settlement Agreement ¶ 29.

Plaintiffs' counsel's declaration describes Plaintiffs' participation in this case. Melmed Decl., ¶¶ 68, 69. Plaintiffs also submitted their own declarations describing their participation in the case. Torres Decl.; Morales Decl.

The court grants a total reduced award of \$5,000 (\$2,500 for each Plaintiff).

III.
CONCLUSION

Based upon the foregoing, the Court orders that:

1) The Parties' Motion for Approval of PAGA Settlement is GRANTED as the settlement is fair, adequate, and reasonable.

2) The essential terms are:

A. The Gross Settlement Amount ("GSA") is \$950,000.

B. The Net Settlement Amount ("Net") (\$141,316.73) is the GSA minus the following:

\$316,666.67 (33%) for attorney fees to PAGA Counsel,
Melmed Law Group P.C.;

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Group;

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\$438,947.60 (75% PAGA penalty) to the LWDA.

C. Plaintiffs release of Defendants from claims described herein.

3) By November 29, 2022, Plaintiffs must:

- a. serve this Order on the LWDA pursuant to Labor Code section 2699 (1)(3);
- b. file and serve a [Proposed] Judgment consistent with this ruling containing among other things, the PAGA aggrieved employee definition; PAGA period; and full release language; and
- c. email the [Proposed] Judgment in Word format to Dept. 9 staff at sscdept9@lacourt.org.

4) Non-Appearence Case Review is set for December 6, 2022, 8:30 a.m., Department 9.

5) By July 27, 2023, Plaintiffs must file and serve a final accounting.

6) Non-Appearence Case Review is set for August 3, 2023, 8:30 a.m., Department 9.

CLERK TO GIVE NOTICE TO MOVING PARTY. THE MOVING PARTY TO GIVE NOTICE TO ALL OTHER PARTIES.

IT IS SO ORDERED.

DATED: October 27, 2022

YVETTE M. PALAZUELOS

YVETTE M. PALAZUELOS
JUDGE OF THE SUPERIOR COURT