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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN BERNARDINO**

12 JAMES AHLBORN, an individual, on behalf
13 of the State of California, as a private attorney
14 general,

15 PLAINTIFF,

16 v.

17 BUILDING MATERIALS
18 MANUFACTURING CORPORATION, a
19 Delaware Corporation; and DOES 1 to 50,
20 inclusive,

21 DEFENDANTS.

Case No.: CIVSB2124640

[Assigned for all purposes to the Hon. Joseph
T. Ortiz, Dept. S-17]

**NOTICE OF MOTION AND MOTION
FOR APPROVAL OF
REPRESENTATIVE PAGA
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

*[Filed concurrently with Declaration of
David S. Winston, Declaration of James
Ahlborn and the Proposed Order]*

Date: January 20, 2023

Time: 1:30 p.m.

Complaint Filed: August 26, 2021

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on January 20, 2023 at 1:30 p.m. in Department S-17 of the
3 above-entitled court, located at 247 W. 3rd St., San Bernardino, CA 92415, Plaintiff James Ahlborn
4 will and does move the Court for an Order of Approving Proposed PAGA Settlement (“PAGA
5 Settlement Approval Order”), a copy of which is filed concurrently herewith.

6 The Motion will be made on the grounds that the proposed PAGA Settlement is fair, adequate,
7 reasonable, and in the best interest of the State of California and aggrieved employees. The Motion
8 will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the
9 Declaration of David S. Winston, the Declaration of James Ahlborn, the Parties’ Settlement
10 Agreement, and all other papers and records on file in this action, and on such oral and documentary
11 evidence as may be presented at the hearing on this Motion.

12 DATED: December 27, 2022

WINSTON LAW GROUP, P.C.

13
14 By: David Winston
15 DAVID S. WINSTON
16 Attorney for Plaintiff James Ahlborn and the
17 Aggrieved Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff James Ahlborn submits this Memorandum of Points and Authorities in support of
4 this Motion for Approval of PAGA Settlement reached between Plaintiff and Defendant. Pursuant to
5 Labor Code § 2699(1)(2), the superior court is required to “review and approve any settlement of any
6 civil action filed pursuant to [PAGA].” The Proposed Settlement provides for a monetary payment
7 of \$130,000.00. The Proposed Settlement, which was negotiated in light of all known facts and
8 circumstances during a mediation through the USC Mediation Clinic. The Proposed Settlement
9 represents a fair outcome in this litigation based upon the risk factors associated with the claims
10 especially in light of the U.S. Supreme Court’s decision in *Viking River Cruises, Inc. v. Moriana*, 142
11 S. Ct. 1906, 1911, reh’g denied, 143 S. Ct. 60 (2022). Declaration of David Winston In Support of
12 PAGA Settlement, ¶ 8 (hereafter the “Winston Decl.”).

13 Although Plaintiff intended to challenge the alleged contract formation and the enforceability
14 of the agreement since several of the arbitration provider’s rules have been struck down by either the
15 California Supreme Court or California Court of Appeal,¹ significant risk existed that either the cost
16 of litigation would outweigh the recovery or that the Court could find after *Viking River* that the
17 claims were precluded by Defendant’s alleged arbitration agreement. Winston Decl., ¶ 8. If the U.S.
18 Supreme Court sides with the employer in *Viking River*, a reasonable chance exists that the Defendant
19 might prevail entirely in this action and that the State could recover nothing. *Id.* at ¶ 9. The status of
20 whether or not the aggrieved employees PAGA claims are dismissed if the representatives claims are
21 compelled to arbitration is an issue currently pending before the California Supreme Court in *Adolph*
22 *v. Uber Technologies, Inc.* S274671 (2022). *Id.*

23
24 ¹ *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 133 (1998) (finding that AAA’s rules
25 governing representation violated Bus. & Prof. Code section 6125’s prohibition on unauthorized practice of law in
26 California); *Azteca Construction, Inc. v. ADR Consulting, Inc.*, 121 Cal. App. 4th 1156, 1162 (2004) (finding that AAA
27 Rule R-20 in construction litigation, which is comparable to its employment rules, violated California’s laws regarding the
28 disqualification of an arbitrator (“the parties to an arbitration agreement cannot contract away their statutory right to
disqualify an arbitrator” and because “the state retains ultimate control over the structural aspect of the arbitration
process.”); *accord Roussos v. Roussos*, 60 Cal. App. 5th 962, 974 (2021); AAA Rules also do not permit a party to
stenographically record all hearings nor to petition a court when an arbitrator refuses to allow such recording in express
violation of Code of Civ. Proc. § 1282.(c) (authorizes a party to “petition the court for an order to compel the arbitrator to
grant the party’s request” if an arbitrator fails to grant a party’s request for a stenographic recording.).

By this Motion, Plaintiff requests that the Court:

(1) Grant approval of the PAGA Settlement and Release Agreement signed by the Parties (the “Settlement Agreement”). A true and correct copy of the Settlement Agreement is attached to the Winston Decl., as Exhibit 1;

(2) Appoint ILYM Group, Inc. as the Settlement Administrator;

(3) Award PAGA Representative James Ahlborn a Service Award in the amount of \$7,500.00; and

(4) Approve PAGA Counsel’s Attorneys’ Fees and Costs Request;

Plaintiff believes that the proposed settlement of this action is fair, reasonable, adequate, and in the best interests of the state of California and the aggrieved employees given the issues in this action. Accordingly, Plaintiff respectfully requests that the Court grant approval of the Parties’ Proposed PAGA Settlement. The Proposed Settlement was provided to the LWDA as required by PAGA. Winston Decl., ¶ 14, Exh. 2.

Further, while Plaintiff apologizes to the Court for filing the moving papers one (1) day late because Defendant failed to timely sign the Settlement Agreement, the circumstances were outside Plaintiff’s control and Plaintiff did not want to turn-in a motion for approval without a signed agreement. Defendant agreed to go in *ex parte* themselves to shorten time, but the Parties did not want to waste the Court’s resources on an *ex parte* and instead are addressing the issue in their papers. Defendant’s Counsel advised that Defendant intends to file a response advising that they do not have any issues with respect to the length of the notice.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On June 1, 2021, Plaintiff filed and served a PAGA notice alleging that Defendant violated Labor Code §§ 201, 202, 203, 204, 210, 226, 226.3, 510, 558, 1197, and 1198, as well as IWC Wage Order No. 1-2001. Winston Decl., ¶ 10. Concurrently with his PAGA notice, Plaintiff submitted a record request to Defendant seeking his personnel file, time records, and pay records. *Id.* Shortly, thereafter on July 27, 2021, Plaintiff filed an Amended PAGA Notice adding additional facts related to the alleged overtime violations, claims for unauthorized wage deductions, failure to reimburse

1 business expenses, forced patronage claims related to uniform expenses, and for forcing employees
2 to sign documents authorizing wage deductions for uniform expenses from their wages. After
3 exhausting PAGA's administrative waiting period, Plaintiff filed the instant action in San
4 Bernardino County Superior Court. The Parties began discussing the possibility of Mediation and
5 their respective views of the case.

6 Ultimately, the Parties agreed to mediate both this action and a separate discrimination action
7 pending before the California Department of Fair Employment and Housing through the USC
8 Mediation Clinic. Winston Decl., ¶ 11. Plaintiffs and Defendant separately negotiated the claims in
9 each action and reached a settlement in the PAGA action and this Settlement was not conditioned
10 upon the resolution of Plaintiff Ahlborn's separate FEHA claims before the California Department
11 of Fair Employment and Housing. *Id.*

12 **III. THE NATURE OF A PAGA ACTION**

13 The Private Attorney General Act ("PAGA") (Labor Code section 2698, *et seq.*) creates a
14 means of "deputizing" citizens as private attorney generals to enforce the Labor Code on behalf of
15 the state of California. *Brown v. Ralphs Grocery Co.*, 197 Cal.App.4th 489, 501 (2011). Through
16 PAGA, an aggrieved employee can recover civil penalties for violations of the Labor Code committed
17 against the aggrieved employee on behalf of the State of California. Lab. Code § 2699(a) and (f).
18 Thus, in bringing a PAGA action, the aggrieved employee acts as the proxy or agent of the state labor
19 law enforcement agencies, representing the same rights and interest of the state of California who
20 remains the real party in interest. *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234
21 Cal.App.4th 1109, 1119 (2015) (holding "the government is always the real party in interest" in a
22 PAGA action.).²

23 Since in a PAGA action the state serves as the real party in interest, any judgment in a PAGA
24 action binds only the state of California and does not alter the rights of any of the allegedly aggrieved
25 employees except with respect to civil penalties that could be recovered by the state of California on

27 ² See also *Montano v. The Wet Seal Retail, Inc.*, 232 Cal.App.4th 1214, 1222 (2015) ("[A] PAGA action is a dispute
28 between an employer and the State agency."). Accordingly, a plaintiff may not bring a PAGA claim simply on his or her
own behalf as an individual. *Arias v. Sup. Ct.* 46 Cal.4th 969, 986 (2009); see also *Reyes v. Macy's, Inc.*, 202 Cal.App.4th
1119, 1123-1124 (2011).

1 behalf of the aggrieved employees. *Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct.*,
2 46 Cal.4th 993, 1003 (2009); (holding that “[PAGA] does not create property rights or any other
3 substantive rights.”); *Medina v. Vander Poel*, 523 B.R. 820, 825 (E.D. Cal. 2015) (holding “PAGA
4 plaintiffs do not have property rights in their cases.”).

5 Moreover, as the Ninth Circuit and California Supreme Court and Appellate Courts have
6 recognized, “a PAGA suit is fundamentally different than a class action.” *Baumann v. Chase Inv.*
7 *Servs. Corp.*, 747 F.3d 1117, 1122 (9th Cir. 2014); *Kim v. Reins International California, Inc.*, 9
8 Cal.5th 73, 81 (2020) (“A PAGA claim is legally and conceptually different from an employee's own
9 suit for damages and statutory”). Unlike in a class action, “PAGA does not make other potentially
10 aggrieved employees parties or clients of plaintiff's counsel, does not impose on a plaintiff or counsel
11 any express fiduciary obligations, and does not subject a plaintiff or counsel to scrutiny with respect
12 to the ability to represent a large class.” *Williams vs. Sup. Ct.*, 3 Cal.5th 531, 546-547 (2017). PAGA
13 also “has no notice requirements for unnamed aggrieved employees, nor may such employees opt out
14 of a PAGA action.” *Baumann*, 747 F.3d at 1122.³

15 **IV. THE PROPOSED SETTLEMENT**

16 The Proposed Settlement only covers the State's claims for Labor Code violations committed
17 against a group of aggrieved employees defined “as all persons currently or formerly employed by
18 Defendant, as non-exempt, hourly-paid employees in the State of California during the Settlement
19 Period (defined as February 2, 2020 through October 16, 2022). Winston Decl., ¶ 13, Exh. 1 at p. 2.
20 As of the October 16, 2022 cut-off date there were 430 aggrieved employees who worked 32,557 pay
21 periods. Winston Decl., ¶ 13, Exh. 1 at p. 1. Notably, as discussed above none of the employees,
22 except for Plaintiff, are waiving any of their own individual rights to pursue claims against Defendant
23 as only the State's claims for civil penalties were ever at issue in this action. *Amalgamated Transit*,
24 46 Cal.4th at 1003; *Kim*, 9 Cal. 5th at 81.

25 The Proposed Settlement provides for Defendant to pay a non-reversionary Gross Settlement
26

27 ³ See also *O'Connor v. Uber Technologies, Inc.*, No. 13-CV-03826-EMC, 2016 WL 4398271, at *18 (N.D. Cal. Aug. 18,
28 2016), (“PAGA does not require class action procedures, such as notice and opt-out rights.”) citing *Iskanian v. CLS*
Transportation Los Angeles, LLC, 59 Cal. 4th 348, 381 (2014) (emphasis added).

Amount of \$130,000.00 subject to the following proposed allocation:

Gross Settlement Amount:	\$130,000.00
Attorneys' Fees: (1/3)	up to \$43,333.33
Case Costs:	up to \$2,644.66
Settlement Administration Costs:	\$6,000.00
Service Award for Plaintiff Ahlborn:	up to \$7,500.00

Estimated Net PAGA Penalties:	\$70,522.01
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Winston Decl., ¶¶ 13 and 15, Exh. 1 at p. 7.

The Net PAGA Payment is the amount to be distributed to the LWDA and the aggrieved employees and consists of the Gross Settlement Amount minus Court Approved PAGA Counsel's attorneys' fees and litigation costs, the settlement administrator costs charged by third-party settlement administrator ILYM, and Plaintiff Ahlborn's proposed service award. Winston Decl., ¶¶ 13 and 16, Exh. 1 at p. 7-10. The Net PAGA Payment Amount will be allocated pursuant to Labor Code section 2699(i) with 75% paid to the LWDA (\$52,891.50) and 25% paid to the aggrieved employees on a pro-rata basis (\$17,630.51). *Id.* The portion of PAGA penalties distributed to each PAGA Aggrieved Employee shall be calculated by dividing the number of PAGA periods worked by an aggrieved employees during the covered period by the total number of pay periods worked by all aggrieved employees during the covered period (32,557) and multiplying that amount by the amount of PAGA penalties awarded to the aggrieved employees (*i.e.* \$17,630.51). *Id.* Based on the data provided by Defendant, the Proposed Settlement itself represents a gross PAGA penalty award of \$3.99 per pay period (\$130,000.00/32,557 pay periods) and a net PAGA penalty award of \$2.17 per pay period (\$70,552.01/32,557 pay periods). Winston Decl., ¶ 17. In addition, the average estimated gross settlement award per aggrieved employee is \$302.33 (\$130,000/430 aggrieved employees) and the average estimated net settlement award for an aggrieved employee is approximately \$41.00 (\$17,630.51 Net PAGA Penalties for the aggrieved employees/430 aggrieved employees). Winston Decl., ¶ 17.

1 **V. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT**

2 Although a party need not bring a motion for approval of a PAGA settlement, nor must the
3 Court conduct a hearing on the fairness of a PAGA settlement—as evidenced by the fact that the
4 LWDA website notes a hearing time “if any”—a court must nevertheless review and approve the
5 PAGA settlement. Lab. Code § 2699 (l)(2) (“The superior court shall review and approve any
6 settlement of any civil action filed pursuant to this part.”). Winston Decl., ¶ 23, Exh. 4.

7 **A. The Standard the Court Should Consider When Reviewing the Settlement**

8 On November 30, 2021, the California Court of Appeal for the first time in a published
9 decision established the standard applicable to review of a PAGA settlement in *Moniz v. Adecco USA,*
10 *Inc.*, 72 Cal. App. 5th 56, 77 (2021). In *Adecco*, the Court of Appeal held that when reviewing a
11 PAGA Settlement, the “court should evaluate a PAGA settlement to determine whether it is fair,
12 reasonable, and adequate in view of PAGA’s purposes to remediate present labor law violations.” *Id.*
13 at 26-27. The Court explained that while unlike in a class case “PAGA does not require the trial court
14 to act as a fiduciary for aggrieved employees” the following “factors can be useful in in evaluating
15 the fairness of a settlement”: “the strength of the plaintiff’s case, the risk, the stage of the proceedings,
16 and likely duration of further litigation, and the settlement amount.” *Id.* at 26. Further, the Court
17 should also consider whether the settlement is fair in view of PAGA’s purpose and policies.” *Id.* The
18 proposed Settlement provides genuine and meaningful relief for the State of California and aggrieved
19 employees despite the significant risk that existed as of the time of mediation because of the pending
20 decision in *Viking River* that was ultimately decided in the employer’s favor.

21 **1. The Experience and Views of Counsel and Mediator’s Involvement**
22 **Supports Approval of the Parties Agreement**

23 Although not technically a factor in a PAGA action, PAGA Counsel is experienced in wage-
24 and-hour class actions and has worked on numerous class and representative PAGA wage and hour
25 cases. Winston Decl., ¶¶ 3-6.⁴

26 Plaintiff and PAGA Counsel, operating at arm’s length and with the assistance of the USC

27 ⁴ *Williams*, 3 Cal.5th at 546-547 (2017) PAGA does not make other potentially aggrieved employees parties or clients of
28 plaintiff’s counsel, does not impose on a plaintiff or counsel any express fiduciary obligations, and does not subject a
plaintiff or counsel to scrutiny with respect to the ability to represent a large class.”).

1 Mediation clinic weighed the strengths and risks of this case, and unanimously share the view that
2 this is a fair and reasonable settlement in light of the nature of the claims, the complexities of the
3 case, the state of the law, and the uncertainties of litigation. Winston Decl., ¶ 18. PAGA Counsel's
4 knowledge and experience as well as a mediator's participation in the settlement negotiation weighs
5 considerably against any inference of collusion.⁵ Further, after factoring in the risks explained below,
6 PAGA Counsel believes that the proposed Settlement is fair and reasonable and should be approved.
7 Winston Decl., ¶ 18.

8 **2. The Strengths and Risks Associated with Plaintiff's Case**

9 **a. The Strength of and Risks Associated with Plaintiff's Overtime 10 Related PAGA Claims**

11 Labor Code § 510 requires an employer to compensate an employee who works more than
12 eight (8) hours in one workday, forty (40) hours in a workweek, and for the first eight (8) hours
13 worked on the seventh consecutive day no less than one and one-half times the regular rate of pay
14 for an employee. Further, Labor Code § 510 obligates employers to compensate employees at no
15 less than twice the regular rate of pay when an employee works more than twelve (12) hours in a
16 day or more than eight (8) hours on the seventh consecutive day of work.

17 When calculating an employee's regular rate, California and federal courts, with limited
18 exceptions, look to the federal Fair Labor Standards Act ("FLSA"). *Huntington Mem'l Hosp. v. Sup.*
19 *Ct.*, 131 Cal. App. 4th 893, 902 (2005). Under the FLSA, the regular rate of pay includes all forms
20 of remuneration. *See* 29 U.S.C. § 207(e); *Huntington Mem'l*, 131 Cal. App. 4th at 90 (holding that
21 shift differential must be included in the regular rate when calculating and paying overtime).

22 Plaintiff alleges that Defendant violated California's law with respect to minimum wages
23 and overtime by: 1) failing to include some shift differentials when calculating and paying overtime
24 wages; and 2) failed to include non-discretionary bonuses known as a meal-period benefit when
25 calculating and paying overtime. Winston Decl., ¶ 19. Aside from the risk that *Viking River* would

26 ⁵ *In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF (HRL), 2008 U.S. Dist. LEXIS, 108195 (N.D. Cal. Nov.
27 5, 2008) (mediator's participation weighs considerably against any inference of a collusive settlement); *In re Amtel Corp.*
28 *Derivative Litig.*, No. C 06-4592 JF (HRL), 2010 U.S. Dist. LEXIS 145551 (N.D. Cal. June 25, 2008) (same); *D'Amato v.*
Deutsche Bank, 236 F.3d 78, 85 (2nd Cir. 2001) (a "mediator's involvement in pre-certification settlement negotiations
helps to ensure that the proceedings were free of collusion and undue pressure.").

1 negate Plaintiff's ability to maintain this action, additional risk existed with respect to each of
2 Plaintiff's overtime claims. With respect to the shift differential claim, Defendant presented evidence
3 including Plaintiff's own pay records evidencing that the violations were not systemic and instead
4 occurred intermittently on rare occasions where payroll was submitted late. Winston Decl., ¶ 19.

5 Plaintiff also alleges that Defendant failed to include a non-discretionary bonus/incentive
6 payment known as a Meal-Period Benefit Pay when calculating and paying overtime and doubletime
7 wages. Winston Decl., ¶ 20. Defendant offered this compensation in an effort to encourage
8 employees to take duty-free meal periods instead of skipping their breaks. *Id.* Although Plaintiff
9 alleges that Defendant omitted such amounts when calculating and paying overtime, a court could
10 decline to impose significant penalties where Defendant's alleged unlawful activity arose from its
11 desire to provide its employees with a financial incentive to take meal periods by compensating
12 employees while they were off-the-clock. *Id.*

13 **b. The Strength of and Risks Associated with the Meal Period Related**
14 **PAGA Claims**

15 Labor Code § 512 requires employers to provide employees with thirty (30) minute
uninterrupted and duty-free meal period within the first five (5) hours of work. Moreover, an
16 employee who works more than ten (10) hours per day is entitled to receive a second thirty (30)
17 minute uninterrupted and duty-free meal period.

18 Plaintiff alleged that Defendant failed to either authorize and permit and/or provide a lawful
19 meal period (including timely first meal periods) to Plaintiff and the other aggrieved employees and
20 failed to pay meal period premiums at the proper rate. Winston Decl., ¶ 21.

21 It was undisputed that Defendant paid meal period premiums to employees who reported
22 not receiving proper meal periods. Winston Decl., ¶ 22. Plaintiff's pay records and the informal
23 discovery indicated that Defendant paid employees' meal period premiums when they reported that
24 they didn't receive proper meal periods. *Id.* While the payment of a meal period premium does not
25 absolve the employer of liability, it could impact the amount of PAGA penalties awarded by the
26 Court. *Id.*; See e.g. *Kim v. Reins International California, Inc.*, 9 Cal.5th 73, 84 (2020) ("employers
27 can pay an additional hour of wages as a remedy for failing to provide meal and rest breaks. (§
28

226.7, subd. (c).) But we have held that payment of this statutory remedy ‘does not excuse a section 226.7 violation.’”) (quoting *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal.4th 1244, 1256 (2012). Plaintiff was confident that he would prevail on this claim absent the risk associated with *Viking River Cruises* because Defendant failed to include shift differentials, the extra compensation provided to employees for taking meal periods, and certain non-discretionary bonuses when calculating and paying meal period premiums. Winston Decl., ¶ 22. Ultimately, the risk associated with *Viking River Cruises* was realized following mediation when the US Supreme Court sided with the employer and found that PAGA claims are arbitrable. *Id.*

While Plaintiff was confident that he would prevail on this claim, some risk existed that the amount of recoverable damages would be low because Defendant’s practice made efforts both to provide employees with meal periods and the initiation of this action predated the California Supreme Court’s ruling in *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858, 878 (2021). *Id.* (“we hold that the term ‘regular rate of compensation’ in section 226.7(c) has the same meaning of regular rate of pay’ in section 510(a) and encompasses not only hourly wages, but all nondiscretionary payments for work performed by the employee.”). Prior to the California Supreme Court’s ruling in *Ferra*, the Court of Appeal in *Ferra* found that California law permitted employers to pay meal period premiums at the employer’s hourly base rate instead of their regular rate of compensation/pay. As such, it is possible that the Court might decline to award significant penalties for Defendant’s alleged violation. Winston Decl., ¶ 24. Thus, Plaintiff believed a reasonable amount of risk existed that the Court could exercise its discretion to award a small amount of PAGA penalties on this claim due to Defendant’s efforts to comply with California’s meal period policies.

c. The Strength of and Risks Associated with the Rest Period Related PAGA Claims

Labor Code § 226.7(c) provides that “if an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law...the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each workday that the meal or rest or recovery period is not provided.” Rest period premiums within the meaning of Labor Code § 226.7(c) must be paid at an employee’s regular rate instead of their hourly base rate. *Ferra*

1 *v. Loews Hollywood Hotel, LLC*, 11 Cal. 5th 858, 878 (2021) (“we hold that the term ‘regular rate
2 of compensation’ in section 226.7(c) has the same meaning of regular rate of pay’ in section 510(a)
3 and encompasses not only hourly wages, but all nondiscretionary payments for work performed by
4 the employee.”).

5 As previously explained, Plaintiff alleged that Defendant failed to pay aggrieved
6 employees’ meal/rest period premiums at the correct rate. Winston Decl., ¶ 25. For the same reasons
7 as previously explained, Plaintiff believed that significant risk existed that the Court might decline
8 to award significant penalties for Defendant’s alleged failure to pay rest period premiums at the
9 correct rate.

10 **d. The Strength of and Risks Associated with Plaintiff’s PAGA Claim**
11 **that Defendant Unlawfully Deducted Expenses Associated with Uniforms**
12 **Failed To Maintain The Unlawfully Withheld Amounts In Proper Bank**
13 **Accounts, And Failed To Reimburse Business Expenses**

14 Labor Code § 2802 provides that “[a]n employer shall indemnify his or her employee for
15 all necessary expenditures or losses incurred by the employee in direct consequence of the discharge
16 of his or her duties, or of his or her obedience to the directions of the employer, even though
17 unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.”
18 Labor Code § 221 expressly prohibits an employer from collecting or receiving from an employee
19 any part of wages paid by the employer to the employee.

20 Labor Code § 403 also requires that cash received as a bond be “deposited in a savings
21 account in a bank authorized to do business in this State, and may be withdrawn only upon the joint
22 signatures of the employer and the employee or applicant.” Additionally, Labor Code § 403 requires
23 that the bond be accompanied by “an agreement in writing made by the employer and employee or
24 applicant, setting forth the conditions under which the bond is given.” Similarly, Labor Code § 406
25 clarifies that “[a]ny property put up by an employee directly, or indirectly, shall be deemed to be
26 put up as a bond and is subject to the provision of this article whether the property is put up on a
27 note or as a loan or an investment and regardless of the wording of the agreement under which it is
28 put up.

Moreover, Labor Code § 450 prohibits an employer from compelling or coercing any

1 employee or applicant for employment from patronizing his employer or any other person in the
2 purchase of anything of value.

3 Further, Section 9(A) of IWC Wage Order No. 1-2001 provides that “[w]hen uniforms are
4 required by the employer to be worn by the employee as a condition of employment, such uniforms
5 shall be provided and maintained by the employer.” Although IWC Wage Order No. 1-2001
6 required Defendant to both provide and maintain the work uniforms, Defendant did not provide
7 either the uniforms or any compensation to the aggrieved employees to reimburse them for the
8 expenses associated with maintaining the uniforms. This includes for the time associated with the
9 maintenance of the uniforms.

10 Plaintiff alleged that by deducting and collecting part of Plaintiff and the other aggrieved
11 employees’ wages for uniform expenses and/or deposits, Defendant violated Labor Code §§ 221,
12 224, 403, 406, 450 2802 as well as IWC Wage Order 1-2001. Winston Decl., ¶ 26.

13 In addition, regardless of whether or not such amounts were deducted, Plaintiff alleged
14 Defendant violated Labor Code section 432.5 by requiring Plaintiff and the other aggrieved
15 employees to sign documents authorizing such charges. Labor Code section 432.5 provides that
16 “No employer, or agent, manager, superintendent, or officer thereof, shall require any employee or
17 applicant for employment to agree, in writing, to any term or condition which is known by such
18 employer, or agent, manager, superintendent, or officer thereof to be prohibited by law.”

19 Although Plaintiff was confident that the State would prevail on these claims, substantial
20 risk existed that the pending decision in *Viking River Cruises* would prevent Plaintiff from
21 maintaining these claims in Court or impede his ability to recover PAGA penalties on behalf of
22 other aggrieved employees. Winston Decl., ¶ 26.

23 **e. The Strength of and Risks Associated With the Wage Statement**
24 **Related PAGA Claims**

25 Labor Code § 226 (a) states, in relevant part: (a) Every employer shall, semimonthly or at the
26 time of each payment of wages, furnish each of his or her employees . . . an accurate itemized
27 statement in writing showing . . . (1) gross wages earned; (2) total hours worked;...(5) net wages
28 earned;...and (9) all applicable hourly rates in effect during the pay period and the corresponding

number of hours worked at each hourly rate by the employee”. Unlike other provisions of the Labor Code for which no default penalty exists, an employer who commits a non-knowing and intentional violation of Labor Code § 226(a) is liable for PAGA penalties at the specific civil penalty proscribed by Labor Code § 226.3. Notably, unlike the per pay period default PAGA penalties, Labor Code § 226.3 provides for a per employee penalty of \$250 for an initial violation and also gives the Court or Labor Commissioner discretion to “decide not to penalize an employer for a first violation.” Lab. Code § 226.3 *cf* Lab. Code § 2699.3.

Plaintiff also alleged a derivative claim based upon Defendant’s alleged failure to pay minimum wages, overtime wages, and pay allegedly owed meal/rest period premiums. Winston Decl., ¶ 27. The issue of whether or not an employee can recover wage statement penalties based upon an alleged meal/rest period violation was pending before the California Supreme Court in *Naranjo v. Spectrum Security Services, Inc.*, 257 Cal. Rptr. 3d 188 (2020) (granting review and denying request to depublish the appellate decision) when the Parties mediated this Action. In the non-depublished appellate court decision in *Naranjo v. Spectrum Security Services, Inc.*, 40 Cal. App. 5th 444 (2019), the California Court of Appeal held that employees could not recover wage statement penalties based upon an employer’s failure to provide meal/rest period premiums. With respect to the derivative wage statements claims predicated upon alleged off-the-clock minimum wage and overtime violations, Plaintiff believed that a significant probability existed that Defendant would prevail on the minimum wage and overtime related claims because the wage statements showed the amount of overtime wages paid. *Maldonado v. Epsilon Plastics, Inc.* 22 Cal. App. 5th 1308, 1336-1337 (2018). Given *Naranjo* and *Maldonado*, Plaintiff believed the value of the non-derivative itemized wage statement claims to be negligible at the time of Mediation. Winston Decl., ¶ 27. Although the California Supreme Court ultimately reversed the appellate court in *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93, 104 (2022) and cast doubt upon the viability of *Maldonado* in the process, significant risk still existed with this claim because of the issues related to *Viking River* that remain unresolved under California law. Winston Decl., ¶ 27.

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1 **f. The Strength of and Risks Associated With Plaintiff's PAGA Claims**
2 **Based Upon Final Pay and Failure to Timely Pay Wages During and**
3 **After Employment**

4 Plaintiff brought derivative PAGA claims for the late payment of wages during employment
5 under Labor Code §§ 204 and 210 as well as after employment pursuant to Labor Code §§ 201-203
6 predicated upon Defendants' alleged failure to pay minimum wages (for the time associated with
7 maintaining uniforms), overtime wages, or meal/rest period premiums allegedly owed. Winston
8 Decl., ¶ 28. Since these claims were derivative in nature, Defendant possessed the same defenses to
9 these claims with the underlying claims. *Id.* In addition, as with the wage statement claim, the viability
10 of the meal/rest period related aspects of this claim depends upon the outcome of the California
11 Supreme Court's decision in *Naranjo*. Further, the amount of PAGA penalties that Plaintiff could
12 recover in association with these claims is uncertain. Winston Decl., ¶ 28. To Plaintiff's knowledge,
13 no appellate case exists concerning the number of pay periods for which such penalties can be
14 recovered. While since Labor Code § 2699.5 identifies violations of Labor Code §§ 201 and 202—
15 which can only arise post-employment—as separately enumerated non-curable PAGA violations it
16 seems likely that post-employment PAGA penalties can be recovered, it does not appear that any
17 appellate case has directly addressed this issue. Winston Decl., ¶ 28.

18 **g. The Strength of and Risks Associated With Plaintiff's Claim for the**
19 **Failure to Maintain Accurate Time Records**

20 Labor Code § 1174 provides that each employer shall keep "payroll records showing the hours
21 worked daily by and the wages paid to...employees employed at...establishments." An employer
22 who fails to maintain the records proscribed by Labor Code § 1174 is subject to a civil penalty of five
23 hundred (\$500) dollars under Labor Code § 1174.5. Plaintiff alleged that Defendant failed to maintain
24 accurate records of the actual time worked by Plaintiff and the aggrieved employees. Winston Decl.,
25 ¶ 29. In light of the California Supreme Court's explanation in *Donohue vs. AMN Services, LLC*, 11
26 Cal. 5th 81 (2021) that "it is the employer's duty to maintain accurate time records," Plaintiff was
27 confident that he would prevail on this claim. *Id.*

28 While Plaintiff was confident he would prevail on this claim, some risk existed that the
amount of recoverable damages would be low because this action predated *Donohue* and the fact
that while Defendant's practice may not have been compliant it did make efforts both to provide

1 employees with meal periods and financially incentivize employees to take meal periods. Winston
2 Decl., ¶ 29. Thus, aside from the risks associated with *Viking River Cruises*, Plaintiff believed a
3 reasonable amount of risk existed that the Court could exercise its discretion to award a small
4 amount of PAGA penalties on this claim due to Defendant's efforts to comply with California's
5 meal period laws. *Id.*

6 **3. The Risk, Expense, Complexity, and Likely Duration of Further Litigation**

7 This Action involved a considerable amount of risk as of the time of Mediation and still does.
8 As previously discussed, the U.S. Supreme Court's pending decision in *Viking River Cruises* could
9 have precluded all PAGA claims and Plaintiff from pursuing this action further. Winston Decl., ¶ 30.
10 It remains uncertain under California law that if Defendant prevailed on their threatened motion to
11 compel arbitration that Plaintiff would possess standing to pursue PAGA penalties on behalf of any
12 of the State of California for the other aggrieved employees. Winston Decl., ¶ 30. If the Court were
13 to side with the employer and dismiss the PAGA claims of the other aggrieved as suggested by the
14 US Supreme Court in *Viking River*, the aggrieved employees aside from Plaintiff would not recover
15 anything in this Action. That would render the claims in this Action for the other aggrieved employees
16 worthless. Winston Decl., ¶ 30.

17 Moreover, there are always risks attendant to wage and hour cases given the evolving nature
18 of such claims. Winston Decl., ¶ 31. Given the ever-evolving landscape of wage and hour law, there
19 are always risks that a new case will come out that will clarify and/or potentially limit employees'
20 claims. Winston Decl., ¶ 31. For example, although generally it was well-established that employees
21 could recover both wage statement and waiting time penalties based upon an employer's failure to
22 provide lawful meal/rest periods, a recent appellate case held that such penalties are not recoverable.
23 *See Naranjo v. Spectrum Security Services, Inc.*, 40 Cal. App. 5th 444 (2019) before it was overturned
24 after the Parties' settled this Action. Similarly, in another recent decision the California Court of
25 Appeal held that employers could pay employees meal/rest period premiums at the employee's hourly
26 base rate instead of at their regular rate. *Ferra v. Loews Hollywood Hotel, LLC*, 40 Cal. App. 5th
27 1239 (2019). While Plaintiff was confident that he would prevail on his claims based upon present
28

1 law, the plaintiffs in *Ferra* and *Naranjo* likely believed they would have as well and actually did on
2 their derivative claims prior to the California Court of Appeal’s recent ruling and before each matter
3 was eventually reversed by the California Supreme Court. Winston Decl., ¶ 31. As the California
4 Court of Appeal explained in the now overturned *Naranjo* decision, “[a]lthough wage and hour
5 lawsuits are ubiquitous in state courts, most settle before trial. Consequently, our appellate courts
6 have not had much opportunity to publish decisions addressing the derivative wage claim issue[s].”
7 *Naranjo*, 40 Cal. App. 5th at 468. While Plaintiff acknowledges that the California Supreme Court
8 reversed in both cases, each nevertheless are emblematic of the inherent risk associated with litigating
9 wage and hour cases and the fact that a new appellate decision can dramatically alter the strength of
10 the employees’ claims. Indeed, such a risk was realized in this Action when the US Supreme Court
11 ruled in the employer’s favor during the pendency of *Viking River Cruises*. Winston Decl., ¶ 31.

12 In addition, as with any PAGA case, significant risk exists with respect to the amount of
13 PAGA penalties that a Court may award given their discretionary nature. Under PAGA, Courts can
14 exercise their discretion to reduce the amount of penalties awarded. Winston Decl., ¶ 32.

15 Given the risks outlined above, the issues in this case were complex and the risks for Plaintiff
16 and the aggrieved employees were substantial. Winston Decl., ¶ 33. Due to the complexity and
17 unsettled nature of the issues in this case—including a dearth of case law regarding the valuation of
18 the PAGA penalties at issue and the issues concerning Defendant’s alleged arbitration agreements—
19 it is also likely that any outcome at trial would have resulted in a lengthy and costly appeal. *Id.*

20 **4. The Amount Offered in Settlement**

21 It was very difficult for the Parties to reach this Settlement. Winston Decl., ¶ 34. Defendant
22 asserted that Plaintiff’s claims were worth very little, if any, money and doubted that Plaintiff would
23 prevail on the PAGA claims or even that California law had been violated. *Id.* While PAGA Counsel
24 believes that stacking of PAGA penalties is permissible based upon the California Court of Appeal’s
25 ruling in *Kaanaana v. Barrett Business Services, Inc.*, 29 Cal.App.5th 778, 808 (2018),⁶ the
26

27 ⁶ *Kaanaana*, 29 Cal.App.5th at 808 (affirming the award of PAGA penalties for violations of Labor Code § 512 where
28 employees’ meal periods were interrupted and remanding to the trial court the amount of PAGA penalties that should be
awarded based upon the minimum wage violations associated with the same interrupted meal periods.);

1 *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504, 529 (2018) Court declined to award such
2 penalties and instead limited its award only to Labor Code § 558 PAGA penalties where the plaintiff
3 sought both Labor Code § 2699.3 and 558 PAGA penalties.⁷

4 **a. The Proposed Settlement Falls Well Within The Range of Reasonableness**

5 Plaintiff and PAGA Counsel did not believe that in light of the risk associated with each claim
6 and the numerous legal issues explained in detail above that the maximum possible settlement amount
7 was a remotely plausible outcome given Defendant’s significant defenses and the discretionary nature
8 of the PAGA penalties. Winston Decl., ¶ 35. Under PAGA, Courts can exercise their discretion to
9 reduce the amount of penalties awarded. *See e.g. Carrington*, 30 Cal.App.5th at 529 (the trial court
10 declined to stack PAGA penalties and the Court of Appeal affirmed the reduction of the PAGA
11 penalties to \$5.00 per pay period). Indeed, in light of the outcome in *Viking River Cruises* it is possible
12 that Plaintiff might lose the ability to pursue all of the claims at issue in this action for Labor Code
13 violations committed against anyone but himself.

14 After weighing the other benefits and risks associated with each of the claims in light of the
15 factual challenges as well as Defendant’s potential defenses and the risks associated with PAGA
16 standing after *Viking River Cruises*, Plaintiff determined the amount offered in settlement was fair
17 and reasonable considering the risks and the likelihood of success on the merits. Winston Decl., ¶ 36.

18 (1) The Maximum Penalties Potentially At Issue Without Taking Into
19 Account the Risks

20 A trial court should not evaluate a proposed settlement “against a hypothetical or speculative
21 measure of what might have been achieved had plaintiffs prevailed at trial.” *Munoz v. BCI Coca-Cola*
22 *Bottling Co.*, 186 Cal. App. 4th 399, 409 (2010). “The test is not the maximum amount plaintiffs might
23 have obtained at trial on the complaint, but rather whether the settlement is reasonable under all of the
24 circumstances.” *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 250 (2001), disapproved on
25 another ground in *Hernandez v. Restoration Hardware, Inc.* 4 Cal.5th 260, 269 (2018). Nor does a

26 _____
27 ⁷ *Carrington*, 30 Cal. App. 5th at 508 and 529 (“Carrington sought civil penalties and unpaid wages under sections 2699,
28 subdivision (a) and 558, subdivision (a).... Although the trial court may have disagreed with Starbucks regarding the issue
of liability, it clearly took the circumstances proffered by Starbucks into consideration when it imposed the penalty, as
evident from the significant reduction of the \$50 maximum penalty (per initial violation) to the penalty imposed—only \$5
per initial violation.”).

1 *Kullar* showing require parties to submit the outer reaches of maximum possible recovery without
2 taking into account various risks. *Munoz*, 186 Cal. App. 4th at 409; *Altamirano v. Shaw Industries,*
3 *Inc.*, 2015 WL 4512372, at *9 (N.D. Cal. 2015) (preliminarily approving wage and hour class action
4 settlement, stating, “[a]lthough 15% represents a modest fraction of the hypothetical maximum
5 recovery estimated by Plaintiff, that figure is sufficient for the Court to grant preliminary approval.”).

6 Nevertheless, to allow the Court to analyze the reasonableness of the Parties Proposed
7 Settlement, Plaintiff analyzed the maximum possible value of the claims at issue in this action.
8 Further, the Court should be aware that while one appellate court reversed and remanded a trial court’s
9 decision not to award stacked PAGA penalties—*i.e.* that a court can award more than one set of
10 PAGA penalties per pay period—the court left open the possibility of the court awarding the same
11 amount or no additional PAGA penalties within the exercise of its discretion. *Kaanaana*, 29
12 Cal.App.5th at 808.

13 When taking into account the stacking of PAGA penalties and assuming a 100% violation
14 rate on every single claim, and without taking into account any of Defendant’s significant defenses
15 or the discretionary nature of PAGA penalties, Plaintiff and PAGA Counsel determined the maximum
16 exposure on the PAGA claims to be \$23,004,900.00 calculated as follows:

17 **Labor Code § 2699 Penalties For Alleged Minimum Wage Violations**

- 18 • PAGA penalties assessed at the \$100 per pay period initial violation rate = 32,557
pay periods x \$100=\$3,255,700.00

19 **Labor Code § 2699 Penalties For Alleged Overtime Violations**

- 20 • PAGA penalties assessed at the \$100 per pay period initial violation rate = 32,557
pay periods x \$100=\$3,255,700.00

21 **Labor Code § 2699 Penalties For Alleged Meal Period Violations**

- 22 • PAGA penalties assessed at the \$100 per pay period initial violation rate = 32,557
pay periods x \$100=\$3,255,700.00

23 **Labor Code § 2699 Penalties For Alleged Rest Period Violations**

- 24 • PAGA penalties assessed at the \$100 per pay period initial violation rate = 32,557
pay periods x \$100=\$3,255,700.00

25 **Labor Code § 2699 Penalties For Alleged Reimbursement Violations**

- 26 • PAGA penalties assessed at the \$100 per pay period initial violation rate = 32,557
pay periods x \$100=\$3,255,700.00

27 **Labor Code § 210 Penalties Recoverable Pursuant to PAGA for Defendant’s Violations**
28 **of Labor Code Section 204**

- Labor Code § 210 PAGA penalties are assessed at the rate of \$100 per pay period = 32,557 pay periods x \$100=\$3,255,700.00

Labor Code § 226 PAGA Penalties Related to the Issuance of Itemized Wage Statements⁸

- PAGA penalties assessed at the \$100 per pay period initial violation rate = 32,557 pay periods x \$100=\$3,255,700.00

Labor Code § 1174.5 Penalties Recoverable Pursuant to PAGA for Defendant's Violations of Labor Code section 1174

- Labor Code § 1174.5 PAGA penalties are assessed at the rate of \$500 per employee = 430 aggrieved employees x \$500=\$215,000.00

Winston Decl., ¶ 37.

Although theoretically this is the maximum potential recovery in this action if Plaintiff achieved complete and total victory based purely upon PAGA's mathematical formulas, Plaintiff and PAGA Counsel did not believe that this constituted a remotely plausible approximation of the actual expected recovery given Defendant's significant defenses to several of the claims, the risks associated with *Viking River Cruises*, the Court's ability to decline to award stacked PAGA penalties and/or exercise its discretion to reduce the amount of PAGA penalties awarded, the significant efforts that Defendant made to incentivize employees to take meal periods, the nature of many of the violations, and potential manageability issues at trial. Winston Decl., ¶ 38. In light of *Viking River Cruises*, real risk existed that Defendant might prevail completely on the PAGA claims for the aggrieved employees other than Plaintiff. *Id.* It is also important to recognize that the many courts that recognize stacking nevertheless have declined to actually award stacked PAGA penalties at trial such that the likely realistic recovery was significantly less than the maximum possible recovery. *See e.g. Carrington*, 30 Cal. App. 5th at 508 and 529.

5. The Court Should Award PAGA Counsel Attorneys' Fees in the Amount of \$43,333.33

In *Laffitte v. Robert Half Internat., Inc.*, 1 Cal. 5th 480, 503 (2016), the California Supreme

⁸ There is currently a split of authority regarding which PAGA penalties apply to violations of Labor Code § 226(a). *Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334, 355 (2021) (holding that such violations give rise to a 2699.3 penalty) *cf.*; *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 675 (2018) (holding that such violations give rise to a Labor Code § 226.3 penalty). Plaintiff performed the calculations in accordance with the decision in *Gunther* as Plaintiff believes it is better reasoned.

1 Court unequivocally held that when “litigation established a monetary fund for the benefit of the class
2 members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the
3 court may determine the amount of a reasonable fee by choosing an appropriate percentage of the
4 fund created” without considering the amount of hours expended on the case. *Id.* The court further
5 held that “[t]he recognized advantages of the percentage method – including relative ease of
6 calculation, alignment of incentives between counsel and the class, a better approximation of market
7 conditions in a contingency case, and the encouragement it provides counsel to seek an early
8 settlement *and avoid unnecessarily prolonging litigation* – convince us the percentage method is a
9 valuable tool that should not be denied by our trial courts.” *Id.*

10 As the California Court of Appeal recently recognized and as other California Courts have
11 consistently explained, “fee awards in class actions average around one-third of the recovery”
12 regardless of “whether the percentage method or the lodestar method is used.” *Amaro v. Anaheim*
13 *Arena Mgmt., LLC*, 69 Cal. App. 5th 521, 545 (2021) (“[F]ee awards in class actions average around
14 one-third of the recovery” regardless of “whether the percentage method or the lodestar method is
15 used.”) (*quoting Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 66, fn. 11 (2008)); *McCrary v. Elations*
16 *Co., LLC*, No. EDCV 13-0242 JGB (SPx), 2016 U.S. Dist. LEXIS 24050, at *2 (C.D. Cal. Feb. 25,
17 2016) (“California Courts have consistently recognized “that most fee awards based on either a
18 lodestar or percentage calculation are 33%.”); *McClellan, LLC v. Chase Home Fin. LLC*, No. SACV
19 12-1331-JGB (JEMx) 2015 U.S. Dist. LEXIS 118005, at *20 (C.D. Cal. Aug. 31, 2015) (“California
20 district courts routinely award attorneys' fees in the range of 30-40% in class actions that result in the
21 recovery of a common fund under \$10 million.”).⁹

22
23
24 ⁹ See also *Miller v. CEVA Logistics USA, Inc.*, No. 2:13-CV-01321-TLN, 2015 U.S. Dist. LEXIS 104704, at *8 (E.D.
25 Cal. Aug. 10, 2015) (“California district courts usually award attorneys' fees in the range of 30-40% in wage and hour
26 class actions that result in the recovery of a common fund under \$10 million”); *Romero v. Producers Dairy Foods, Inc.*,
27 No. 05-0484, 2007 U.S. Dist. LEXIS 86270, 2007 WL 3492841, at *4 (E.D. Cal. Nov. 14, 2007) (awarding 33% of the
28 settlement fund in a wage-and-hour case involving allegations of unpaid wages after explaining that “fee awards in class
actions average around one-third of the recovery.”); *Stuart v. RadioShack Corp.*, No. C-07-4499 EMC, 2010 WL 3155645
(N.D. Cal. Aug. 9, 2010) (noting that a fee award of 1/3 of the settlement was “well within the range of percentages which
courts have upheld as reasonable in other class action lawsuits.”); *Singer v. Becton Dickinson and Co.*, No. 08-cv-821-IEG
(BLM), 2010 WL 2196104, at * 8 (S.D. Cal. June 1, 2010) (approving fee award of 33.33% of the common fund); *Boyd*
v. Bank of Am. Corp., No. SACV 13-0561-DOC (JPRx), 2014 U.S. Dist. LEXIS 162880 (C.D. Cal. Nov. 18, 2014)
(awarding a 33.34% fee on a \$5,800,000 settlement).

PAGA Counsel's diligent and efficient litigation of this action resulted in the creation of an ascertainable common fund of \$130,000.00 that will substantially benefit the state of California. Winston Decl., ¶ 47. Consistent with numerous cases, including those identified above, PAGA Counsel seeks approval of an award of attorneys' fees in the amount of \$43,333.33 representing 1/3 of the common fund. PAGA Counsel's fee request is inherently reasonable as he seeks only 1/3 of the value of the settlement fund despite PAGA Counsel's significantly negative lodestar of 0.67 (\$43,333.33/\$64,312.50). PAGA Counsel's request is also consistent with fee awards in other similar cases. PAGA Counsel has also provided information about the time spent on the case. The attorneys' fees in this action are being divided as follows: 71% to Winston Law Group, P.C., 25% to Accident Defenders and 4% to Barkodar Law Group P.C. Winston Decl., ¶¶ 13 and 60, Exh. 1 at p. 9. Plaintiff consented to this division of fees and the division of fees did not increase the amount of legal fees that the client would pay or has agreed to pay attorneys for services rendered on the client's behalf or the amount of the request. Ahlborn Decl., ¶ 4; Winston Decl., ¶¶ 13 and 60, Exh. 1 at p. 9.

In the interest of transparency, Plaintiff and PAGA Counsel also wish to disclose to the Court that Plaintiff and Defendant settled Plaintiff's separate individual employment discrimination claims, DFEH Case No. 202107-14295027. Winston Decl., ¶¶ 13 and 61, Exh. 1 at Exh. B. A copy of Plaintiff's individual settlement agreement for his separate claims that were never at issue in this Action is incorporated as Exhibit B to the Settlement Agreement in case the Court wishes to review the individual settlement agreement. PAGA Counsel did not receive compensation or cost reimbursement associated with Plaintiff's unrelated employment discrimination claims that were never at issue in this action. Winston Decl., ¶¶ 13 and 61, Exh. 1 at Exh. B; Ahlborn Decl., ¶ 9. The attorney time sought in this matter does not include time associated with Plaintiff's DEFH case, which were logged under a different matter code. Winston Decl., ¶ 61.

6. The Court Should Award PAGA Counsel Cost Reimbursement Award in the Amount of \$2,644.66

PAGA Counsel further request that, in addition to awarding them reasonable attorneys' fees, the Court grant its application for reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred by them in connection with the prosecution of this litigation in the amount of

1 \$2,644.66. Winston Decl., ¶ 62, Exh. 3. All of these costs were necessarily incurred and/or are
2 expected to be incurred.

3 **7. The Court Should Award Plaintiff Ahlborn a Service Award of \$7,500.00**

4 Before filing this action, in 2021, Plaintiff Ahlborn researched and identified Counsel that he
5 believed could best represent the interests of the State of California and the aggrieved employees.
6 Ahlborn Decl., ¶ 7. Plaintiff Ahlborn expended time and effort assisting PAGA Counsel with the
7 investigation of the claims and gathering of information including discussing his work experience
8 and the experience of others that he had observed while working for Defendant, regularly contacted
9 PAGA Counsel for updates regarding his case, kept himself informed about the status of the
10 settlement discussions and claims, participated in a mediation via Zoom , and assisted PAGA Counsel
11 in evaluating possible settlements. Ahlborn Decl., ¶ 8. As of the submission of this Motion, Plaintiff
12 Ahlborn estimates that he has spent approximately 24.6 hours on this case. *Id.*

13 In addition to the time and efforts Plaintiff Ahlborn invested in the prosecution of this action,
14 Plaintiff Ahlborn’s proposed service award also reflects the fact that neither the State of California
15 nor any of the aggrieved employees would have enjoyed any benefits if he did not initiate this action.
16 Thus, for the reasons discussed above, this Court should grant Plaintiff’s requested service award in
17 the amount of \$7,500.00.

18 **VI. EXPLANATORY LETTER TO THE AGGRIEVED EMPLOYEES**

19 Although the aggrieved employees do not possess property rights in a PAGA action and this
20 action is not subject to the class action approval or notice process, the aggrieved employees will
21 receive an explanatory letter, in English and Spanish, a true and correct copy of which is attached to
22 the Settlement Agreement as Exhibit A. Winston Decl., ¶¶ 13 and 63, Exh. 1 at Exh. A; *Arias v.*
23 *Superior Court*, 46 Cal.4th 969 (2009) (explaining that in a PAGA action “nonparty
24 employees...[are] not given notice of the action or afforded an opportunity to be heard.”); *Baumann*
25 *v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1122 (9th Cir. 2014) (“PAGA has no notice requirements
26 for unnamed aggrieved employees, nor may such employees opt out of a PAGA action.”); *see also*
27 *O’Connor v. Uber Technologies, Inc.*, No. 13-CV-03826-EMC, 2016 WL 4398271, at *18 (N.D.
28 Cal. Aug. 18, 2016), (“PAGA does not require class action procedures, such as notice and opt-out

rights.”) *citing Sicanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 381 (2014) (emphasis added).

VII. CONCLUSION

Plaintiff respectfully submits that the proposed Settlement is fair, adequate, and reasonable. Therefore, Plaintiff respectfully requests (and Defendants join in the request) that the Court (1) grant approval of the PAGA Settlement; (2) appoint ILYM Group, Inc. as the Settlement Administrator, direct that the explanatory Notice be sent to aggrieved employees in the manner set forth in the Settlement Agreement; (3) award PAGA Counsel their fees’ and litigation costs; and (4) award Plaintiff Ahlborn a service award of \$7,500.00.

DATED: December 27, 2022

WINSTON LAW GROUP, P.C.

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aggrieved employees