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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

GAETANO BALISTRERI, individually, and
on behalf of aggrieved employees pursuant to
the Private Attorneys General Act ("PAGA"),

Plaintiff,

v.

STERLING BANK AND TRUST, FSB;
STERLING BANCORP, INC.; and DOES 1
through 100, inclusive,

Defendants.

Case No. CGC-21-596359

Assigned to: Hon. Richard B. Ulmer
Dept. 302

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
APPROVAL OF PAGA SETTLEMENT
AND ENTRY OF JUDGMENT**

Hearing Date: July 22, 2024
Time: 9:30 a.m.
Judge: Hon. Richard B. Ulmer
Location: Dept. 302

Complaint Filed: November 1, 2021
Trial Date: None Set

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1 **I. INTRODUCTION**

2 *Balistreri* hereby submits this Motion for Approval of the representative PAGA claims
3 pending before this Court. This is a PAGA settlement only and does not release any class claims.
4 The *Balistreri* settlement resolves approximately **5732** pay periods worked by **195** aggrieved
5 employees. The Parties have agreed to a Gross Settlement Fund of \$235,000.00. After deduction
6 for fees and costs, costs of administration, and plaintiff’s enhancement, the Net Settlement
7 Amount is \$145,100.00 with approximately \$108,825.00 allocated to the LWDA and \$36,275.00
8 to the PAGA Settlement Aggrieved Employees.

9 Having resolved Plaintiff’s individual claims sent to arbitration, Plaintiff and Defendants
10 have returned to Court with a negotiated resolution of the representative PAGA claims pending
11 before this Court. Plaintiff hereby submits this motion for approval of the representative PAGA
12 claims pending before this Court.

13 **II. LITIGATION OVERVIEW**

14 Plaintiff was terminated by Defendants in December of 2020. On or about July 26, 2021,
15 Plaintiff filed a Charge of Discrimination in the California Department of Fair Employment and
16 Housing (the “DFEH”) and the U.S. Equal Employment Opportunity Commission (the “EEOC”),
17 Charge No. 846-2021-22707C (the “Charge”), alleging that his termination was racially
18 motivated and thus he alleged suffered discrimination at the hands of Defendants (Sterling Bank
19 & Trust and Sterling Bancorp, Inc. (hereinafter “Sterling”)).

20 On October 13, 2021, Plaintiff filed a Demand for Arbitration alleging various wage and
21 hour violations (i.e., violation of California Labor Code §§ 510, 558, 1194, 1198, 2802 and IWC
22 Wage Order 7-2001, as well as wrongful termination, slander, and defamation stemming from
23 his employment with Sterling.¹

24 When Mr. Balistreri was hired by Defendants (Sterling Bank & Trust and Sterling
25 Bancorp, Inc. (hereinafter “Sterling”)), he entered into an arbitration agreement. At the time the
26

27 ¹ At the time Plaintiff filed his Demand for Arbitration, Plaintiff’s Charge of Discrimination was under
28 investigation before the EEOC. The EEOC would not handle the wage and hour violations.

1 arbitration was filed, the landscape of California law was such that PAGA claims could not be
2 waived through arbitration agreements nor compelled to arbitration. Declaration of J. Glugoski
3 ¶ 7.

4 Thus, on November 1, 2021, Plaintiff Balistreri filed a PAGA action in the County of San
5 Francisco Superior Court based on violations of the California Labor Code at issue in the
6 arbitration.

7 In early 2022, the SCOTUS granted review on the issue of whether PAGA claims were
8 subject to arbitration agreements. Soon thereafter, the SCOTUS ruled in *Viking v. Moriana*, that
9 an individual's PAGA claim can be severed from the representative claims and compelled to
10 arbitration. Sterling moved to stay this action pending the outcome of the arbitration on the
11 grounds that should Plaintiff lose on the merits in arbitration, he would lose standing to pursue
12 PAGA penalties in this case. This Court granted Sterling's Motion and Plaintiff's individual
13 PAGA claim was added to his existing arbitration with JAMS.

14 During the arbitration, the parties engaged in extensive discovery, motion practice, and
15 were set to try Plaintiff's individual damages and PAGA claims in February 2024 before the Hon.
16 Ken Kawaichi, ret. Given the hotly contested issues in the case and with the arbitration drawing
17 near, in October 2023, the parties discussed engaging in settlement negotiations aimed at a
18 resolution of Plaintiff's individual claims. The arbitration was continued to allow the parties to
19 explore settlement and the parties successfully reached settlement of the individual claims,
20 including the claims raised with the DFEH and EEOC.

21 Having resolved Plaintiff's individual claims in arbitration as well as the EEOC charge,
22 ² Plaintiff and Sterling, having conducted extensive discovery on the merits of the policies
23 practices and procedures applicable to the PAGA claims, negotiated resolution of the
24

25 ² On May 27, 2024, the Parties entered into an Individual Settlement Agreement to fully settle and release
26 Plaintiff's claims in arbitration consisting of: (1) wrongful termination, (2) discrimination, (3) slander, (4)
27 defamation, (5) failing to pay all meal period wages and rest break wages, (6) failing to properly calculate and pay
28 all minimum and overtime wages, (7) failing to provide accurate wage statements, (8) failing to pay all wages due
and owing upon termination of employment, and (9) failing to reimburse all necessary business expenses including
attorney fees costs and interest against Defendants pertaining to arbitration. Declaration of J. Glugoski ¶ 12.

1 representative PAGA claims pending before this Court.

2 The underlying facts giving rise to the PAGA claims have been litigated for more than 2
3 years and the parties agree that this resolution is fair, reasonable, and in the best interest of all
4 parties. The parties reached an agreement to settle the representative PAGA claims in their
5 entirety for \$235,000.00.³ Marked and attached as Ex. 1 to the Declaration of J. Glugoski is a
6 true and correct copy of the PAGA Settlement and Release Agreement. Declaration of J.
7 Glugoski ¶ 14.

8 The Private Attorneys General Act of 2004 (“PAGA”) provides:

9 The superior court shall review and approve any settlement of any civil action
10 filed pursuant to this part. The proposed settlement shall be submitted to the
11 agency at the same time that it is submitted to the court.

12 (3) A copy of the superior court’s judgment in any civil action filed pursuant to
13 this part and any other order in that action that either provides for or denies an
14 award of civil penalties under this code shall be submitted to the agency within
15 10 days after entry of the judgment or order.

16 (Cal. Labor Code §2699(l).)

17 This case alleged PAGA claims based on a variety of alleged Labor Code violations and
18 was filed on behalf of non-exempt employees (hereinafter referred to as “PAGA Settlement
19 Aggrieved Employees”) dating back to August 26, 2020.⁴ Plaintiff has represented himself
20 individually and faithfully served as the representative for the State of California to collect civil
21 penalties from for the alleged California Labor Code violations. At the time of settlement, the
22 central issue involved whether Sterling acted intentionally and with deliberate indifference and
23 conscious disregard to the rights of all employees in: (1) failing to pay all meal period wages and
24 rest break wages, (2) failing to properly calculate and pay all minimum and overtime wages, (3)

25 ³ This is only a settlement of the PAGA claims for civil penalties. It is not a class settlement and does not
26 release the individual claims, if any, of the affected employees. (Cal. Labor Code §2699(g)(1); *Iskanian v. CLS*
27 *Transportation*, (2014) 59 Cal. 4th 348, 381.)

28 ⁴ Plaintiff sought penalties for violations of the California Labor Code provisions alleged herein, including
Cal. Labor Code §§ 200, 201, 202, 203, 204, 226, 226.7, 500-508, 510, 515, 558, 1194, 2802, 2810.5, 1197, and
1198.

1 failing to provide accurate wage statements, (4) failing to pay all wages due and owing upon
2 termination of employment, and (5) failing to reimburse all necessary business expenses. This
3 motion seeks approval of a non-reversionary settlement that consists of \$235,000.00. Declaration
4 of J. Glugoski ¶ 13.

5 Sterling has steadfastly denied that it violated the Labor Code as to Plaintiff and the
6 alleged Aggrieved Employees. The settlement reached by the parties is intended to resolve the
7 PAGA claims on behalf of Plaintiff, the State of California, and all PAGA Settlement Aggrieved
8 Employees employed from August 26, 2020 through May 15, 2024.

9 The PAGA settlement is set forth in the accompanying Settlement Agreement. See Ex. 1,
10 attached to the Declaration of J. Glugoski, filed herewith. The LWDA received notice of this
11 settlement and this motion as set forth in the Declaration of Glugoski, para. 11.

12 A proposed order confirming review and approval of the PAGA settlement has been
13 lodged with the Court.

14 **III. THE GOALS OF PAGA AND ITS REQUIREMENTS**

15 In 2003, the Legislature, recognizing the historic underfunding of the LWDA and the
16 California Division of Labor Standards & Enforcement (the “DLSE”), passed the PAGA in an
17 effort to both spur more consistent compliance with California’s labor laws and discourage
18 employers from engaging in unlawful and anti-competitive business practices. (See Cal. Labor
19 Code § 2698, note §1.) The parties’ settlement agreement achieves the PAGA’s goals.

20 While procedurally a PAGA claim may be filed as a class action, a PAGA claim is really
21 an enforcement action pursued on behalf of the California Labor and Workforce Development
22 Agency—the real party in interest. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) The
23 PAGA Settlement Aggrieved Employees have *no* substantive claims under the PAGA.
24 (*Amalgamated Transit Union, Local 1756 v. Superior Court* (2009) 46 Cal.4th 993, 1003.)

25 The differences between a traditional class action and a PAGA representative action are
26 well settled. Following the California Supreme Court’s decision in *Iskanian v. CLS*
27 *Transportation* (2014) 59 Cal.4th 348, the Ninth Circuit in *Sakkab* explained:

1 The class action is a procedural device for resolving the claims of absent parties
2 on a representative basis. See Fed.R.Civ.P. 23; *Ortiz v. Fibreboard Corp.*, 527
3 U.S. 815, 832- 33 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-17
4 (1997). By contrast, a PAGA action is a statutory action in which the penalties
5 available are measured by the number of Labor Code violations committed by the
6 employer. An employee bringing a PAGA action does so “as the proxy or agent
7 of the state’s labor law enforcement agencies,” *Iskanian*, 59 Cal.4th at 380
8 (quoting *Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009)), who are the real
9 parties in interest, *see id.* at 382. As the state’s proxy, an employee-plaintiff may
10 obtain civil penalties for violations committed against absent employees, Cal.
11 Lab.Code § 2699(g)(l), just as the state could if it brought an enforcement action
12 directly. However, by obtaining such penalties, the employee-plaintiff does not
13 vindicate absent employees’ claims, for the PAGA does not give absent
14 employees any substantive right to bring their “own” PAGA claims. *See*
15 *Amalgamated Transit Union. Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th
16 993, 1003 (2009); *see also Iskanian*, 59 Cal.4th at 381 (explaining that “[t]he civil
17 penalties recovered on behalf of the state under the PAGA are distinct from the
18 statutory damages to which employees may be entitled in their individual
19 capacities”).

20 *Sakkab v. Luxottica Retail N. Am., Inc.* (9th Cir. 2015) 803 F.3d 425, 435–436 *en banc review*
21 *denied.*

22 The approval process in a PAGA case differs from a traditional class action as PAGA
23 aggrieved employees do not hold substantive rights. (*See Turrieta v. Lyft, Inc.* (2021) 69
24 Cal.App.5th 955, 972–974 (stating that aggrieved employees’ ability to file PAGA claims on
25 behalf of the state does not convert the state’s interest into their own or render them real parties
26 in interest and that PAGA settlements bind the government and do not injure the personal
27 interests of aggrieved employees)). While the PAGA Settlement Aggrieved Employees are to
28 receive 25% of the penalties the State collects (*see* Cal. Labor Code § 2699(i)), they lack a
substantive right to these penalties. Rather, the State authorizes the penalties to incentivize
bringing a suit on its behalf:

The nature of PAGA penalties is also markedly different than damages sought in
Rule 23 class actions. In class actions, damages are typically restitution for
wrongs done to class members. But PAGA actions instead primarily seek to
vindicate the public interest in enforcement of California’s labor law. *See Sample*
v. Big Lots Stores, Inc., No. C 10-03276 SBA, 2010 WL 4939992 at *3 (N.D. Cal.
Nov. 30, 2010); *Franco v. Athens Disposal Co.*, 171 Cal.App.4th 1277 (2009). The
bulk of any recovery goes to the LWDA, not to PAGA Settlement Aggrieved
Employees. And, the twenty-five percent portion of the penalty awarded to the
aggrieved employee does not reduce any other claim that the employee may have

1 against the employer – in this case, for example, for withheld overtime pay. *See*
2 *Caliber Bodyworks, Inc. v. Super. Ct.*, 134 Cal.App.4th 365 (2005). The
3 employee’s recovery is thus an incentive to perform a service to the state, not
4 restitution for wrongs done to members of the class.

5 In the end, Rule 23 and PAGA are more dissimilar than alike. A PAGA action is
6 at heart a civil enforcement action filed on behalf of and for the benefit of the
7 state, not a claim for class relief.

8 *Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1123–1124. *Iskanian* makes
9 clear the 25% share of penalties does not make the employees real parties in interest:

10 A PAGA representative action is therefore a type of *qui tam* action.
11 “Traditionally, the requirements for enforcement by a citizen in a *qui tam* action
12 have been (1) that the statute exacts a penalty; (2) that part of the penalty be paid
13 to the informer; and (3) that, in some way, the informer be authorized to bring suit
14 to recover the penalty.” (*Sanders v. Pacific Gas & Elec. CO.* (1975) 53
15 Cal.App.3d 661, 671 (*Sanders*). The PAGA conforms to these traditional criteria,
16 except that a portion of the penalty goes not only to the citizen bringing the suit
17 but to all employees affected by the Labor Code violation. The government entity
18 on whose behalf the plaintiff files suit is always the real party in interest in the
19 suit. (See *In re Marriage of Biddle* (1997) 52 Cal.App.4th 396, 399.)

20 *Iskanian*, 59 Cal.4th at 382; *Turrieta*, Cal.App.5th at 973–974.

21 PAGA provides that PAGA Settlement Aggrieved Employees may bring actions to
22 recover civil penalties. (See Cal. Labor Code § 2699(a), (g).) Those civil penalties are a maximum
23 of \$100 per employee per pay period escalating to \$200 per employee per pay period under
24 certain circumstances and subject to reduction based on statutory factors; see *Bernstein v. Virgin*
25 *Am., Inc.* (9th Cir. 2021) 3 F.4th 1127 at *1144:

26 Until the employer has been notified that it is violating a Labor Code provision
27 (whether or not the [Labor] Commissioner or court chooses to impose penalties),
28 the employer cannot be presumed to be aware that its continuing underpayment
of employees is a ‘violation’ subject to penalties.

Virgin was not notified by the Labor Commissioner or any court that
it was subject to the California Labor Code until the district court partially granted
Plaintiffs’ motion for summary judgment. On this basis, we reverse the district
court’s holding that Virgin is subject to heightened penalties for any labor code
violation that occurred prior to that point.

(*Bernstein v. Virgin America, Inc.* (C.A. 9th 2021) 3 F.4th 1127, 1144; see *Gunther v. Alaska*
Airlines, Inc. (2021) 72 Cal.App.5th 334, 355–356.) Courts retain discretion to reduce the PAGA
penalty below the maximum based on a variety of factors. (Cal. Labor Code § 2699(e).) Of any

civil penalties collected, 75% belongs to the LWDA and 25% belongs to the PAGA Settlement Aggrieved Employees. (Cal. Labor Code § 2699(i).)

The appropriate focus of the Court’s review here should be on whether or not the real party in interest, i.e., the LWDA, objects to this proposed settlement and whether the proposed settlement enhances the State’s enforcement of the State’s labor regulations. *See Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 64.

It is submitted that this settlement warrants approval by the Court. The settlement amount of \$235,000.00 is outstanding.

With respect to the amounts to be paid to the Aggrieved Employees from these settlement funds, the payment of \$235,000.00 for approximately 5,732 equates to an approximate \$40.99 per pay period, and an average net settlement of \$186.00 for each of the approximate 195 PAGA Settlement Aggrieved Employees identified by Defendants’ counsel.

After payment of administration costs, attorney’s fees and costs, and plaintiff’s enhancement, the proposed settlement provides a Net Settlement Amount of \$145,100.00 with approximately \$108,825.00 allocated to the LWDA and \$36,275.00 to the PAGA Settlement Aggrieved Employees. Based on this Settlement, the PAGA Settlement Aggrieved Employees will receive an average payment of \$186.00 to be mailed to each of the, PAGA Settlement Aggrieved Employees. (Declaration of J. Glugoski (“Glugoski Decl.”) ¶15.)

IV. BECAUSE THE EMPLOYEES HAVE NO SUBSTANTIVE CLAIMS TRADITIONAL NOTICE IS NOT REQUIRED

In a PAGA action, the real party in interest is the LWDA and the employees are nominal parties. (*See Urbino v. Orkin Servs. of Cal.* (9th Cir. 2013) 726 F.3d 1118, 1122–1123.) The LWDA, as the real party in interest has, of course, received formal notice of the terms of the settlement as required under California Labor Code section 2698(l). In contrast, the employees do not receive the traditional class notice because none is required:

Because a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees’ due process rights in PAGA arbitrations. *Compare Concepcion*, 131 S.Ct. at 1751-52 (observing “it is...odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights

are satisfied”), with *Arias*, 46 Cal.4th at 984-87, 95 Cal.Rptr.3d 588, 209 P.3d 023. PAGA arbitrations therefore do not require the formal procedures of class arbitrations. See *Baumann*, 747 F.3d at 1123.

Unlike Rule 23(c)(2), PAGA has no notice requirements for unnamed PAGA Settlement Aggrieved Employees, nor may such employees opt out of a PAGA action. In a PAGA action, the court does not inquire into the named plaintiff’s and class counsel’s ability to fairly and adequately represent unnamed employees – critical requirements in federal class actions under Rules 23(a)(4) and (g)...Moreover, unlike Rule 23(a), PAGA contains no requirements of numerosity, commonality, or typicality *Id.* at 1122-23 (citations omitted).

(*Sakkab*, 803 F.3d at 436.)

V. RELEVANT ISSUES AND PROCEDURAL HISTORY

On April 3, 2017, Defendants hired Plaintiff and terminated him on or about December 20, 2020. Declaration of J. Glugoski ¶ 7.

On or about July 26, 2021, Balistreri filed a Charge of Discrimination against Sterling Bank and Trust, FSB with the California Department of Fair Employment and Housing (the “DFEH”) and the U.S. Equal Employment Opportunity Commission (the “EEOC”), Charge No. 846-2021-22707 (the “Charge”). Plaintiff alleged that he suffered discrimination and was wrongfully terminated based on his race and ethnicity.⁵ Declaration of J. Glugoski ¶ 8

On August 26, 2021, Plaintiff provided notice of Plaintiff’s allegations to the Labor and Workforce Development Agency (the “LWDA”). Plaintiff provided notice to Sterling as well. The LWDA did not respond to these notices, thus allowing Plaintiff to initiate the PAGA lawsuit under California Labor Code section 2699.3(a)(2)(A). Declaration of J. Glugoski ¶ 11.

On or about October 13, 2021, Balistreri filed an arbitration before JAMS, styled *Gaetano Balistreri, Claimant v. Sterling Bank and Trust, FSB; Sterling Bancorp, Inc.; and Andrew White, Respondents*, JAMS Ref. No. 1100112694 (the “Arbitration”) based on alleged violations of California’s wage and hour laws including: (1) failing to pay all meal period wages and rest break wages, (2) failing to properly calculate and pay all minimum and overtime wages, (3) failing to

⁵ In December of 2022, Plaintiff amended his Demand for Arbitration to add the claims pending before the EEOC after receiving a Right to Sue Letter. The claims included wrongful termination, discrimination, retaliation, defamation, and slander.

1 provide accurate wage statements, (4) failing to pay all wages due and owing upon termination
2 of employment, and (5) failing to reimburse all necessary business expenses. Declaration of J.
3 Glugoski ¶ 9.

4 On or about November 1, 2021, Balistreri filed a civil action in the Superior Court of the
5 State of California, San Francisco County, against Sterling styled *Gaetano Balistreri, Plaintiff,*
6 *v. Sterling Bank & Trust, FSB; Sterling Bancorp, Inc.; and DOES 1-100, inclusive, Defendants,*
7 Case No. CGC-21-596359 (the “Superior Court Action”) seeking PAGA penalties based on
8 alleged California wage and hour violations alleged in the arbitration. Declaration of J. Glugoski
9 ¶ 10.

10 The parties engaged in hard-fought litigation over the underlying labor code violations
11 and Plaintiff intended to take his claims to arbitration and then return to Court to pursue the
12 representative PAGA claims of the aggrieved employees he contends are similarly situated based
13 on the outcome in arbitration challenging the legality of Sterling’s uniform policies and
14 procedures. Plaintiff was attempting to prepare a trial plan that would meet the Court’s standards
15 for a representative PAGA trial as to both liability and penalties following the arbitration.
16 Declaration of J. Glugoski ¶ 16.

17 In terms of an award of penalties under California Labor Code Section 2699(e)(1) & (2),
18 Defendants were prepared to argue—and the Court could very well agree—that a lesser penalty
19 was more appropriate than the statutory maximum penalty. (Glugoski Decl. ¶16.)

20 After conducting significant discovery about the policies and procedures that would be
21 the back bone of the PAGA action, Plaintiff concluded that a settlement of the action was in the
22 best interest of all. Declaration of J. Glugoski ¶ 17.

23 The facts and the continuing risk and expense of further litigation, appeals, and a delayed
24 trial led the parties to pursue settlement negotiations. In preparation for settlement discussions,
25 Sterling provided the number of pay periods (5,732) and the number of employees (195). With
26 the extensive discovery conducted as to the policies and procedures (i.e., production of policies,
27 manuals, employee handbooks, training material), the time keeping policies, and the information
28

1 above, Plaintiff was able to evaluate the claims at issue in this case as discussed in more detail
2 below. Declaration of J. Glugoski ¶ 18.

3 Plaintiff was also provided with policy and procedure documents, employment files, the
4 total number of PAGA Settlement Aggrieved Employees, and total number of pay periods
5 between August 26, 2020 and May 15, 2024. Using this information, Plaintiff was able to
6 calculate Defendants' total penalty exposure for the one-year statutory PAGA period. (Glugoski
7 Decl. ¶19.)

8 **VI. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES**

9 **A. Summary of Settlement Terms (Glugoski Decl. ¶ 20)**

10 The proposed Settlement Agreement (Glugoski Decl., Exhibit 1) involves the formation
11 of a non-reversionary fund consisting of \$235,000.00 ("Gross Settlement Fund"). The Gross
12 Settlement Fund will be used to make payments to the LWDA and PAGA Settlement Aggrieved
13 Employees after costs of administration. Plaintiff requests settlement administration costs to
14 ILYM Group Inc. in the amount of \$5,000.00 to be paid from the Gross Settlement Amount. The
15 Net Settlement Fund of \$145,100.00 will be distributed as follows: Seventy-five percent (75%),
16 i.e., \$108,825.00 will be distributed to the California Labor & Workforce Development Agency
17 ("LWDA") as required by the PAGA and the remaining twenty-five percent (25%), i.e.,
18 approximately \$36,275.00 will be distributed to all PAGA Settlement Aggrieved Employees on
19 a pro-rata share basis based on the number of pay periods worked by each Settlement Aggrieved
20 Employee. (Glugoski Decl. ¶ 20.)

21 **B. The Notice (Glugoski Decl. ¶21)**

22 Defendants agreed to fund the Settlement Amount within 30 days of the Court's Order
23 approving the Settlement ("Effective Date"). (Settlement Agreement ¶16). Within 30 calendar
24 days of the funding of the QSA, the Settlement Administrator shall issue the following payments
25 from the QSA: (a) the Individual Settlement Payments to Aggrieved Employees (including
26 Plaintiff); (b) the LWDA PAGA Payment (as defined below) to the LWDA; (c) Attorney's Fees
27 and Costs to Plaintiff's Counsel; (d) the Service Award to Plaintiff; and (e) the Administration
28

1 Fees to itself. The Settlement Administrator, and not Defendants, will issue appropriate tax forms
2 for all payments issued under this Settlement, if and as required by law as determined by the
3 Settlement Administrator. Because the payments made under this Agreement will be made with
4 respect to only the PAGA claims for all Aggrieved Employees, this Agreement is not subject to
5 the rules governing the settlement of class or collective actions. Accordingly, the settlement
6 payments shall be distributed without a claims process or an opportunity to object or opt out. (Ex.
7 1, Settlement Agreement ¶17).

8 Any checks returned as non-deliverable on or before the check cashing deadline will be
9 sent promptly via regular First-Class U.S. Mail to the forwarding address affixed thereto. If no
10 forwarding address is provided, the Settlement Administrator will promptly attempt to determine
11 the correct address using a skip-trace, or other search using the name, address, or Social Security
12 number of the Aggrieved Employee, and will then perform a single re-mailing. Funds contained
13 in the settlement checks that are returned as undeliverable and in settlement checks uncashed for
14 more than 180 days after issuance will be tendered to the California State Controller's Office -
15 Unclaimed Property Fund, to be held in the name of the Aggrieved Employee. All settlement
16 payments to Aggrieved Employees will be treated as miscellaneous income for which a 1099
17 will be issued to the extent required by law.

18 Marked and attached hereto as Exhibit 2 is a true and correct copy of the PAGA NOTICE
19 to be sent to the aggrieved employees.

20 **C. Settlement Allocation to the PAGA Settlement Aggrieved Employees**
21 **Glugoski Decl. ¶ 22)**

22 As noted, twenty-five percent (25%) of the PAGA penalties will be allocated to the
23 PAGA Settlement Aggrieved Employees. Based on the numbers Defendants provided,
24 approximately 195 former employees will share in this fund in proportion of the pay periods each
25 member worked. The portion to each of the PAGA Settlement Aggrieved Employees will be
26 treated as non-wages since these are civil penalties and reported by the Settlement Administrator
27 by law PAGA Settlement Aggrieved Employees will receive, on average, \$186.00. (Glugoski
28 Decl. ¶ 22).

1 **D. The Release (Glugoski Decl. ¶ 23)**

2 The California Supreme Court has explained that a judgment in “a representative action
3 brought by an aggrieved employee under the Labor Code Private Attorneys General Act of
4 2004...is binding not only on the named employee plaintiff but also on government agencies and
5 any aggrieved employee not a party to the proceeding.” (*Arias*, 46 Cal. 4th at 985–986.)

6 The release in the Settlement Agreement narrowly binds the PAGA Settlement Aggrieved
7 Employees for civil penalty claims brought in the Action (Settlement Agreement ¶ 22), as
8 follows:

9 all any and all claims for PAGA civil penalties under the California Labor
10 Code, Wage Orders, regulations, and/or other provisions of law alleged or
11 that could have been alleged to have been violated in the Action with
12 respect to Aggrieved Employees based on the facts alleged in the
13 Complaint or Plaintiff’s letter(s) to the California Labor & Workforce
Development Agency during the Settlement Period. Aggrieved
Employees will not be deemed to have released any non-PAGA individual
claims by virtue of this Agreement.(Settlement Agreement para. 22.)

14 Decl. of J. Glugoski ¶ 23.

15 **VII. THE SETTLEMENT IS FAIR AND REASONABLE AND WARRANTS COURT**
16 **APPROVAL**

17 In 2016, the PAGA was amended to require the Court to “review and approve any
18 settlement of any civil action filed pursuant to this part.” (Cal. Labor Code § 2699(1)(2).) The
19 amendment also required that the “proposed settlement shall be submitted to the agency at the
20 same time that it is submitted to the court.” As such, the Settlement and this Motion have been
21 concurrently submitted to the LWDA in accordance with this section. (Glugoski Decl. ¶12, Ex.
22 3).

23 **A. Evaluation of the PAGA Settlement**

24 Although PAGA and the legislative history do not require a Court to analyze a PAGA
25 settlement in comparison to the “value” of the claims, the Court should pay particular attention
26 to the views, if any are presented, of the LWDA. Plaintiff does not expect the LWDA to object
27 to this proposed settlement because the penalties obtained here are reasonable and should be
28

viewed as a successful resolution in favor of the PAGA Settlement Aggrieved Employees and the State of California.

As well, a representative settlement is presumed fair where: (1) the settlement is reached through arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) (and) counsel is experienced in similar litigation. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802; see *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77 (stating factors used in determining the fairness of class action settlements are useful in evaluating a PAGA settlement).)

A court may also consider relevant factors such as the strength of the plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, [and] the presence of a governmental participant. (*Officers of Justice v. Civil Service Com'n of City and County of San Francisco* (9th Cir. 1981) 688 F.2d 615, 625.) "This list is not exhaustive and should be tailored to each case. Due regard should be given to what is otherwise a private consensual agreement between the parties." (*Dunk*, 48 Cal.App.4th at 1801.) Moreover, the trial court has broad powers to determine whether a proposed [representative action] settlement is fair. (*Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 438.)

In this case, Plaintiff's theory centered around Sterling's policy and practice of not paying all wages owed, not providing meal and rest breaks, and not reimbursing for all home office business-related expenses during the COVID period, as required by California law. (Glugoski Decl. ¶ 24).

With respect to the off-the-clock claim, Plaintiff's investigation uncovered a policy wherein employees turned in time records that had the same entries for: a) start of the day, b) commencement of lunch, c) return from lunch, and d) end of the day for each and every work day. Further, the time records were filled out for days that had not yet been worked (i.e., turning in time card for Thursday and Friday on the Wednesday). Plaintiff contends the time records are

1 not accurate; however, Sterling took the position that the employees signed off on the time sheets
2 and knew time must be recorded accurately. On the other hand, employees are not robots and the
3 likelihood that everyone started exactly at 8:30 a.m. - - as opposed to 8:31 or 8:37 a.m., and left
4 every day at 5:30 p.m. with exactly one hour for lunch to arrive at 8 hours worked per day is not
5 credible. Sterling would counter with employees verified the accuracy of the time record by
6 signing at the bottom. Plaintiff believed representative evidence could be used to establish
7 liability. Sterling contended it would require an examination of each employee. Declaration of J.
8 Glugoski ¶ 25.

9 With respect to meal and rest periods, Plaintiff alleged that the aggrieved employees did
10 not receive meal and rest breaks and that the entries in the time records could easily be debunked
11 by phone records, computer log in and log outs, and e-mails would show that the employees did
12 not receive meal periods and/or rest breaks as indicated on time sheets. Sterling contended that
13 the employees got their meal and rest breaks and attested to them in their time sheets.
14 Unfortunately, for Plaintiff, phone logs and computer log in and log outs were not maintained.
15 Plaintiff attempted to track down the information directly from the phone providers and service
16 providers to no avail. Thus, Plaintiff would have to rely on anecdotal evidence. Declaration of J.
17 Glugoski ¶ 26.

18 With respect to business expenses, the employees were sent to work from home during
19 the COVID period. Plaintiff contends that the employees should have been reimbursed for
20 expenses associated with the use of home internet, utilities, and personal cell phones. Plaintiff
21 contends that at least some – if not all – employees were sent to work from home during COVID.
22 Sterling took the position that the employees voluntarily worked from home because banks were
23 essential businesses that remained open. Further, some employees did in fact work in the branch
24 during COVID. Declaration of J. Glugoski ¶ 27.

25 Plaintiff contends that the trial plan being developed would meet the Court’s standards
26 for a representative PAGA trial as to both liability and penalties; however, given the challenges
27 in proving a representative action as identified above, Plaintiff concluded that a settlement of the
28

1 action was in the best interest of all. Declaration of J. Glugoski ¶ 28.

2 Sterling maintains data for all 195 PAGA Settlement Aggrieved Employees. The data
3 produced by Defendants confirm 5,732 pay periods (Glugoski Decl. ¶24).

4 Therefore, based on this analysis, Plaintiff believes the realistic total exposure of the
5 claims is \$573,200.00 based on 5,732 pay periods (x \$100 per violation). (Glugoski Decl. ¶24.)

6 Under the PAGA, Courts have considerable discretion to reduce the penalty award below
7 the maximum. In *Fleming v. Covidien* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 154590, a federal
8 court reduced PAGA penalties by 82.2%, because the court found maximum penalties “unjust.”
9 Some trial courts have awarded no civil penalties, even when Labor Code violations were
10 established. Examples of such reductions include but are not limited to the following:

11 • *Makabi v. Gedalia* (2nd Dist. Ct. of App. Mar. 6, 2016) 2016 Cal.App.Unpub.
12 1489, *5–7 (no PAGA penalties were awarded by the Los Angeles County Superior Court)
13 (unpublished decision).

14 • *In re Taco Bell Wage & Hour Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43
15 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).

16 • *Franco v. Ruiz Food Products, Inc.*, 2012 WL 5941801 (E.D. Cal. 2012), where
17 the court approved a total PAGA penalty amount of \$10,000, for as many as 2,055 current and
18 former employees.

19 • *Schiller v. David’s Bridal, Inc.*, 2012 WL 217001 (E.D. Cal. 2012), the court
20 approved a PAGA penalty amount of \$10,000 for 3,326 individuals.

21 • *Enombang v. Target*, Case No. RG17853948, on July 24, 2018 for a total amount
22 of \$9,000,000. The dispute involved 90,462 allegedly aggrieved employees and 1,939,006 pay
23 periods in Alameda Superior Court. [\$4.66 per pay period].

24 • *Pickett v. 99 Cents Only Stores*, Case No. BC473038, on August 1, 2017, for a
25 total amount of \$1,290,000. The dispute involved approximately 10,000 allegedly aggrieved
26 employees and approximately 1,592,592.6 pay periods in Los Angeles Superior Court. [\$.81 per
27 pay period.]

1 • *Carrington v. Starbucks Corp.*, (2018) 30 Cal.App.5th 504, the Court of Appeal
2 affirmed a judgment after trial which provided for a PAGA penalty of \$5 per pay period. In *Doe*
3 *v. Google, et al.*, Case No. CGC-16-556034, the court approved \$15 per aggrieved employee.

4 This result is positive and favorable to the State, which will receive \$108,825.00. The
5 PAGA Settlement Aggrieved Employees will receive \$36,275.00, which amounts on average to
6 \$186.00 per aggrieved employee. (Declaration of Glugoski ¶ 29).

7 **VIII. THE ATTORNEY’S FEES AND COSTS SHOULD BE AWARDED**

8 Notice to the LWDA has been provided as required by statute. We expect the LWDA
9 will have no objection to the fee and cost request in light of the factual and legal record
10 supporting the request.

11 PAGA carries with it a mandatory fee shifting statute under PAGA. Cal. Lab. Code
12 Section 2699(g). As noted, Plaintiff has provided notice to the LWDA regarding all aspects of
13 this settlement, including the amount of fees sought. Should the LWDA contact Plaintiff’s
14 counsel regarding any aspects of this settlement prior to the hearing date, we will promptly
15 notify the Court. Nevertheless, Plaintiff submits that the requested fees and costs sought are
16 reasonable. The parties conducted substantial discovery prior to agreeing to settle this case. The
17 tenacity of Arnold & Porter defense strategy – coupled with the complexity, risk, and demands
18 of this case -- required the expenditure of 137.7 attorney hours. Consistent with the scope of this
19 action, the nature of the relief obtained on behalf of the LWDA and Aggrieved Employees, and
20 the amount of time expended in prosecution of the case, Plaintiff and Counsel hereby move for
21 an award of attorney’s fees and costs of \$78,333.33.⁶ The requested fee is fair compensation for
22 undertaking complex, risky, expensive, and time-consuming litigation on a contingent fee basis,
23 especially in light of the benefits achieved. As outlined above and set forth in the accompanying
24 Declaration of John Glugoski, Counsel diligently litigated and investigated this case without
25 duplication of efforts. Declaration of Glugoski ¶ 47.

26
27 ⁶ Righetti Glugoski, P.C. has expended \$1,649.30 in litigation costs (Glugoski Declaration ¶ 49;
28 Exhibit 6).

1 More importantly, not only are the attorney's fees being sought here in line with the
2 market rates, but also approved by Courts in California:

- 3 • In *Enomvang v. Target*, Alameda County Superior Court Case No. RG17853948,
4 the court approved a settlement of \$9,000,000 for 1,939,006 pay periods, which
5 equates to \$4.66 per pay period and Plaintiff's counsel were awarded 40% of the
6 \$9,000,000 settlement in attorney's fees;
- 7 • In *Varela et. al., v. Dolgen California, LLC*, Riverside County Superior Court
8 Case No. RIC1306158, the court approved a fee award of \$3,980,000.00 which
9 equated to 40% of the Settlement Fund based on a lodestar of \$2,783,570.00 times
10 a multiplier of 1.43.

11 Declaration of Glugoski ¶ 48.

12 In *Varela*, the Court actually applied a 1.43 multiplier to Plaintiff Counsel's lodestar in
13 awarding the 40% fee request. Here, Plaintiffs Counsel's lodestar exceeds the fees being
14 requested and thus the practical effect would be an application of a negative multiplier to arrive
15 at the requested fee.

16 **a. Lodestar Calculation Approach**

17 The trial court has broad authority to calculate the lodestar. (*PLCM Group, Inc. v.*
18 *Drexler* (2000) 22 Cal.4th 1084, 1094-1095 [[T]he fee setting inquiry in California ordinarily
19 begins with the "lodestar," i.e., the number of hours reasonably expended multiplied by the
20 reasonable hourly rate)]. "California courts have consistently held that a computation of time
21 spent on a case and the reasonable value of that time is fundamental to a determination of an
22 appropriate attorneys' fee award." The reasonable hourly rate is that prevailing in the
23 community for similar work. The lodestar figure may then be adjusted, based on consideration
24 of factors specific to the case, in order to fix the fee at the fair market value for the legal services
25 provided. (*Id.* at 1095).

26 **b. Reasonable Hourly Rate**

27 In calculating the lodestar, a billing rate of the attorneys are as follows:
28

1 • Attorney John Glugoski of Righetti Glugoski (26 years in practice): \$850.00;
2 See Glugoski Declaration ¶¶1-6,). This is equivalent to his current billing rates on a non-
3 contingency fee basis. (Glugoski Declaration ¶¶ 31-35). This amount is supported by market
4 rates of attorneys with similar experience and are consistent with their hourly rates that have
5 been approved by other courts, as set forth in the accompanying declarations. (Glugoski
6 Declaration ¶¶36-43).

7 **c. Number of Hours Expended**

8 In determining the number of hours expended by counsel, compensable hours include
9 services provided including services prior to the filing of the complaint that were reasonably
10 required. (*Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 655). Moreover, detailed time records
11 are not required. “Testimony of an attorney as to the number of hours worked on a particular
12 case is sufficient evidence to support an award of attorney fees (*Martino v. Denevi* (1986) 182
13 Cal.App.3d 553, 559; *see also, Wershba., supra*, 91 Cal.App.4th at 255). Counsel has submitted
14 time summaries setting forth in detail the categories of work performed and the amount of time
15 spent on each of the various categories to support the number of hours expended. The categories
16 are:

- 17 (1) Investigations, Factual Research;
18 (2) Discovery;
19 (3) Pleadings, Briefs, and Pretrial Motions (includes legal research);
20 (4) Court Appearances;
21 (5) Mediation Settlement and Administration;
22 (6) Litigation Strategy, Analysis, and Case Management;
23 (7) Class Certification; and
24 (8) Trial Preparation and Trial.

25 The time summaries are attached to the corresponding attorney’s Declaration. (Glugoski
26 Declaration ¶ 46).
27
28

1 As of the filing of this motion, attorney John Glugoski of Righetti Glugoski, P.C., has
2 spent 137.7 hours in the prosecution of this lawsuit. Attorney Glugoski's lodestar at the time of
3 the filing of this motion is (Glugoski Declaration ¶ 46).

4 Counsel's efforts were required to achieve a successful outcome in the case. (Glugoski
5 Declaration ¶¶ 44-47). It is estimated that Counsel will expend (in total) an additional 15 hours
6 of time beyond their current lodestars preparing for, the approval hearing and overseeing the
7 completion of administration of this Settlement including monitoring the distribution of
8 proceeds, following up on missing payments, communicating with clients, the Settlement
9 Administrator and aggrieved employees, providing a final accounting for the Court, etc.

10 **d. Adjustments to Lodestar/Multiplier**

11 Not including anticipated future work through the completion of the case the lodestar is
12 \$117,045.00. Counsel's lodestar exceeds the fee award requested here by close to \$40,000.00.
13 No multiplier is being sought since the lodestar exceeds the fee request.

14 Generally, numerous courts have approved fee multipliers up to 4 times, but court's
15 commonly have adjusted multiplier's upward to 2.0 multiplier based on certain factors such as:
16 (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting
17 them, (3) the extent to which the nature of the litigation precluded other employment by the
18 attorneys, (4) the contingent nature of the fee award. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122,
19 1132). For example, 2.0 multipliers were awarded in *Graham v. DaimlerChrysler Corp.* (2004)
20 34 Cal.4th 553, 579 -2.25 multiplier and *Coalition for L.A. County Planning v. Board of*
21 *Supervisors* (1977) 76 Cal.App.3d 241, 251 -2.0 multiplier.

22 Although these factors, when applied to the facts of this case, weigh in favor of a positive
23 multiplier commensurate with other cases, Counsel's lodestar far exceeds the amount requested.
24 Thus, a fee award of \$78,333.33 is tantamount to Counsel's lodestar with a negative multiplier.

25 **IX. THE REPRESENTATIVE AWARD SHOULD BE GRANTED**

26 Plaintiff Balistreri submits that it is appropriate that he receive an enhancement of
27 \$5,000.00 for the significant effort and risks he undertook in prosecuting this case. Because the
28

1 purpose of the PAGA is to create incentives for private litigants to bring actions enforcing the
2 California Labor Code, rewarding prevailing litigants with a substantial recovery promotes
3 PAGA's purpose.

4 **X. SUBMISSION TO THE LWDA**

5 As set forth in the Glugoski Decl. at ¶ 11, the settlement and this motion are concurrently
6 being submitted to the LWDA in accordance with California Labor Code section 2699(1)(2). The
7 proof of electronic submission is attached as Exhibit "3" to the Glugoski Declaration.

8 **XI. THE SETTLEMENT ADMINISTRATOR**

9 ILYM will serve as the Settlement Administrator and will be responsible for processing
10 the settlement payments and providing notice to the PAGA Settlement Aggrieved Employees.
11 The Settlement Agreement authorizes the amount of \$5,000 in administration costs to be paid
12 from the Gross Settlement Amount to IYLM (Settlement Agreement ¶ 6). A copy of the resume
13 of IYLM is attached to the Declaration of J. Glugoski as Ex. 7.

14 **XII. CONCLUSION**

15 In light of the foregoing, Plaintiff respectfully requests that the Court approve the parties'
16 Settlement Agreement attached as Exhibit 1 to the Glugoski Declaration, including Plaintiff's
17 request for administrative expenses, so that ILYM Group Inc. may begin administering the
18 settlement in accordance with the terms of the Agreement.

19 Dated: June 26, 2024

Respectfully submitted,

20 **RIGHETTI GLUGOSKI, P.C.**

21
22 By: /s/ John Glugoski
23 John Glugoski, Esq.
24 Attorneys for Plaintiff
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27
28