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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF CONTRA COSTA

MONICA ARMSTRONG, an individual, on behalf of herself and others similarly situated,

PLAINTIFF,

v.

VISION OF SUCCESS, INC.; and DOES 1 thru 50, inclusive,

DEFENDANTS.

Case No. MSC21-01992

[Case Assigned for All Purposes to Hon. Danielle Douglas in Dept. D-18]

NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed concurrently with Declarations of Kelsey M. Szamet, Kane Moon; Lisa Mullins of ILYM Group, Inc., and Plaintiffs Monica Armstrong and Kendra L. McGhee in Support of Plaintiffs' Motion for Approval of Representative Action Settlement; [Proposed] Order, and Judgment]

Date: TBD
Time: TBD
Dept.: 18

Complaint Filed: September 13, 2021
Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on a date and time to be determined by the Court, in Department 18 of the above-entitled court, Plaintiffs MONICA ARMSTRONG and KENDRA L. MCGHEE will move the Court for an Order Granting Approval of Representative Action Settlement.

The Motion will be made on the grounds that the proposed Settlement is fair, adequate, reasonable, and in the best interest of Plaintiffs, all Aggrieved Employees, and the Parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Kelsey M. Szamet and Kane Moon, the PAGA Settlement Agreement (Exhibit "1" to the concurrently filed Szamet Declaration), all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: December 19, 2024

KINGSLEY SZAMET & LY

By: ______________________

Kelsey M. Szamet
Jessica Bulaon
Attorneys for Plaintiffs and all Aggrieved Employees

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Monica Armstrong and Kendra L. McGhee ("Plaintiffs") submit this Memorandum of Points and Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiffs and Defendant VISION OF SUCCESS, INC. ("Defendant") (collectively, the "Parties") have reached a proposed settlement documented in the PAGA Settlement Agreement ("Settlement" or "Agreement"), attached to the concurrently-filed declaration of Kelsey M. Szamet.

This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699, et seq. ("PAGA"). The Gross Settlement Amount is $140,000.00. After deduction of attorney's fees and litigation expenses, litigation enhancement to Plaintiffs, and settlement administration costs as discussed in the Agreement, the remaining amount to be divided between the Labor and Workforce Development Agency ("LWDA") and the Aggrieved Employees as required by Labor Code section 2699(i) is $46,333.33, with $34,750.00 (or 75%) going to the LWDA and $11,583.33 (or 25%) distributed to the Aggrieved Employees.[1]

Plaintiffs request that the Court "review and approve any settlement of any civil action filed pursuant to this part" (*See* Lab. Code § 2699(1)(2).) If the Court deems the Settlement fair and acceptable, Plaintiffs request that the Court: (1) enter an order approving the Settlement and ordering the Parties to carry the terms of the Agreement; and (2) and enter a Final Judgement thereon.[2]

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Litigation Overview and Procedural History

On September 13, 2021, Plaintiff Monica Armstrong commenced this Action by filing a Class Action Complaint against Defendant, alleging causes of action for: (1) failure to provide

[1] Pursuant to PAGA, civil penalties recovered by Aggrieved Employees shall be distributed 75 percent to the Labor and Workforce Development Agency ("LWDA") and 25 percent to the Aggrieved Employee(s). Lab. Code § 2699(i).

[2] Plaintiffs' Motion for Approval of Representative Action Settlement will be concurrently uploaded to the LWDA's website on the date this Motion is filed. Proof of submission of Plaintiffs' Motion for Approval of Representative Action Settlement, all related documents, and copy of the email from the LWDA confirming receipt can be provided to the Court upon request. (Szamet Decl. ¶5.)

meal breaks pursuant to Labor Code §§ 226.7 and 512; (2) failure to provide rest breaks pursuant Labor Code § 226.7; (3) Violation of Labor Code § 2802; (4) failure to provide accurate itemized wage statements pursuant to Labor Code § 226(a); (5) penalties pursuant to Labor Code § 203; and, (6) violation of Business & Professions Code § 17200, *et seq*. [Declaration of Kelsey M. Szamet ("Szamet Decl.") at ¶6).]

On November 29, 2021, Plaintiff Armstrong filed a First Amended Complaint alleging an additional cause of action against Defendant for penalties under Labor Code § 2699, *et seq.*, the Private Attorneys General Act ("PAGA") for the aforementioned allegations set forth in the Complaint, in addition to a seating violation as the basis for the PAGA claim. (Szamet Decl. ¶7.)

In light of an existing arbitration agreement executed by Plaintiff Armstrong, Plaintiff filed a Second Amended Representative Action Complaint, alleging a single cause of action for penalties under PAGA, on August 4, 2022. (Hereafter, "Armstrong Action".) (Szamet Decl. ¶8.)

On September 13, 2021, Plaintiff Kendra L. McGhee sent a letter to the LWDA and Defendant giving notice of her intent to pursue a representative action pursuant to PAGA on behalf of herself and the State of California, as well as on behalf of a proposed group of Aggrieved Employees.

On September 14, 2021, Plaintiff McGhee filed a class action complaint in the action entitled *Kendra L. McGhee v. Vision of Success, Inc.*, Case No., MSC21-01903 ("McGhee Action"), pending in the Superior Court of the State of California, County of Contra Costa. Shortly thereafter, Defendant's counsel provided Plaintiff McGhee's counsel a copy of a valid arbitration agreement signed by Plaintiff McGhee, which led Plaintiff McGhee to seek dismissal of her class and individual claims. On November 30, 2021, Plaintiff McGhee filed a first amended complaint alleging only one cause of action for civil penalties under PAGA.

On March 19, 2024, the Parties participated in an all-day mediation presided over by experienced employment mediator Brandon McKelvey, Esq. which led to this Agreement to settle the Action. (Szamet Decl. ¶9.)

As part of the Settlement reached, Plaintiffs filed a Third Amended Complaint on December 18, 2024, asserting the following labor code violations, and are resolved by this

Settlement: (1) failing to provide compliant meal periods or premium pay in lieu thereof pursuant to Lab. Code sections 226.7, 512, and 1198; (2) failing to provide compliant rest periods or premium pay in lieu thereof pursuant to Lab. Code sections 226.7 and 1198; (3) failing to reimburse business related expenses pursuant to Lab. Code section 2802; (4) failing to provide and maintain accurate payroll records pursuant to Lab. Code sections 226(a)/(f)/(h), 226.3, 1174(d); (5) failing to pay owed wages due pursuant to Lab. Code sections 201-203; and (6) failing to provide suitable seating. (Hereafter, the "Action.") (Szamet Decl. ¶10.)

B. The Discovery Process

Prior to mediation, Plaintiffs obtained, through informal discovery, time and pay data, relevant to both Plaintiffs and the Aggrieved Employees, including handbooks and Plaintiffs' personnel files. (Szamet Decl. ¶11.) Through the exchange of information and attendant discussions between the Parties, Plaintiffs learned that the number of Aggrieved Employees is no more than 558 (including Plaintiffs) and there is a maximum of 11,091 PAGA Pay Periods at issue. (*Id.*; Ex. 1, ¶4.1.)

Thereafter, the Parties engaged in good faith, arms-length negotiations with Defendant concerning possible resolution of the claims asserted in the Litigation. (Szamet Decl. ¶12.) In light of this information, the Parties were able to reach a tentative settlement, with the aid of an experienced wage and hour mediator, subject to finalization of a formal PAGA Settlement Agreement and the approval of the Court. (*Id.*) The Parties negotiated the terms and conditions of the Agreement and now present the agreed-upon PAGA Settlement Agreement to the Court for Approval. (Szamet Decl. ¶13.)

Although Defendant denies that it violated any pertinent laws, Defendant recognized the risks and attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to finalization of a formal PAGA Settlement Agreement and the approval of the Court. (Szamet Decl. ¶14.) The Parties negotiated the terms and conditions of the Agreement and now present the agreed-upon Settlement to the Court for Approval. (*Id.*)

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III. PAGA ACTIONS AND THE REQUIREMENTS

A. The PAGA Statutory Scheme

PAGA creates a means of "deputizing" citizens as private attorney generals to enforce the Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A Plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own behalf as an individual claim, but "as the proxy or agent of the state's labor law enforcement agencies." *Id.*, at 986; *see also Reyes v. Macy's, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011); *Iskanian v. CLS Transp. Los Angeles*, LLC, 59 Cal. 4th 348, 380).

When an aggrieved employee brings a PAGA claim, "the government is always the real party in interest." *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) ("[A] PAGA action is a dispute between an employer and the State agency."). Accordingly, a plaintiff that brings a PAGA claim represents "the same legal right and interest as state labor law enforcement agencies," in that the plaintiffs are seeking to recover those civil penalties that otherwise would have been assessed and collected by the LWDA. *Arias*, *supra*, 46 Cal.4th at 986; Lab. Code § 2699 (a) & (f); *Securitas*, *supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 (holding "PAGA Plaintiffs do not have property rights in their cases."). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties recovered; thus, recoveries are principally for the state and only secondarily for Aggrieved Employees. Lab. Code § 2699 (i). Therefore, when a Plaintiff brings a PAGA claim, he or she is properly conceived of as a private attorney general prosecuting violations of California's labor laws on behalf of the state.

An employee may commence a PAGA action by fulfilling the requirements of Cal. Lab. Code § 2699.3 (a)(1), which simply states:

> "The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation."

Lab. Code § 2699.3 (a)(1)

As explained above, Plaintiffs have complied with the notice requirements and have properly pled a PAGA cause of action.

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

PAGA provides for penalties in the amount of one hundred dollars ($100) for each Aggrieved Employee per pay period for the initial violation and two hundred dollars ($200) for each Aggrieved Employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2).

"PAGA penalties...are mandatory, not discretionary" and must be awarded upon a showing that Defendant violated the Labor Code.[3] *Amaral v. Cintas Corp. No. 2* 163 Cal. App. 4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code §2699(e)(2) states that "a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Here, Defendant denies that it violated any law or that they engaged in any knowing or intentional conduct giving rise to liability, and expressly denies that any employees suffered harm.

C. Standards for Settlement Approval

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

[3] *See also Willner v. Manpower Inc., supra. 35 F. Supp. 3d at 1136*; *McKenzie v. Federal Exp. Corp*, *supra*, 765 F.Supp.2d at 1232.

settlement should go into effect.

IV. THE SETTLEMENT

Defendant will pay the total sum of $140,000.00 in full and final settlement of the PAGA claims alleged. (Szamet Decl. ¶15, Exhibit 1, ¶3.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount:	$140,000.00	
Plaintiffs' Counsel Fees Payment:	$46,666.67	
Plaintiffs' Counsel Litigation Expenses Payment:	$30,000.00[4]	
Administrator Expenses Payment:	$6,950.00	
Named Plaintiffs Enhancement:	$10,000.00 ($5,000 to each plaintiff)	
PAGA Penalties:	$46,333.33 *($34,750.00 to the LWDA; $11,583.33 to remain in the Net Settlement Amount)*	

(Szamet Decl. ¶16; *Id.*)

Each Aggrieved Employee shall receive a pro-rata portion of the remaining amount in PAGA penalties based by dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties by the total number of PAGA Pay Periods worked by all Aggrieved Employees during the PAGA Period[5], and then multiplying the result by each Aggrieved Employee's PAGA Pay Periods. (Szamet Decl. ¶17, Ex. 1, ¶3.2.4.1.)

For settlement purposes, the Aggrieved Employees are defined as: "all persons who are employed or have been employed as an employee by VISION OF SUCCESS, INC., in the State of California who worked one or more pay periods during the Covered Period" ("Aggrieved Employee"). (Szamet Decl. ¶19, Ex. 1, ¶1.4.)

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4 The Agreement provided for counsel to receive cost reimbursement up to $30,000.00. However, counsel's final costs come to $25,881.99. The extra $4,118.01 will remain in the Net Settlement Amount, causing the Net Settlement Amount for distribution to the LWDA and the PAGA Employees to be slightly higher than the $46,333.33 contemplated in the Agreement. Specifically, $50,451.34 will be allocated as the Net Settlement Amount, with 75% ($37,838.51) to the LWDA as its LWDA PAGA Payment and 25% ($12,612.84) to the PAGA Employees as their Individual PAGA Payments.

5 The Covered Period or PAGA Period means the period from September 13, 2020 to May 19, 2024. (Szamet Decl. ¶18, Ex 1, ¶1.20)

V. ARGUMENT

A. <u>The Court Should Approve the Agreement</u>

The Parties recognize that in accordance with Labor Code §2699(l), Court approval is required in the event of a settlement of a PAGA action on a representative basis. However, as explained in *Arias v. Superior Court* 46 Cal.4th 969 (2009), the Parties are not obligated to follow the class action procedural rules in PAGA cases and therefore need not obtain approval of the PAGA settlement through a motion for primary or final approval. Nonetheless, in order to comply with the requirements of Labor Code §2699, the Parties submit the instant Motion and the Agreement (Exhibit "1" to the Szamet Declaration) for Court approval.

B. <u>The Risks of Moving Forward with Plaintiffs' PAGA Claim</u>

To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation and discount taken follows. (Szamet Decl. ¶20.) Plaintiffs believed that Defendant may persuasively argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether waive any penalties under PAGA. (Szamet Decl. ¶21.) Pursuant to Labor Code §226.3, the Labor Commissioner has the discretion to "decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake." (Szamet Decl. ¶22.) And in accordance with PAGA, the court in a PAGA action has the same discretion "to assess a civil penalty" that the Labor Commissioner would have, as well as complete discretion to "award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Labor Code § 2699(e)(1) and (e)(2)). (Szamet Decl. ¶23.)

Plaintiffs' counsel anticipated that, at trial, counsel for Defendant could make a potentially persuasive argument that: (1) the Aggrieved Employees were properly paid wages and/or reimbursed in accordance with Defendant' lawful policies and practices, and that any alleged failure to compensate the Aggrieved Employees, or compensate them timely, was the result of inadvertence and clerical error; (2) the Aggrieved Employees were provided with the opportunity to take meal and rest breaks in compliance with California law and Defendant maintained accurate meal records; (3) the Aggrieved Employees were expected not to be stationary for long periods in areas where employees scanned items and processed payments within its stores, and instead to quickly complete these tasks before moving to different parts of the store; (4) until this Action was filed, no employees had complaints about any alleged failure to pay wages, including overtime, provide meal and/or rest breaks, reimburse expenses, provide suitable seating, and issue accurate itemized wage statements; and, (5) none of Defendant's employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiffs' allegations. (Szamet Decl. ¶24.) All of which, counsel for Defendant would argue, should mitigate in factor of significantly reducing or waiving any PAGA penalties. (*Id.*) While Plaintiffs disagree that this analysis is legally correct or persuasive, Plaintiffs' counsel had to consider the foregoing facts and arguments and how they might impact any judgment ultimately awarded to Aggrieved Employees if the Court were persuaded by them. (Szamet Decl. ¶25.)

In addition to the fact that liability was vigorously disputed by Defendant, and as discussed in further detail below, the main issue driving resolution here was Defendant's ability to pay any meaningful settlement or judgment against it. (Szamet Decl. ¶26.)

In light of all these significant risks and the fact that PAGA gives the Court broad discretion to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement Amount of $140,000.00 was fair and reasonable. (Szamet Decl. ¶27., Exhibit 1, ¶3.1.)

1. The Risks Associated with the Wages/Overtime Claim

California law allows employers to round employee time punches to the nearest tenth or quarter of an hour, as long as the rounding policy is consistent, fair and neutral and, on average, favors neither overpayment nor underpayment over a period of time. *See's Candy Shop, Inc. v. Superior Court*, 210 Cal.App.4th 889 (2012). Under this standard, rounding employee time punches is only legal if the rounding is neutral "both facially and as applied." (*Id.* at p. 903.) Neutrality "as applied" goes beyond the policy itself to look at its "results." Even a facially neutral policy cannot "result in a failure to pay employees for time worked" over the long term. (*Id.* at p. 901.)

Further, California workers are statutorily entitled to overtime compensation, unless they are properly classified as falling within one of the narrow exemption categories. Under California law, "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek…shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." (Lab. Code, § 510, subd. (a).) Labor Code § 1198 also states that the employment of an employee for longer hours than those fixed by the IWC is unlawful.

Here, Plaintiffs' claim for unpaid wages and overtime is based on Defendant's alleged practice of only paying Plaintiffs and the Aggrieved Employees based on scheduled shift hours, not actual hours worked, failing to pay overtime and meal break premiums at the regular rate of pay, and auto-deducting meal breaks from employees' hours worked, regardless of whether a meal break was actually taken. (Szamet Decl. ¶28.) Plaintiffs' expert found that Defendant did not blend non-discretionary bonuses into an employee's regular rate when paying overtime. (*Id*.) Plaintiffs testified at their depositions that they were under managers' instructions when inputting their start/end times and meal breaks even when they did not receive them. (*Id*.) Because they were instructed to enter meal breaks even though they did not actually receive breaks, Plaintiffs contend they are owed wages for working off-the-clock for this time. (*Id*.)

However, Defendant maintains that it properly paid Plaintiff and the Aggrieved Employees for all hours worked. (Szamet Decl. ¶29.) Defendant contends that its written policies are facially compliant and are properly enforced, including the calculation of an employee's regular rate and the accurate recording of hours worked. (*Id*.) Defendant would also argue that any unpaid wages owed due to any failure to blend would be *de minimis*. (*Id*.) Defendant also maintains, that at all relevant times, it kept written policies that prohibited Plaintiff and Aggrieved Employees from recording inaccurate or false information on their timecards. (*Id*.)

Plaintiffs further anticipate that, at trial, Defendant would likely rely on the timecards showing that Plaintiffs and the Aggrieved Employees entered meal periods were provided and thus, no meal premiums are owed such that there was no duty to pay meal premiums at the employees' regular rate of pay. (Szamet Decl. ¶30.) Because Plaintiffs both testified they inputted their time, Defendant would likely rely on the records and contend that they are actually accurate. (*Id.*)

Furthermore, Defendant would argue that Plaintiff's theories of liability would each be extremely difficult to prove on a representative basis. (Szamet Decl. ¶31.) Defendant would argue that the time records cannot substantiate this claim on a representative basis because this practice could be due to one or two rogue managers, and that this case would devolve into a series of mini-trials wherein Defendant would have the right to question each and every allegedly Aggrieved Employees as to whether they contended that they worked any unpaid time and, if so, why they contend the time was not properly paid. (*Id.*)

While Plaintiff disagrees that these arguments are legally correct or persuasive, Plaintiff acknowledges this risk. (Szamet Decl. ¶32.) As such, PAGA Counsel determined that in light of these risks, the settlement reached is both fair and reasonable. (*Id.*)

2. The Risks Associated with the Meal Period Claim

Under California Labor Code section 512 and IWC Wage Order No. 7, no employer shall employ any person for a work period of more than five hours without providing a meal period of not less than thirty minutes. The first meal period must be permitted to commence no later than after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be permitted to commence no later than after ten hours of work, or the start of the eleventh hour of work (10.0 hours on the clock). (*Ibid.*) The California Supreme Court succinctly described Section 512's mandate: "Employers must afford employees uninterrupted half-hour periods in which they are relieved of any duty or employer control and are free to come and go as they please." (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.)

Furthermore, Labor Code §§ 226.7 and 512 require an employer to pay an additional hour of compensation for each meal period the employer fails to provide. In *Ferra v. Loews Hollywood Hotel, LLC,* 11 Cal.5th 858 (2021), the California Supreme Court set forth the formula for calculating the one extra hour of bonus pay that employees are owed if an employer fails to provide a compliant meal period or rest break. (*Id.*) Specifically, the Court held that those bonus payments must include the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses, commissions, etc.), and cannot simply be paid at an employee's base hourly rate. (*Id.*)

In addition, Plaintiffs allege that Defendant maintain an unlawful policy of requiring Plaintiffs and the Aggrieved Employees to remain on the premises during meal periods in violation of *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257, 269 (2016) (an employer that limits where an employee can take a break does not "relinquish control over how employees spend their time"). (Szamet Decl. ¶33.)

Further, Plaintiffs contend that Defendant failed to maintain accurate records of hours worked and all meal periods taken or missed by Plaintiffs and the Aggrieved Employees. (Szamet Decl. ¶34.) Pursuant to California Labor Code § 1174.5, employers who willfully fail to maintain accurate and complete records required by California Labor Code § 1174 is subject to a penalty under § 1174.5. Pursuant to the applicable IWC Order § 7(A)(3), every employer shall keep time records showing when the employee begins and ends each work period. Meal periods and total hours worked daily shall also be recorded.

Here, Plaintiff alleges that Defendant failed to apprise Plaintiffs and the Aggrieved Employees of their rights associated with meal periods and failed to provide timely meal periods. (Szamet Decl. ¶35.) Plaintiffs contend that Defendant has had a consistent practice of: (1) forcing Plaintiffs and the Aggrieved Employees to input meal periods received when they did not; (2) not providing on time, uninterrupted, 30-minute meal periods within the first five hours of a shift of over six hours; (3) not compensating Plaintiffs and the Aggrieved Employees with meal premiums as a result of these violations; and (4) not permitting Plaintiffs and the Aggrieved Employees to leave the premises for their meal periods. (*Id.*)

Specifically, Plaintiffs contend that their meal breaks were often taken after the 5th hour of work due to understaffing and heavy workload. (Szamet Decl. ¶36.) Indeed, Plaintiffs allege that there would often be so many customers at the store and insufficient staffing of employees to service the customers which necessitated Plaintiffs and other employees to try to take a meal period after the 5th hour of work. (*Id.*) As mentioned above, Plaintiffs also testified that they were required to input they were provided meal breaks at the direction of management, regardless of whether they took a meal period. (*Id.*) Plaintiffs also allege that management was aware employees were unable to take meal periods, but still instructed them to input their breaks as if they did. (*Id.*) Plaintiffs further testified that if they marked they did not receive meal periods, they would be reprimanded. (*Id.*)

Plaintiffs further allege that their expert found unique meal break violations in the majority of all shifts analyzed. (Szamet Decl. ¶37.) Unique meal break violations are defined as shifts with at least one of the following: 1) recorded 1st meal break after the end of the 5th hour for shifts greater than 6 hours; 2) 1st meal break less than 30 minutes for shifts greater than 6 hours; 3) no 1st meal break for shifts greater than 6 hours; or 4) no 2nd meal break for shifts greater than 12 hours. (*Id.*) Accordingly, Defendant's pattern and practice was not to provide meal periods to Plaintiffs and the Aggrieved Employees in compliance with California law. (*Id.*)

Here, as explained above, Plaintiffs allege that Defendant did not maintain accurate records of hours worked and all meal periods taken or missed by Plaintiffs and all Aggrieved Employees. (Szamet Decl. ¶38.) Defendant's alleged failure to maintain records required by the California Labor Code and applicable IWC Wage Orders deprived Plaintiffs and the Aggrieved Employees the ability to know, understand and question the accuracy and frequency of meal periods, and the accuracy of their hours worked stated in Defendant's records. (*Id.*) Therefore, Plaintiffs and the Aggrieved Employees had no way to dispute the resulting failure to pay wages, all of which resulted in an unjustified economic enrichment to Defendant. (*Id.*)

However, as explained above, Defendant would argue that its managers did not instruct Plaintiffs and the Aggrieved Employees to input inaccurate meal periods and that if a manager did do that, it would likely have been one or two rogue managers as opposed to a company-wide practice. (Szamet Decl. ¶39.) Again, Defendant also argued that it would be entitled to inquire of each and every Aggrieved Employee whether his/her meal periods were provided and, if not, why not. (Szamet Decl. ¶40.) Defendant maintains that this type of inquiry would foreclose Plaintiffs' ability to pursue the meal period claims on a representative basis. (Szamet Decl. ¶41.) Plaintiffs had to acknowledge that there are certainly some risks associated with the meal period claim and did consider them when evaluating this settlement. (Szamet Decl. ¶42.)

3. The Risks Associated with the Rest Break Claim

Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour of compensation for each workday the employer fails to provide a rest period according to law. Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11070, subd. 12(A).)

The California Supreme Court has held: "Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." (*Brinker Rest. Corp. v. Superior Court*, supra, 53 Cal.4th at 1029.) In an eight-hour workday, being denied the two paid rest breaks in a day is "essentially perform[ing] 20 minutes of 'free' work." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104.)

The Court also clarified what steps an employer has to take to "make available" rest breaks to its employees. Under *Brinker*,

> An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it.

(Brinker Rest. Corp. v. Superior Court, supra, 53 Cal.4th at 1033 (emphasis added.).)

Employers must authorize and permit a net ten-minute paid rest period for every four hours, or major fraction thereof, of work for its employees. If an employer does not, then the employer must pay the employee one hour of pay at the employee's regular rate of pay for each workday that the rest period is not provided. (Cal. Code Regs., tit. 8, § 11070, subd. 12(B).)

Defendant failed to maintain an accurate policy informing Plaintiff and the Aggrieved Employees of their rights with respect to rest periods. Defendant failed to provide Plaintiff and the Aggrieved Employees with rest breaks of not less than ten (10) minutes per four (4) hour work period as required by the Labor Code during the relevant time period. (Szamet Decl. ¶43.)

Specifically, Plaintiffs maintain that they were unable to take their first and second rest break on any given day. (Szamet Decl. ¶44.) Not surprisingly, Plaintiffs contend they were almost never able to take their second rest break due to heavy workload with respect to the high number of customers in the store relative to the number of employees. (Szamet Decl. ¶45.)

In addition, Plaintiffs alleged that Defendant maintains an unlawful policy of requiring Plaintiffs and the Aggrieved Employees to remain on the premises during rest periods in violation of *Augustus v. ABM Security Services, Inc.,* 2 Cal.5th 257, 269 (2016) (an employer that limits where an employee can take a break does not "relinquish control over how employees spend their time"). (Szamet Decl. ¶46.) As such, Plaintiffs allege that Defendant failed to provide Plaintiffs and the Aggrieved Employees with compliant rest periods and also failed to compensate them with one (1) hour of wages for each compliant rest period as required by Labor Code § 226.7. (*Id*.)

Here, Plaintiffs allege that Defendant regularly denied them and the Aggrieved Employees rest breaks. Plaintiffs maintain, and confirmed by its expert, that Defendant also did not pay rest break premiums. (Szamet Decl. ¶47.) As discussed above, *Ferra* requires the rest period premium payments must include the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses), and cannot simply be paid at an employee's base hourly rate. As with meal periods, when rest premiums are provided, Defendant has had a consistent policy of paying rest period premiums at the base rate and not the blended rate in violation of Labor Code §§ 226.7.

However, Defendant again raised the defense that employees did actually receive their rest breaks because they were adequately staffed. (Szamet Decl. ¶48.) Defendant would likely present evidence at trial from other employees and argued that other employees would testify as such. (Szamet Decl. ¶49.) In its defense, Defendant also argued that Plaintiffs' rest period claim cannot readily be proven as to all Aggrieved Employees because California law does not require employees to record rest periods. (*Id*.) Absent a shift-by-shift, break-by-break, employee-by-employee inquiry, Defendant would have argued that there was simply no way to know (1) whether a break was taken on any given day; and (2) if not, why not. (*Id*.) For each instance where an employee contends that she did not take a 10-minute rest period by the end of the fourth hour of work, the trier of fact would still have to determine why that particular employee had less than their full allotment of rest time. (*Id*.) Defendant accordingly would have argued that rest break claims are inherently individualized in nature because employers only need to "authorize and permit" breaks; they need not ensure that rest breaks are taken. (*Id.*; *Brinker*, *supra,* 53 Cal. 4th at 1004.) To succeed, "[a]n employee must show that the employer prevented the employee from taking breaks; mere proof of knowledge that the employee was forgoing breaks is insufficient." As such, Plaintiffs had to acknowledge that it could potentially be easy for Defendant to defeat this claim if it was able to gather testimonial evidence from aggrieved employees indicating that they were provided the opportunity to take all required rest breaks each day. (*Id.*)

Though Plaintiff does not believe this was the case, Plaintiff must acknowledge it poses serious risks as to establishing liability. (Szamet Decl. ¶50.) Just as with meal periods, there is risk as to both sides as to what declarations and depositions of aggrieved employees might reveal. (*Id.*)

4. The Risks Associated with the Reimbursement Claim

Labor Code section 2802 provides that an employer must "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties . . . ." (Lab. Code, § 2802, subd. (a).)

On a regular and consistent basis, Plaintiffs contend that Defendant failed to reimburse Plaintiffs and the Aggrieved Employees the cost of using their personal cell phones for business related purposes. (Szamet Decl. ¶51.) Plaintiffs allege that Defendant required that Plaintiffs and the Aggrieved Employees be available by cell phone while working, and this was necessary to perform their job duties. (*Id.*) Plaintiffs contend that they used their cell phones to communicate with supervisors throughout their shift and to call law enforcement authorities due to safety issues. (*Id.*) Despite the constant use of their personal cell phones for business purposes, Plaintiffs were never reimbursed for this expense. (*Id.*) Plaintiffs maintain that cell phones were not provided by Defendant, and Defendant failed to reimburse Plaintiffs and the Aggrieved Employees for the costs associated with using these personal cell phones. (*Id.*)

The main risk that Plaintiff considered was the fact that not all Aggrieved Employees used their cell phones, laptops, or vehicles for every pay period. (Szamet Decl. ¶52.) Defendant contends that it does not require the Aggrieved Employees to use personal cell phones as work phones are provided at all. (*Id.*) Therefore, even if Plaintiffs could establish liability, Plaintiffs had to consider that the violations under Labor Code § 2802 may have been relatively low as they were not triggered for every pay period. (*Id.*) Plaintiff also anticipated that Defendant could argue primarily that it provided all necessary tools, but to the extent it did not, any exposure was limited to a very small group of Aggrieved Employees for a short window of time who may have chosen to use their personal cellphones for work related purposes out of convenience. (*Id.)* If Defendant were able to establish such, there could be no recovery at all for this claim. (*Id.*)

Based on these risks, Plaintiffs determined that discounting this claim for settlement purposes was fair and reasonable. (Szamet Decl. ¶53.)

5. The Risks Associated with the Wage Statement Claim

Labor Code § 226(a) provides that every employer shall furnish each of his or her employees an accurate itemized wage statement in writing showing nine pieces of information, including: (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer, 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. An employee is presumed to suffer an injury if this information is missing. (Labor Code § 226(e)(2)(B)(iii).)

Here, Plaintiffs alleged that Defendant furnished Plaintiffs and the Aggrieved Employees with itemized wage statements that do not accurately show total hours worked. (Szamet Decl. ¶54.) Defendant furnishes Plaintiffs and the Aggrieved Employees with itemized wage statements that do not accurately show all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate because Plaintiff and the Aggrieved Employees performed work while off the clock while working through their meal and rest periods. (*Id.*) The work performed off the clock was not recorded and thus was not reflected in the

Aggrieved Employees' wages and wage statements. (*Id*.)

Further, Plaintiffs and the Aggrieved Employees are issued wage statements that do not include accurate meal and rest premiums as a result of the claims alleged above. (Szamet Decl. ¶55.) Plaintiffs allege that Defendant's failure to provide accurate itemized wages statements according to Labor Code § 226(a) was all done on a regular and consistent basis. (*Id*.)

Again, the risks flow from the underlying unpaid wages and meal/rest claims, but the main risk taken into account is that wage statement claims are vulnerable to an argument that Aggrieved Employees did not suffer any harm. (Szamet Decl. ¶56.) Defendants commonly argue that, without more, wage statement claims are nothing but technical violations for which a court should award a dramatically reduced civil penalty, if anything at all. (*Id.*)

6. The Risks Associated with the Waiting Time Penalties Claim

Labor Code section 203 provides that if an employer fails to provide wages at the time of an employee's termination or within 72 hours of his/her resignation, then such employee's wages shall continue as a penalty for up to thirty (30) days. "If an employer willfully fails to pay . . .any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid . . . but the wages shall not continue for more than 30 days." (Lab. Code, § 203, subd. (a).)

Here, many Aggrieved Employees, including Plaintiffs, are no longer employed by Defendant. Defendant have failed to pay employees wages immediately or within 72 hours of termination and/or resignation by not paying all wages, including meal and rest premiums. (Szamet Decl. ¶57.) Therefore, under California Law, "waiting time" penalties would be triggered for each former employee in the class. Labor Code section 203 reflects a public policy concern that favors the full and prompt payment of earned wages. (See, e.g., *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.)

Defendant may attempt to argue that a good-faith belief applies here and that its actions were not willful. However, the well-settled meaning of "willful," as used in Labor Code section 203, is that an employer has intentionally failed or refused to perform an act which was required to be done. (*Amaral v. Cintas Corp.* No. 2 (2008) 163 Cal.App.4th 1157, 1201.) Plaintiff factored in the risk of establishing that any violation was "willful" and the fact that this claim is derivative. (Szamet Decl. ¶58.)

7. The Risks Associated with the Suitable Seating Claim

The California IWC Wage Orders provide that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." (Wage Order No. 7-2001, §14(A).) Private individuals may enforce this provision on behalf of the California Labor Commissioner pursuant to the California Labor Code's Private Attorneys General Act of 2004 ("PAGA").

The California Supreme Court established the standards governing suitable seating claims, considering the "nature of the work," whether the work reasonably permits a seat, the employer's business judgment, and whether compliance is feasible based on whether a suitable seat exists. First, the *Kilby* court held that the phrase "nature of the work" refers to tasks performed at a given location, not to an employee's duties performed throughout a given shift. (*Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal.4th 1, 8.) "[C]ourts must examine subsets of an employee's total tasks and duties by location, such as those performed at a cash register or a teller window, and consider whether it is feasible for an employee to perform each set of location-specific tasks while seated." (*Id.* at p. 18.) "An employee may be entitled to a seat to perform tasks at a particular location even if his job duties include other standing tasks, so long as provision of a seat would not interfere with performance of standing tasks." (*Ibid.*) The Court also clarified that the seating requirement applies to on-duty tasks that can be performed while seated, as opposed to off-duty time or "lulls in operation." (*Id.* at p. 19.)

The *Kilby* court also set forth factors that courts should consider in deciding whether the "nature of the work" reasonably permits a seat "based on the totality of the circumstances." (*Id.* at p. 19.) "Analysis begins with an examination of the relevant tasks, grouped by location, and whether the tasks can be performed while seated or require standing." (*Id.* at pp.19-20.) The task-based assessment can be balanced against considerations of feasibility, including "whether providing a seat would unduly interfere with other standing tasks, whether the frequency of transition from sitting to standing may interfere with the work, or whether seated work would impact the quality and effectiveness of overall job performance." (*Id.* at p. 20.)

While an employer's business judgment is relevant, "an employer's mere preference for standing cannot constitute a relevant 'business judgment' requiring deference." (*Id.* at 22.) By the same token, while the physical layout of the space may be relevant, an employer "may not unreasonably design a workspace to further a preference for standing or to deny a seat that might otherwise be reasonably suited for the contemplated tasks." (*Id.* at p. 22.) However, an employer may assert as an affirmative defense that "compliance is infeasible because no suitable seating exists." (*Id.* at p. 24.)

Here, Plaintiffs maintain the nature of store attendant work reasonably permits the use of a seat and Defendant failed to provide suitable seats to Plaintiffs and the Aggrieved Employees. (Szamet Decl. ¶59.) Plaintiffs do not contend that all scanning and processed payments must be done from a seat, but rather that a seat should be provided at the areas for job duties that can be done while seated. (*Id*.) While store attendants' broader job duties may include stocking shelves and maintaining store appearance, Plaintiffs contend that the actual work performed behind the register are more limited and stationary. (*Id*.)

However, Defendant argued that there were chairs available in the store either in the manager's office or in the back of the store. (Szamet Decl. ¶60.) Again, Defendant would likely argue at trial that these seats were suitable for use behind the register, and as such, it did not fail to provide suitable seats to its employees. (*Id*.) Furthermore, Plaintiffs also acknowledge the potential costs of retaining ergonomic experts to prove this claim at trial. (*Id*.) As such, Plaintiffs took these risks into account when assessing the value of this claim.

In light of all these significant risks and given that PAGA gives the Court broad discretion to reduce any penalties ultimately awarded, especially Defendant's solvency issues, PAGA Counsel determined that the Gross Settlement Amount of $140,000.00 was fair and reasonable. (Szamet Decl. ¶61, Exhibit 1, ¶3.1.)

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C. A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty Awarded for Technical Violations of the Labor Code

"PAGA penalties…are mandatory, not discretionary" and must be awarded upon a showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp. No.* 2 163 Cal. App 4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code section 2699(e)(2) states that "a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (*See Fleming v. Covidien Inc*. (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047 [court awarded $18 per wage statement, reflecting 18% of the potential exposure]; *Carrington v. Starbucks Corp*. (2018) 30 Cal. App. 5th 504, 529 [awarding 10% of maximum civil penalty for meal break claims in light of Starbucks' "good faith attempts" to comply and because the violations were minimal]; *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135–1136, disapproved on another ground in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 196, fn. 8 [considering the defendant's inability to pay as a factor in reducing the penalties imposed]; see also *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 681 [noting that a court should consider whether a violation was inadvertent when assessing penalties].) [6]

In *Fleming,* the Court exercised its discretion to reduce the PAGA penalty amount. There, the plaintiff brought a PAGA claim for violations of section 226(a) based on the following issues: (a) the statements did not show either an employee identification number or the last four digits of the social security number of the employee; (b) the statements did not show the beginning date of the pay period for which the employee was paid; (c) the statements identified Covidien as the employee's employer. (*Id*. At *2). There were approximately 28,000 wage statements at issue.

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[6] On May 11, 2016, following a bench trial, Los Angeles Superior Court Judge John Wiley reduced PAGA penalties from $409,950 to $53,294 after finding the maximum statutory penalty amount to be unjust, arbitrary, oppressive, and/or confiscatory. (*Kaanaana et al. v. Barrett Business Serv.s Inc., et al.,* L.A. Super. Ct., Case No. BC 496090.))

(*Id*. at *3). The *Fleming* court calculated the maximum potential civil penalty exposure at $2.8 million ($100 per wage statement). (*Ibid*; *see also* Labor Code § 2699(f)(2)). After a bench trial, the Court elected to exercise its discretion to reduce the civil penalty per wage statement to $18 per wage statements, reflecting 18% of the potential exposure. (*Id*. at *4). The Court reasoned:

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

(*Id.* at *4.) A court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence.

Here, as explained above, Plaintiffs' counsel anticipated that, at trial, counsel for Defendant would argue that: (1) the Aggrieved Employees were properly paid wages and/or reimbursed in accordance with Defendant' lawful policies and practices, and that any alleged failure to compensate the Aggrieved Employees, or compensate them timely, was the result of inadvertence and clerical error; (2) the Aggrieved Employees were provided with the opportunity to take meal and rest breaks in compliance with California law and Defendant maintained accurate meal records; (3) the Aggrieved Employees were provided with suitable seats to use when the nature of the work permitted the use of such seats; (4) until this Action was filed, no employees had complaints about any alleged failure to pay wages, including overtime, provide meal and/or rest breaks, reimburse expenses, provide suitable seating, and issue accurate itemized wage statements; and, (5) none of Defendant's employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiffs' allegations. All of which, counsel for Defendant would argue, should mitigate in favor of significantly reducing the civil penalty.

Furthermore, since Defendant has raised its inability to pay from the outset of this case, Plaintiffs greatly considered the risk of continuing litigation, potentially using up any financial ability Defendant is able to pay toward this settlement instead on litigating the case through trial, and ultimately would be unable to pay any judgment. (Szamet Decl. ¶62.)

In light of all these significant risks, Plaintiffs' counsel determined that the Gross Settlement Amount of $140,000.00 was fair and reasonable. (Szamet Decl. ¶63.)

D. Based on the Risks Above and the Analysis of the Maximum Penalties Available, And Defendant's Inability to Pay a Larger Settlement, Plaintiffs believe this Settlement is Fair and Reasonable

Based on these figures, the maximum potential exposure for the PAGA claims for the Aggrieved Employees is $6,654,600.00 (11,091 pay periods at issue multiplied by $100 a pay period x each Labor Code violation). While there is no authority available on this issue, a court could conceivably "stack" per pay period violations as Plaintiff has done above. However, the main risk taken into account with PAGA is the discretionary nature of the penalty award. (Szamet Decl. ¶64.) For example, if a court were to disallow the "stacking" of PAGA penalties (given the lack of caselaw doing so), then Defendant's maximum exposure at trial would actually be $1,109,100. From there, a court has further discretion to reduce the amount accordingly.

The settlement here represents approximately 8% of the maximum exposure at trial, which is in line with judgments reached in other PAGA cases. (See e.g. See e.g., Carrington, supra, 30 Cal.App.5th 504, 529 [affirming the trial court's reduction from the maximum penalty of $50 per initial violation to only $5]; *Thurman, supra,* at 203 Cal.App.4th at 1135–1136, [affirming trial court's decision to reduce penalties by 30%].)

Moreover, during negotiation efforts, Defendant raised the issue of its inability to pay a larger sizeable settlement that the amount agreed upon or judgment against it. (Szamet Decl. ¶65.) As stated above, Plaintiffs acknowledge the risk of litigating this case through to trial. (*Id*.) Given Defendant's financial inability to pay a larger settlement at this stage of the litigation, Plaintiffs also considered that continuing to litigate this case would only further result in additional attorneys' fees and costs that could result in Defendant's insolvency and/or exacerbate its inability to pay any judgment achieved at trial. (*Id*.)

In light of Defendant's inability to pay a larger settlement, and the risks of litigating this case through trial, Plaintiff believes that the settlement for $140,000 is fair and reasonable.

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VI. THE REQUEST FOR ATTORNEYS' FEES AND COSTS

As detailed fully in the Settlement, the settlement provides for Defendant to create a Gross Settlement Amount of $140,000.00. (Szamet Decl. ¶69; Ex. 1 at ¶3.) From that fund, Plaintiffs request an award of attorneys' fees for Plaintiffs' counsel in the amount of $46,666.67, or 33.33% of the Gross Settlement Amount, and $25,881.99 in reimbursement for litigation costs. (*Ibid*.)

A. Plaintiffs' Counsel are Entitled to a Fee from the Common Fund

On August 11, 2016, the California Supreme Court decided *Laffitte v. Robert Half International,* which addressed the correct methodology for awarding fees in a class action settlement. (*Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 205 Cal.Rptr.3d 555, 573.) The *Laffitte* Court approved awarding fees as a percentage of the settlement fund in cases like the present one, where a settlement results in the creation of a common fund on behalf of a class:

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards Class Counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.

(*Id.* at 573.) The Court then set out several reasons why the percentage-of-the-fund method is preferred over the alternative lodestar-multiplier approach in California courts:

> The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation [citations]—convince us the percentage method is a valuable tool that should not be denied our trial courts.

(*Id.* at 573.)

An award of 33.33% of the common fund is appropriate here under the "substantial benefit" theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a representative capacity to recover fees when the litigant's efforts have created a substantial, actual, and concrete benefit for members of an ascertainable class and the court's jurisdiction over the subject matter makes possible an award which spreads the cost proportionately among the members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th 563, 578.)

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

B. <u>The Attorneys' Fees Request Are Well Within the Range of Fees in Comparable Cases</u>

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

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

(*Newberg on Class Actions*, 3rd Ed., 1992, § 14.03; *and see Chavez v. Netflix, Inc*. (2008) 162 Cal.App.4th 43, 66, fn 11 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."].) Thus, Plaintiffs' counsel's requested fee of 33.33% is not only well within the range of reasonableness, but lower than the average fee award of 35% and is fair compensation for undertaking this complex, risky, expensive, and time-consuming litigation on a contingent basis.

C. Plaintiffs' Counsel's Fee Request is Reasonable Under a Lodestar Crosscheck

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

i. No Multiplier is Requested

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

Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Szamet Decl. ¶70.) Plaintiffs' counsel have an aggregate lodestar in the amount of $193,585.00 which represents 281.45 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiffs' instant Motion, and 10 future hours. (Szamet Decl. ¶71; Declaration of Kane Moon, ¶¶ 38-40.)

As such, Plaintiffs' counsel has billed more hours than they are requesting. (Szamet Decl. ¶72.)

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VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

In addition to their request for fees, Plaintiffs' counsel further request reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this litigation, in the amount of $25,881.99. (Szamet Decl. ¶111.) To date, Kingsley Szamet & Ly has incurred $15,681.69 in costs and the Moon Law Group, PC has incurred $10,000.90 in costs. (Szamet Decl. ¶112.) Plaintiffs' counsel anticipates incurring an additional $199.40 in costs to file and serve this motion. (Szamet Decl. ¶113.) As such, Plaintiffs' counsel is requesting a cost reimbursement of $25,881.99. (Szamet Decl. ¶114.)

All of the requested costs are reasonable in amount and were necessarily incurred by Plaintiffs' counsel in prosecuting this litigation. (Szamet Decl. ¶115, Exhibit 5 [Cost Report]; Moon Decl. ¶37, Exhibit 2 [Cost Report].) Expenses in this matter to date include costs for filing fees, research, mediation, and additional costs for the prosecution of this case evidenced in the costs spreadsheet attached to the Declarations of Kelsey M. Szamet and Kane Moon. All of these costs have been incurred in the course of this litigation, and all costs advanced have already been paid by Plaintiffs' counsel, with the exception of the anticipated cost of filing the present motion. (Szamet Decl. ¶116.)

Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court should approve the request for reimbursement in the amount of $25,881.99. (Szamet Decl. ¶117.)

VIII. ENHANCEMENT TO PLAINTIFFS

The Settlement calls for an enhancement payment of $10,000.00, with $5,000 allocated to each of the named Plaintiffs, to be paid from the Gross Settlement Amount. (Szamet Decl. ¶118; Ex. 1 at ¶3.2.2.) Incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. "[I]t is established that named Plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

Here, the enhancement takes into consideration the time, effort, and expense incurred by Plaintiffs in coming forward to litigate this matter on behalf of the Aggrieved Employees. The time spent by both Monica Armstrong and Kendra L. McGhee includes identifying competent counsel, providing information to Plaintiffs' counsel regarding Plaintiffs' relevant employment experiences, compiling documents, meeting with PAGA Counsel frequently to discuss the status of the case and the theories of liability, reviewing settlement documents, and making themselves available for a full day of mediation. (Szamet Decl. ¶119; Moon Decl. ¶8; Declaration of Monica Armstrong, ¶¶5-13; Declaration of Kendra McGhee, ¶4.)

Plaintiffs' counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶120; Moon Decl. ¶10.) The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiffs in coming forward to litigate this matter on behalf of the Aggrieved Employees. (Szamet Decl. ¶121; *Ibid*.) Accordingly, Plaintiffs should be awarded the agreed-upon enhancement of $10,000.00.

IX. CONCLUSION

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

DATED: December 19, 2024

KINGSLEY SZAMET & LY

By: ______________________

Kelsey M. Szamet
Jessica Bulaon
Attorneys for Plaintiffs and all Aggrieved Employees

(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On December 19, 2024, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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[XX] **BY ELECTRONIC SERVICE:** I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (https://dir.tfaforms.net/315) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] **(BY ELECTRONIC MAIL TRANSMISSION)**: I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[XX] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 19, 2024, at Encino, California.

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Kimberly Madrid