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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

(UNLIMITED JURISDICTION)

ORLANDO PEREZ AVALOS,

Plaintiff,

v.

MILAGROS RESTAURANT LLC;
GREGORY HAROLD ST. CLAIRE; and
DOES 1 to 25, inclusive

Defendant(s)

Case no.: 22-CIV-01222

**NOTICE OF PLAINTIFF'S MOTION AND
MOTION FOR APPROVAL OF PAGA
SETTLEMENT AND RELEASE**

Action filed: March 22, 2022

Hearing Date: May 16, 2023

Hearing Time: 2:00 p.m.

Hearing Dept: 2, Hon. Marie S. Weiner

Submitted Herewith Under Separate Cover:

1. Memorandum of Point and Authorities;
2. Declaration of Harout Messrelian;
3. Declaration of Orlando Perez Avalos;
4. Declaration of Jacob Kamenir; and
5. [Proposed] Order and Judgment Approving PAGA Settlement.

1 TO ALL PARTIES, THE CALIFORNIA LABOR AND WORKFORCE DEVELOPMENT
2 AGENCY, AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on May 16, 2023 at 2:00 p.m., or as soon thereafter as the
4 matter may be heard, in Department 2 of the San Mateo County Superior Court, located at 400
5 County Center, Redwood City, California, 94063, Plaintiff Orlando Perez Avalos ("Plaintiff" or
6 "Avalos") will and hereby does move this Court for an order approving the PAGA Settlement
7 Agreement (the "Agreement" or "PAGA Settlement") and entering the [Proposed] Order and
8 Judgment Approving PAGA Settlement.

9 The PAGA Settlement is on behalf of Avalos and all non-exempt California employees
10 who worked for Defendants Milagros Restaurant, LLC and Gregory Harold St. Claire
11 ("Defendants") from January 16, 2021, to January 16, 2023 (the "Aggrieved Employees").
12 Plaintiff alleges that Defendants are liable to him and other Aggrieved Employees for (1) failure
13 to compensate for all hours worked, including minimum and overtime wages; (2) failure to provide
14 accurate, itemized wage statements; (3) failure to pay all wages owed during and at the end of
15 employment; (4) failure to maintain accurate records; (5) failure to give rest breaks and meal
16 breaks; and (6) failure to reimburse for business expenses.

17 The Motion is based on this Notice of Motion and Motion, the attached Memorandum of
18 Points and Authorities, the declarations of Harout Messrelian, Orlando Perez Avalos, and Jacob
19 Kamenir, the PAGA Settlement, all papers and pleadings on file with the Court in this action, all
20 matters judicially noticeable, and on such oral and documentary evidence as may be presented in
21 connection with the hearing on the Motion.

22 Respectfully submitted,

23 MESSRELIAN LAW INC.

24 Dated: April 24, 2023

25 By: Maralle Messrelian
26 Harout Messrelian
27 Maralle Messrelian (Of Counsel)
28 Attorneys for Plaintiff, Orlando Perez Avalos

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DOES 1 to 25, inclusive,

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AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR APPROVAL
OF PAGA SETTLEMENT**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Orlando Perez Avalos (“Plaintiff” or “Avalos”) submits this memorandum of
4 points and authorities in support of his motion for approval of the PAGA Settlement Agreement
5 (the “Agreement” or “PAGA Settlement”)¹ for the civil penalties claim he brought against
6 Defendants Milagros Restaurant, LLC and Gregory Harold St. Claire (“Defendants”) under the
7 Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”).
8 Plaintiff brings this motion because Labor Code section 2699(l) of the PAGA requires Court-
9 approval of any civil penalties sought as part of a proposed settlement agreement. Through this
10 motion, Plaintiff respectfully requests for this Court to approve the PAGA Settlement.

11 **II. FACTUAL AND PROCEDURAL BACKGROUND**

12 Defendants own and operate Milagros restaurant in Redwood City, California. Plaintiff
13 first started working for Defendants as a bartender in or about April of 2021. Plaintiff’s
14 employment ended on or around September 24, 2021. At all times during his employment with
15 Defendants, Plaintiff was considered an hourly, non-exempt employee. HM, ¶ 5.

16 **A. Plaintiff’s Written Notice to the State of California**

17 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under the
18 Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). On
19 October 27, 2021, Plaintiff, on behalf of himself and Defendants’ other California non-exempt
20 hourly employees (hereafter collectively the “Aggrieved Employees”) gave written notice by
21 electronic service to the California Labor and Workforce Development Agency (“LWDA”) and
22 via certified mail to Defendants of the specific provisions of the California Labor Code alleged
23 to have been violated, including the facts and theories to support the alleged violations. HM, ¶ 6,
24 Ex. 3.

25 **B. Plaintiff’s Lawsuit**

26 On March 22, 2022, Plaintiff filed a lawsuit for his individual wage and hour violations,
27

28 ¹ The PAGA Settlement is attached as Exhibit (“Ex.”) 1 to the Declaration of Harout Messrelian
 (“HM”), which is submitted herewith under a separate cover.

1 retaliation, wrongful termination, and the PAGA claim in San Mateo County Superior Court (the
2 “Lawsuit”). HM, ¶ 7, Ex. 4. Regarding the PAGA claim (10th cause of action), Plaintiff asserted
3 on behalf of himself and the Aggrieved Employees that Defendants (1) failed to pay for all hours
4 worked, including but not limited to, minimum and overtime wages (California Labor Code
5 sections 510, 1194, 1197, 1197.1); (2) failed to provide all required timely and duty-free meal
6 and rest periods (California Labor Code sections 226.7 and 512); (3) failed to pay wages owed
7 every pay period (California Labor Code section 204); (4) failed to provide accurate, itemized
8 wage statements (California Labor Code section 226a); (5) failed to pay all wages owed at the
9 end of employment (California Labor section 203); (6) failed to maintain accurate records
10 (California Labor Code section 1174d); (7) failed to reimburse business expenses (California
11 Labor Code sections 2800 and 2802); (8) unlawful tip collection (California Labor Code sections
12 351 and 353); (9) failed to provide sick pay (California Labor Code sections 232 and 246); and
13 (10) failed to provide Worker’s Compensation coverage (California Labor Code section 3700.5).
14 *Id.*

15 In response to Plaintiff’s assertions, Defendants filed their answer on May 23, 2022. HM,
16 ¶ 8, Ex. 5. Defendants deny any liability or wrongdoing of any kind whatsoever associated with
17 the lawsuit. It is the desire of the parties to fully, finally, and forever compromise, and discharge
18 all claims known or unknown related to those alleged in Plaintiff’s lawsuit. HM, ¶ 9.

19 **C. Mediation With Eleanor Barr, Esq.**

20 The parties met and conferred and agreed that it may be in their mutual interests to discuss
21 Plaintiff’s allegations informally, rather than through litigation, and scheduled private mediation.
22 HM, ¶ 10.

23 On January 16, 2023, the parties attended a full day mediation session with Eleanor Barr,
24 Esq. At the mediation, the parties agreed to settle Plaintiff’s PAGA Claim for violation of Labor
25 Code § 2698, *et seq.* Before agreeing to the terms of the Settlement, the Parties engaged in
26 informal discovery regarding Defendants’ policies, practices, operations, time and payroll
27 information and other topics. In advance of mediation, Defendants produced Plaintiff’s personnel
28 file, including time and payroll data through data sampling. Moreover, prior to the mediation,

1 Defense counsel provided Plaintiff's counsel with information and documents relating to other
2 Aggrieved Employees, including time and payroll data. Through extensive arm's length
3 negotiations at the mediation and only after discovery and investigation were performed, the
4 Parties agreed to settlement terms. Now that the parties have finalized the PAGA Settlement,
5 Plaintiff submits it to this Court for approval. HM, ¶ 10.

6 **III. OVERVIEW OF SETTLEMENT**

7 **A. "Aggrieved Employees" Definition**

8 The Aggrieved Employees are all non-exempt California employees who worked for
9 Defendants Milagros Restaurant, LLC and Gregory Harold St. Claire ("Defendants") during the
10 PAGA Period. Agreement, ¶ 1.4. The PAGA Period means the period of time from January 16,
11 2021, to January 16, 2023. Agreement, ¶ 1.19.

12 **B. Monetary Terms Of The Settlement**

13 Defendants have agreed to pay a total of \$130,000.00 ("Gross Settlement Amount" or
14 "GSA") to settle the PAGA lawsuit. In consideration for the release of all claims of Plaintiff and
15 the Aggrieved Employees against Defendants (described more fully below), Defendants agreed
16 to pay \$130,000.00 toward the GSA from which all settlement payments for the Net Settlement
17 Amount, Court approved attorneys' fees and costs, and Settlement Administration Costs shall be
18 paid. Each Aggrieved Employee will receive a portion of the civil penalties on a pro-rata basis
19 calculated based on the total number of pay periods each Aggrieved Employee worked as a non-
20 exempt hourly employee in California during the PAGA Period. Agreement, ¶ 3.2.3.1. The GSA
21 will be divided as follows:

- 22 1. PAGA Counsel Fees Payment amounting to \$43,333.33 (1/3 of the GSA),
23 and PAGA Counsel Litigation Expenses Payment in the amount of
24 \$8,354.80 (the Agreement provides up to \$9,000);
- 25 2. Administration Expenses Payment of \$4,000.00 to Simpluris Inc.
26 ("Simpluris" or "Settlement Administrator") to administer the Settlement;
- 27 3. Approximately \$74,311.87 ("Net Settlement Fund"), divided as follows:
28 a. \$55,733.90 to the LWDA (75%); and
b. \$18,577.96 to the Aggrieved Employees (25%)

Agreement, ¶ 3.

C. Funding and Distribution of the Settlement

Within (30) calendar days after the Effective Date², Defendants shall deposit the Gross Settlement Amount with the Settlement Administrator. Agreement, ¶ 4.3.

Within fifteen (15) calendar days after the Effective Date, Defendants shall provide the Settlement Administrator with the Aggrieved Employee Data, which states each Aggrieved Employees' name, last-known mailing address, Social Security number, and number of PAGA Pay Period. Agreement, ¶¶ 1.5, 4.2.

The Settlement Administrator shall run the addresses of Aggrieved Employees through the United States Postal Service NCOA database to obtain current address information. Within 10 days after Defendants fund the Gross Settlement Amount, the Administrator will mail checks for all Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses Payment, the PAGA Counsel Fees Payment, and the PAGA Counsel Litigation Expenses Payment. Agreement, ¶ 4.4. The Settlement Administrator will issue each Aggrieved Employee a check for his or her share of the NSA along with the Notice of PAGA Settlement (Exhibit 2 to HM Declaration) by first-class United States mail, postage prepaid, with directions to the Postmaster to forward the Notice of PAGA Settlement and return all undeliverable Notices to the Settlement Administrator. The Settlement Administrator will skip trace return mail and re-mail within seven (7) days. Agreement, ¶ 4.4.1-4.4.2.

D. Individual PAGA Payments and Uncashed Checks

The settlement checks issued to Aggrieved Employees will remain valid for one hundred eighty (180) days. Any settlement checks remaining uncashed for more than one hundred eighty (180) days after issuance will be distributed to the California State Controller's Office Unclaimed Property Fund in the name of the Aggrieved Employee. Agreement, ¶ 4.4.1, 4.4.3. All settlement payments to Aggrieved Employees will be treated as miscellaneous income for which an IRS Form 1099 will be issued by the Settlement Administrator if required by law. Agreement, ¶

² "Effective Date" means the date by when both of the following have occurred: (a) the Court enters a Judgment on its Order Approving the PAGA Settlement and (b) the Judgment is final. The Judgment is final as of the latest of the following occurrences: (a) the day the Court enters Judgment. Agreement, ¶1.9.

1 3.2.3.2.

2 **E. Release of Claims For Aggrieved Employees Limited To Those That Could**
3 **Reasonably Arise From the Facts Alleged In The Action.**

4 Upon the Effective Date of this Settlement, Plaintiff, the State of California (including,
5 but not limited to, the LWDA), and the Aggrieved Employees will be deemed to have fully,
6 finally, and forever released, settled, compromised, relinquished, and discharged the Released
7 PAGA Claims with respect to Defendants and each of its former and present directors, officers,
8 shareholders, owners, members, attorneys, insurers, predecessors, successors, assigns,
9 subsidiaries, affiliates and employees. The Released PAGA Claims include:

10 all claims for PAGA penalties that were alleged, or reasonably could have been
11 alleged, based on the PAGA Period facts stated in the Operative Complaint and
12 the PAGA Notice.

13 Agreement, ¶¶ 1.25-1.26, 5.2.

14 **IV. ARGUMENT**

15 **A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT**

16 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(l)(2). The
17 Court necessarily has broad discretion in making the decision to approve or reject a settlement
18 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain
19 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of
20 penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2),
21 Although the PAGA does not set forth the particular standards against which a PAGA settlement
22 should be evaluated, the LWDA has provided guidance for approval that mirrors the standards
23 for evaluating class action settlements. HM, ¶ 12; *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*,
24 2017 U.S. Dist. LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA's
25 guidance, that approval of PAGA settlements may be had where the statutory requirements of
26 the PAGA are met and the terms of the settlement are fundamentally fair, reasonable, and
27 adequate). The established standards for evaluating whether class action settlements are fair,
28 reasonable, and adequate provide a familiar, useful framework for the Court to evaluate PAGA
settlements and have been adopted by several courts. *Id.*, *See Juarez v. Villafan*, 2017 U.S. Dist.
LEXIS 137205, *5 n.4 (E.D. Cal. 2017) (*citing Officers for Justice v. Civil Serv. Comm'n of City*

1 & Cty. of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms,*
2 *LLC*, 2017 U.S. Dist. LEXIS 137272, *8-9 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*,
3 150 F.3d 1011, 1026 (9th Cir. 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7,
4 n.4 (E.D. Cal. 2017); *Smith v. H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal.
5 2018); *Rincon v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal.
6 2018).

7 In making the determination whether a settlement taken as a whole is fair, reasonable,
8 and adequate, the Court should be careful to still give “proper deference to the private consensual
9 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual
10 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
11 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
12 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at 1027. The law favors
13 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
14 conserved by avoiding the time, expense, and rigors of formal litigation. *See Neary v. Regents*
15 *of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
16 1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

17 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**
18 **PAGA**

19 PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.
20 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as
21 follows: 75 percent to the LWDA, and the remaining 25 percent to the aggrieved employees. *See*
22 *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).
23 The parties’ Settlement so provides. HM, ¶ 13, Ex. 1. Second, the LWDA must be given notice
24 of the settlement so that it may be heard before the Court decides whether to grant approval. Cal.
25 Lab. Code § 2699(l)(2). Here, notice is being given to the LWDA concurrently with the filing of
26 this motion. HM, ¶¶ 13, 44, Ex. 14. As a result, Plaintiff has met all procedural statutory
27 requirements for settling a PAGA action.

28

1 **C. THIS COURT SHOULD APPROVE THE PAGA SETTLEMENT BECAUSE**
2 **IT IS FAIR, REASONABLE AND ADEQUATE**

3 To make its determination that the PAGA settlement is fair, reasonable, and adequate, the
4 Court may consider several factors, including:

5 the strength of the Plaintiff's case, the risk, expense, complexity and
6 likely duration of further litigation, the risk of maintaining class
7 action status through trial, the amount offered in settlement, the
8 extent of discovery completed and the stage of the proceedings, and
9 the experience and views of counsel.

10 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS
11 137205, *5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, *8-9; *Gutilla*, 2017 U.S. Dist. LEXIS
12 41655, *7, n.4; *Smith*, 2018 U.S. Dist. LEXIS 67192, *6; *Rincon*, 2018 U.S. Dist. LEXIS 22886,
13 *6. However, this Court should begin its analysis with a presumption that the proposed
14 settlement is fair. "A presumption of fairness exists where: (1) the settlement is reached through
15 arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
16 court to act intelligently; (3) counsel is experienced in similar litigation" *Dunk*, 48 Cal.
17 App. 4th at 1802.

18 The PAGA Settlement warrants a presumption of fairness for several reasons: (1) The
19 parties reached the Settlement through arm's-length bargaining with the aid of a respected
20 mediator; (2) The parties conducted sufficient investigation and discovery to allow Counsel and
21 the Court to act intelligently. Plaintiff requested and Defendants provided the number Aggrieved
22 Employees, the total number of pay periods during the PAGA Period, all policies in effect during
23 the PAGA Period, and a sampling of time records; and (3) Counsel for the Parties are experienced
24 with PAGA cases. HM, ¶ 14. Moreover, neither Plaintiff nor Plaintiff's Counsel have any
25 conflicts of interest with the absent Aggrieved Employees and there are no issues of
26 ascertainability. HM, ¶ 14. For the reasons discussed below, this Court should approve the PAGA
27 Settlement.

28 **1. The PAGA Settlement Is A Result of Extensive, Non-Collusive Arm's Length**
 Negotiations Between The Parties.

 The PAGA Settlement was reached only after litigation and arms' length negotiations
 between experienced attorneys, which included a full day mediation with Eleanor Barr, Esq. At

1 all times, the negotiations were adversarial and contentious, although still professional in nature.
2 HM, ¶ 10.

3 Counsel for the Parties have further investigated the applicable law as applied to the facts
4 discovered regarding Plaintiff's claims, the defenses thereto, and the Labor Code violations
5 claimed by Plaintiff. Plaintiff's counsel is experienced in prosecuting PAGA lawsuits. Counsel
6 for the Defendants are experienced in defending PAGA cases. Based on the parties' own
7 independent investigations and evaluations, the parties and their respective counsel are of the
8 opinion that the Settlement for the consideration and on the terms set forth in the Agreement are
9 fair, reasonable and adequate and are in the best interests of Plaintiff, the Aggrieved Employees,
10 the State, and Defendants in light of all known facts and circumstances and the risks inherent in
11 litigation, especially in this post pandemic era, where businesses are struggling to remain afloat,
12 much less prosper and make a large profit. HM, ¶ 11.

13 **2. The Extent of Investigation and Discovery Completed Provided Ample**
14 **Information to Enter into an Informed and Reasonable Settlement**

15 Plaintiff considered various sources of information in the lead-up to and during the
16 mediation of January 16, 2023 that enabled him to achieve the PAGA Settlement at issue. HM, ¶

17 15. Among other things, Plaintiff considered the following:

- 18 • Defendants produced and Plaintiff's counsel reviewed Plaintiff's personnel file.
- 19 • Plaintiff's counsel requested that Defendants provide any and all policies regarding
20 overtime and double-time wages, off the clock work, expense reimbursement, meal
21 periods, rest breaks, meal period waivers and agreements, compensation plans, and
22 complaints about working conditions in effect during the relevant time period beginning
23 in January of 2021. Defendants produced those policies as part of their employee
24 handbook.
- 25 • Plaintiff's counsel requested that Defendants provide the total number of employees,
26 paychecks, and the pay cycles during the relevant period. Defendants provided the
27 answers to each of these questions.
- 28 • Plaintiff's counsel requested a 20% sample of time and payroll records for the relevant
time period. Defendants provided a sampling of time and pay records for 38 of their
employees. This represents 20% of the total employees that Defendants employed during
the PAGA Period based on data available at the time of mediation.

- Plaintiff's counsel then retained a professional data analyst, James Toney, to examine the records and determine the meal period violation rates, if there was any pay discrepancy in timesheet hours versus paid hours, and if there was any rounding/time shaving issues. Plaintiff is prepared to provide the Court with the data analysis for *in camera* inspection upon its request.
- Plaintiff's counsel analyzed the state of caselaw on PAGA claims, meal and rest break violations, claims for "off the clock" work and business expense reimbursement, especially as it relates to "manageability" arguments brought up by the defense.

HM, ¶ 15.

3. The Settlement Is Fair and Reasonable Based on the Risks and Costs of Further Litigation

Before mediation, Defendants disclosed that for the period of January 16, 2021 to January 16, 2023, there were approximately 186 potential Aggrieved Employees and 3,708 pay periods. Based on this information, Plaintiff's counsel prepared an estimate of the maximum possible civil penalties under the PAGA. HM, ¶ 16. The maximum possible civil penalties under the PAGA is the total number of pay periods with one or more violations multiplied by the maximum possible civil penalty amount per pay period. Under the civil penalty formulas applicable under PAGA, Plaintiff's counsel estimated a maximum possible exposure of approximately \$2,874,000 for civil penalties as follows:

TYPE OF VIOLATION	LABOR CODE SECTION VIOLATED/ CIVIL PENALTY STATUTE	INITIAL PENALTY AMOUNT/PAY PERIOD	PAY PERIODS	CIVIL PENALTIES
Unpaid Minimum Wages	1197/1197.1	\$100	3708	\$370,800.00
Unpaid Overtime	510/558	\$50	3708	\$185,400.00
Inaccurate Wage Statements	226/226.3	\$250	3708	\$927,000.00
Inaccurate Pay Records	1174/1174.5	\$500	186 ees	\$93,000.00
Untimely Wages	201-204/210, 2699(f)(2)	\$100	3708	\$370,800.00
Unreimbursed Expenses	2802/2699(f)(2)	\$100	3708	\$370,800.00
Unprovided Meal Breaks	512/558	\$50	3708	\$185,400.00
Unprovided Rest Breaks	1198/2699(f)(2)	\$100	3708	\$370,800.00
MAXIMUM CIVIL PENALTIES				\$2,874,000.00

1 The potential for recovery of this maximum possible civil penalties depends on circumstances
2 that are highly unlikely and not in line with reality. It would depend on the Court stacking the
3 maximum recoverable civil penalties for unpaid wages violations, inaccurate wage statements
4 violations, inaccurate pay records violations, untimely wages violations, unreimbursed expenses
5 violations, unprovided meal breaks violations, and unprovided rest breaks violations, per pay
6 period for all 3,708 pay periods for all 186 potential Aggrieved Employees during the PAGA
7 Period. Plaintiff's counsel is unaware of any California State court decision awarding a plaintiff
8 and the other Aggrieved Employees he represents multiple civil penalties for the same pay period
9 under different Labor Code provisions. As such, one of the risks Plaintiff faces is that the Court
10 would refuse to "stack" civil penalties arising under the various Labor Code statutes. Plaintiff's
11 counsel had to substantially discount the value of these claims in the settlement negotiations for
12 this and a variety of other reasons. At best, Plaintiff could hope to recover one penalty for each
13 pay period (regardless of the different Labor Code violations that potentially occurred for the
14 same employee, during the same pay periods). Assuming that Plaintiff could prove that there was
15 at least one violation of a Labor Code section per pay period, Plaintiff could expect to recover
16 approximately \$175,450.00 (3,708 pay periods x \$50 = \$185,400.00). HM, ¶ 16.

17 The PAGA action brought forth in this case by Plaintiff had two main substantive
18 arguments: 1) unprovided meal and rest periods, 2) failure to reimburse business expenses for
19 the purchase of work uniforms. The other arguments for PAGA penalties, including inaccurate
20 paystubs, not paying all wages owed every pay period and at the end of employment, and not
21 keeping accurate time records, are all derivative claims that have no value on their own, and
22 especially when the substantive labor code violations, like business expense reimbursement is
23 being used as a predicate. *See Naranjo v. Spectrum Security Services, Inc.*, 40 Cal App5th 444.
24 HM, ¶ 17.

25 There are risks to Plaintiff's meal and rest period claims. Out of the 4,044 total shifts
26 recorded in the sample, only 23.6% of the shifts had a late, short, or no meal period recorded.
27 This required a significant discount during settlement negotiations. HM, ¶ 18.

28 Moreover, Defendants contend that, to establish a violation for missed meal periods, a

1 plaintiff must do more than show that a meal break was not taken. *Brinker Restaurant Corp. v.*
2 *Superior Court* (2012) 53 Cal.4th 1004. So long as an employer provides employees with a
3 “reasonable opportunity” to take a duty-free meal period, it has no further duty to “police meal
4 breaks and ensure no work thereafter is performed.” *Id.* at 1040-41. Instead, a plaintiff must show
5 the employer impeded, discouraged, or prohibited the employee from taking a proper break, or
6 otherwise failed to release the employee of all control. *Id.* “Thus, the crucial issue with regard to
7 the meal break claim is the reason that a particular employee may have failed to take a meal
8 break.” *Washington v. Joe’s Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. Determining by
9 a review of Defendants’ time records the exact reasons why a meal period appears to be short or
10 late would be difficult and pinpointing those days in which Plaintiff and the Aggrieved
11 Employees worked during their meal periods will be a challenge. Additionally, Defendants
12 provided evidence that they provide employees with the opportunity to take meal and rest breaks.
13 Milagros’ Employee Handbook contains legally compliant meal period and rest break policies.
14 HM, ¶ 18.

15 Defendants contend they provided their non-exempt employees with the opportunity to
16 take rest periods in accordance with California law, and, accordingly, Plaintiff’s rest break claim
17 has no support. Additionally, there are other risks to Plaintiff’s rest period claim. Employers are
18 not required to record rest periods and such periods are paid. Unlike meal periods, where there
19 are often records showing whether an employee clocked out or not, there is no such evidence to
20 prove a missed rest period or that the employer refused to authorize and permit one. HM, ¶ 19.

21 There are risks to Plaintiff’s claim for unreimbursed expenses. There is a risk that the
22 Court may consider Plaintiff’s claims as to Defendants’ alleged failure to indemnify for business
23 expenses to be individual in nature. Plaintiff alleges that Defendants did not reimburse him or
24 the other Aggrieved Employees for their purchase of work uniforms. During mediation,
25 Defendants provided evidence that employees were only required to wear black shirts, black
26 pants and black shoes. California’s business reimbursement law does not require an employer to
27 reimburse its employees for the cost of items that are generally usable, including black pants and
28 black shoes because such items do not qualify as a “necessary expenditure.” (*Townley v. BJ’s*

1 *Restaurants, Inc.* (2019) 37 Cal.App.5th 179.) Uniforms are only subject to reimbursement if the
2 items are not “usual and generally usable” in the applicable industry. As such, Plaintiff’s counsel
3 had to significantly discount the value of this claim during settlement negotiations. HM, ¶ 20.

4 Additionally, PAGA states a court has discretion to award a lesser amount than the
5 maximum penalty. See Lab. Code § 2699(e)(2) (“...a court may award a lesser amount than the
6 maximum civil penalty amount specified by this part if, based on the facts and circumstances of
7 the particular case, to do otherwise would result in an award that is unjust, arbitrary and
8 oppressive, or confiscatory.”); see also *Thurman v. Bayshore Transit Management, Inc.* (2012)
9 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the Court
10 could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff’s evidence
11 of willful and intentional conduct. HM, ¶ 21. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504
12 (“*Carrington*”) illustrates this. In that case, the Court of Appeal affirmed a trial court’s heavily
13 discounted award of only \$5 per violation because it was within the Court’s discretion to
14 significantly reduce PAGA penalties even when there is a finding that a violation of the
15 California Labor Code occurred. The plaintiff in *Carrington* had requested penalties in excess of
16 \$70 million and was successful in proving the PAGA claim during a bench trial. However, the
17 trial court reduced the total award after trial to only \$150,000 (30,000 violations x \$5) and stated
18 that this reduction was warranted because imposing the maximum penalty would be “unjust,
19 arbitrary, and oppressive”, based on Starbucks’s “good faith attempts” to comply with meal break
20 obligations and because the Court found the violations were minimal. Applying the same formula
21 here and assuming there was one violation during each pay period, the award of civil penalties
22 could not exceed \$18,540.00 in PAGA penalties (3,708 violations x \$5). As such, this Settlement
23 is a great result based solely on the risk the Court chooses to apply the *Carrington* formula.
24 Defendants have also posed formidable defenses to the Labor Code claims underlying Plaintiff’s
25 allegations. Thus, the chance of Plaintiff recovering a higher amount than the Gross Settlement
26 Amount is uncertain. HM, ¶ 21.

27 Further, although, class certification is not required for a PAGA claim, Defendant could
28 contend that Plaintiff should show that the PAGA claims are manageable, especially as it relates

1 to the business expense reimbursement claim for uniforms and cell phones, which will invariably
2 be an individualized assessment. As such, Defendant could also convince the Court to dismiss
3 the claims due to unmanageability. In *Ortiz v. CVS Caremark Corp.*, the court dismissed a PAGA
4 claim because it was unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal. 2014). The Ortiz
5 court cited the “multitude of individualized assessments” that case would have required in
6 ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed PAGA
7 claims where, as here, there are a large number of allegedly aggrieved individuals whose claims
8 require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3
9 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see*
10 *also Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at *2–4 (E.D. Cal. 2014) (bifurcating
11 trial of plaintiff’s claim from representative claims: “in light of the number of potential aggrieved
12 employees, judicial economy favors deferring the representative portion of the PAGA claim”);
13 *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015). HM, ¶ 22.

14 Furthermore, on September 9, 2021, the California Court of Appeal issued a significant
15 decision in *Wesson v. Staples the Office Superstore, LLC*, No. B302988, 2021 Cal. App. LEXIS
16 743 (Ct. App. Sep. 9, 2021) (“*Wesson*”), holding that courts have authority to ensure that PAGA
17 claims are manageable, and that courts may limit or strike unmanageable PAGA claims.³ HM,
18 ¶ 23.

19 The Parties further recognize that the issues presented in the representative PAGA claim
20 are likely only to be resolved with extensive and costly pretrial and trial proceedings, and that
21 further litigation will cause inconvenience, distraction, disruption, delay, and expense
22 disproportionate to the maximum potential benefits to the Aggrieved Employees and Plaintiff
23 from continued litigation, especially in the post pandemic era where further and extensive
24 litigation may cause businesses to shut down, resulting in no monetary compensation to Plaintiff,
25 Plaintiff’s attorneys, other Aggrieved Employees, and the State of California. HM, ¶ 24.

26 The settlement of the representative PAGA claim involves monetary relief to all

27 ³ The *Wesson* decision marks the first time an appellate court has weighed in on whether PAGA claims
28 must be manageable.

1 Aggrieved Employees, Plaintiff, his attorneys, and the State of California. The Settlement is
2 reasonable given the uncertainties this lawsuit entails. It is also reasonable given the structure
3 and purpose of the PAGA, since the PAGA is not a restitution statute. Rather, it is essentially a
4 punishment statute. It provides for civil penalties only. Within the PAGA framework he is bound
5 by, Plaintiff, considering the evidence he faced, achieved a great result for the employees
6 concerned. Furthermore, any employees who are dissatisfied with the amount they received in
7 civil penalties can pursue any damages they believe they are owed by the Defendants. The
8 Settlement does not require them to opt out to do so. HM, ¶ 25.

9 Furthermore, Plaintiff recognizes that continued litigation presents significant risks that
10 support a significant downward departure from Plaintiff's estimated civil penalties amount. In
11 view of the risks, the Settlement represents a fair, adequate, and reasonable compromise amount
12 for these claims and is in the best interest of Plaintiff and Aggrieved Employees and thus,
13 warrants approval. *See Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3,
14 2014) 2014 WL 2465049, * 3. The PAGA settlement and its terms are fair, just, reasonable,
15 adequate, and equitable to Defendants, Plaintiff, and the State, especially in light of the current
16 economic climate, and are the product of good faith, and informed arms-length negotiations
17 between the Parties consistent with public policy and fully comply with applicable provisions of
18 law. HM, ¶ 26.

19 As such, the settlement of PAGA penalties in the gross sum of \$130,000.00, of which
20 75% of the net amount after attorney's fees, litigation costs, and settlement administration costs
21 (\$55,733.90) will be paid to the LWDA and 25% (\$18,577.96) will be distributed to the
22 Aggrieved Employees, is reasonable and appropriate under the circumstances. HM, ¶ 27.

23 **4. Each Aggrieved Employee Will Be Paid Based on the Potential Extent of His or**
24 **Her Injury Compared to Other Aggrieved Employees**

25 Each Aggrieved Employee will receive a portion of the civil penalties on a pro-rata basis
26 depending on the number of pay periods Defendants employed them for during the PAGA Period.
27 Agreement, ¶ 3.2.3.1. With a total of 186 Aggrieved Employees, the average estimated Individual
28 PAGA Payment for each Aggrieved Employee is approximately \$99.88 (\$18,577.96 (25% of the

1 estimated Net Settlement of \$74,311.87) / 186 Aggrieved Employees). This is a great result given
2 the uncertainties this lawsuit entails. HM, ¶ 28-29.

3 **5. Counsel for the Parties Are Experienced in Similar Litigation**

4 Plaintiff's counsel has considerable experience in wage and hour litigation and is
5 qualified to evaluate the PAGA claims, the value of settlement versus moving forward with
6 litigation, and viability of possible affirmative defenses. Similarly, Defendants' counsel, Helene
7 A. Simvoulakis-Panos and Servando Sandoval of PAHL & MCCAY, APLC, have vast
8 experience in handling employment matters and wage and hour litigation. See HM, ¶¶ 2, 39-40,
9 Exs. 8-9.

10 **6. The Proposed Attorneys' Fees and Costs Are Fair, Adequate, and Reasonable**
11 **and Should Be Approved.**

12 Of the \$130,000.00 allocated towards the GSA, Plaintiff's counsel requests \$43,333.33
13 (1/3 of the GSA) in attorney's fees and \$8,354.80 in litigation expenses, which is fair and
14 reasonable. HM, ¶ 34.

15 It is an accepted practice in wage and hour class action settlements to award attorneys'
16 fees to Plaintiff's counsel based on a percentage of the total settlement value agreed upon by the
17 parties. California courts have long recognized that an appropriate method for awarding
18 attorneys' fees in class actions is to award a percentage of the common fund. (*Serrano v. Priest*
19 (1977) 20 Cal.3d 25, 48-49 ["when a number of persons are entitled in common to a specific
20 fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation
21 or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the
22 fund"]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Lealao v. Beneficial*
23 *California, Inc.* (2000) 82 Cal.App.4th 19, 26-30.)

24 California courts have the discretion to employ (or decline to employ) a "lodestar cross-
25 check" on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)
26 1 Cal. 5th 480, 505 ("*Laffitte*"). However, the California Supreme Court in *Laffitte* has now made
27 clear that this cross-check is not required and approved one-third of the class action settlement
28

1 fund as reasonable attorney fees as “[t]he percentage of the fund method survives in California
2 class action cases...” *Id.* at 574. As other courts have acknowledged since *Laffitte*, “California
3 courts routinely award attorneys’ fees of one-third of the common fund.” *Lopez v. Mgmt. &*
4 *Training Corp.*, 2020 U.S. Dist. LEXIS 70029. The *Lopez* court explained that it need not “engage
5 in a full-blown lodestar analysis when the primary basis remains the percentage method...” The
6 lodestar calculation is merely a “useful perspective on the reasonableness of a given percentage
7 award.” *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638 (“Trial courts ‘also
8 retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
9 reasonableness of a requested percentage fee.’”⁴ *Id.* (citing *Laffitte*)).

10 “[R]egardless whether the percentage method or the lodestar method is used, fee awards
11 in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008)
12 162 Cal.App.4th 43, 66, fn.11 (“*Chavez*”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d
13 373, 379 (“*Pacific*”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.*
14 (9th Cir. 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount).) This is
15 also consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA
16 settlements. HM, ¶ 34.

17 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding
18 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s
19 fee request of \$43,333.33 (1/3 of GSA) is fair and reasonable based on their lodestar as cross-
20 checked against the percentage of the recovery. HM, ¶¶ 35-37, Ex. 6. Plaintiff’s counsel’s
21 previous experience in litigating wage and hour class actions and the caliber of opposing counsel
22 also support the reasonableness of the fee request. HM, ¶¶ 39-40, Exs. 8-9. The award of
23 attorneys’ fees sought is also justified by the contingency nature of the attorney-client
24 relationship, the risks of non-payment and non-reimbursement, the delay in payment and cost
25 reimbursement, and the great results Plaintiff’s Counsel has achieved for the Aggrieved

26 _____
27 ⁴ The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a)) does not apply to
28 unpublished decisions from the lower federal courts. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn.
18 [“Citing unpublished federal opinions does not violate our rules.”].) Like published decisions of the lower federal
courts, unpublished decisions are not binding on us even on questions of federal law, but they are persuasive
authority. (*Western Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 989, fn. 6.)

1 Employees. HM, ¶ 41.

2 In addition, Plaintiff's Counsel incurred substantial costs, \$8,354.80 to date, including the
3 costs of a mediator, to aid in the representation of the Aggrieved Employees. HM, ¶ 38, Ex. 7. As
4 the evidence submitted herewith shows, all of these costs are documented and reasonably
5 incurred. *Id.* Accordingly, they warrant the Court's approval.

6 **7. The Proposed Settlement Administration Costs Are Fair and Reasonable and**
7 **Should Be Approved.**

8 With regard to the settlement administration costs provision, it is reasonable. Before
9 agreeing to Simpluris Inc., the Parties sought and reviewed bids from other reputable third-party
10 administrators which provided higher bids. HM, ¶¶ 42-43, Exs. 10-13. *See generally* Declaration
11 of Jacob Kamenir. Thus, the settlement administration costs provision should be given approval.

12 **V. CONCLUSION**

13 For the reasons stated above, this Court should grant the Plaintiff' Motion in its entirety
14 and adopt the proposed order submitted concurrently herewith.

15
16 Respectfully submitted,

17 MESSRELIAN LAW INC.

18
19 Dated: April 24, 2023

20 By: Maralle Messrelia
21 Harout Messrelia
22 Maralle Messrelia (Of Counsel)
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25
26
27
28