

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

Norman B. Blumenthal (SBN #068687)

Kyle R. Nordrehaug (SBN #205975)

Aparajit Bhowmik (SBN #248066)

Nicholas J. De Blouw (SBN #280922)

2255 Calle Clara

La Jolla, CA 92037

Telephone: (858) 551-1223

Facsimile: (858) 551-1232

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

ANGELA THOMPSON and PENELOPE
PANKEY, on behalf of the State of
California, as private attorneys general,

Plaintiffs,

vs.

FASTAFF, LLC, a Limited Liability
Company; and DOES 1 through 50,
inclusive,

Defendants.

Case No. **22CV395000**

Consolidated with *Pankey v. Fastaff, LLC*
(PAGA) 22CV408861

**NOTICE OF MOTION AND MOTION
TO APPROVE PAGA SETTLEMENT;
and,**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION**

Hearing Date: July 3, 2024

Hearing Time: 1:30 p.m.

Judge: Hon. Theodore C. Zayner
Dept.: 19

Action Filed: March 4, 2022
Trial Date: Not set

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

2 YOU ARE HEREBY NOTIFIED THAT at 1:30 p.m. on July 3, 2024, or as soon
3 thereafter as the matter can be heard, in Department 19 of the above entitled Court before the
4 Honorable Theodore C. Zayner, Plaintiffs Angela Thompson and Penelope Pankey
5 (“Plaintiffs”) will and hereby do move for an order approving the settlement of the Private
6 Attorneys General Act (PAGA) claims alleged against Defendant Fastaff, LLC
7 (“Defendant”) in accordance with Labor Code §2699(*l*). The proposed settlement is set forth
8 in the accompanying PAGA Settlement Agreement (“Agreement”).

9 This Motion will be based on this notice, the accompanying points and authorities, the
10 Declaration of Kyle Nordrehaug, the Agreement, and the complete files and records in this
11 action. The Labor and Workforce Development Agency (LWDA) has been served with this
12 motion and the Agreement as set forth in the accompanying proof of service.

13 Respectfully submitted,

14 Dated: May 17, 2024

**BLUMENTHAL NORDREHAUG
BHOWMIK DE BLOUW LLP**

16 By: /s/ Kyle Nordrehaug
17 Kyle R. Nordrehaug

18 *Attorneys for Plaintiffs*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Angela Thompson and Penelope Pankey (“Plaintiffs”) reached a settlement
4 of the Labor Code Private Attorneys General Act, Cal. Labor Code §2699, *et seq.*
5 (“PAGA”) claims asserted in this action against Defendant Fastaff, LLC (“Defendant”)
6 (collectively, the “Parties”), which provides for a “Gross PAGA Settlement Amount”
7 payment in the amount of \$450,000.00. In accordance with California Labor Code §2699(l),
8 Plaintiffs now ask this Court to review and approve the settlement of Plaintiffs’ PAGA
9 claims.¹ This is only a settlement of the PAGA claims for civil penalties and is not a class
10 settlement and does not release the individual wage claims, if any, of the affected employees
11 other than the Plaintiffs themselves. Cal. Labor Code § 2699(g)(1); *Iskanian v. CLS*
12 *Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 182
13 (2019) (unpaid wages are not recoverable under PAGA).

14 The PAGA settlement is set forth in the accompanying PAGA Settlement Agreement
15 (“Settlement” or “Agreement”), a true and correct copy of the Agreement setting forth the
16 terms for the settlement is attached as Exhibit #1 to the concurrently-filed Declaration of
17 Kyle Nordrehaug. Capitalized terms in this motion shall have the same meaning as defined
18 in the Agreement. The LWDA received notice of this Settlement and this motion as set forth
19 in the accompanying proof of service.

20 A proposed order confirming review and approval of the PAGA Settlement is
21 concurrently submitted with this motion.

22 **II. RELEVANT FACTS**

23 Defendant is a healthcare staffing services company that employed Plaintiff
24 Thompson as a travel nurse on assignments in California including in 2021 and employed
25 Plaintiff Pankey as a travel nurse on assignments in California in 2021. On October 22,
26 2021, Thompson submitted a PAGA Notice letter to the LWDA providing notice of her
27

28 ¹ Section 2699(l)(2) provides as follows: “The superior court shall review and approve any settlement of any civil action pursuant to this part.”

1 intent to seek civil penalties as provided by PAGA for Labor Code violations alleged in the
2 PAGA Notice. (Declaration of Kyle Nordrehaug, at ¶3). The 65-day notice period for the
3 LWDA to notify of its intent to investigate expired on December 26, 2021. On March 4,
4 2022, Plaintiff Thompson filed a Representative Action Complaint in this Court against
5 Defendant alleging a single cause of action for recovery of civil penalties for violation of the
6 PAGA [Labor Code §§ 2698, *et seq.*] (Case No. 22CV395000) (“*Thompson Action*”).

7 Plaintiffs submitted an amended PAGA Notice to the LWDA on October 18, 2022,
8 which included Plaintiff Pankey seeking authorization from the LWDA to pursue an action
9 for civil penalties as provided by the PAGA for the Labor Code violations alleged in the
10 original and amended PAGA Notice. The 65-day notice period for the LWDA to notify of its
11 intent to investigate expired on December 22, 2022. On December 23, 2022, Plaintiff Pankey
12 filed a Representative Action Complaint in this Court against Defendant alleging a single
13 cause of action for recovery of civil penalties for Violation of the PAGA [Labor Code §§
14 2698, *et seq.*] (Case No. 22CV408861) (“*Pankey Action*”). The *Thompson Action* and
15 *Pankey Action* were consolidated on March 14, 2023 under case number 22CV395000.

16 The Parties agreed to mediate with Jeffrey Krivis, an experienced mediator
17 knowledgeable of PAGA and the wage and hour claims at issue in this action. Prior to the
18 mediation, Plaintiffs conducted significant investigation and discovery of the facts and law.
19 Defendant produced numerous documents relating to its policies, practices, and procedures
20 regarding paying non-exempt employees on assignment in California for all hours worked,
21 overtime, meal and rest period policies, payroll and operations policies, and more. Defendant
22 also produced sufficient records and data for Plaintiffs to determine the number of PAGA
23 Settlement Employees and the number of pay periods in the PAGA Period and to evaluate
24 the merits of their claims. The Parties agree that the above-described investigation and
25 evaluation, as well as the information exchanged during the settlement negotiations, are more
26 than sufficient to assess the merits of the Parties’ positions and to compromise the issues on a
27 fair and equitable basis. (Declaration of Kyle Nordrehaug, at ¶3).

1 The Parties engaged in a full-day mediation session with Mediator Krivis on June 6,
2 2023. Plaintiffs' theories of PAGA liability asserted at mediation consisted of the following:
3 Plaintiffs contended that Defendant failed to provide Plaintiffs and other PAGA Settlement
4 Employees with compliant meal and rest breaks. For example, Plaintiffs contended that the
5 time punch records reflect a meal break violation rate of 80.9% of shifts greater than 6 hours
6 but only 29.9% of the meal break violations had a premium paid. Plaintiffs also contended
7 Defendant had a rest period policy that was facially invalid. When read with the meal period
8 policy that explicitly relieved employees of all duties during meal breaks, Defendant's rest
9 period policy failed to prescribe full relief. Plaintiffs contended that Defendant's failure to
10 prescribe full relief during rest periods could only be interpreted to indicate on-duty
11 requirements during rest periods which should be duty-free. Plaintiffs further contended
12 that, in practice, they were indeed expected by their supervisors to be at their beck and call
13 during rest breaks. Plaintiffs also contended they were not paid for work done off the clock.
14 For example, Plaintiff Thompson alleged she checked the medical charts with the latest
15 information on her numerous patients in order to provide the best possible medical care, yet
16 this work was required to be done off the clock and before clocking in as she was required to
17 start treating patients the very moment that her shift started. Plaintiff Thompson also alleged
18 additional off the clock work in that she was required to change into her scrubs before
19 clocking in and was required to input information about her patients and their care into
20 various modules after her shift ended. Plaintiffs also contended they were required to use
21 their personal cell phones for work-related purposes, such as speaking to their supervisors
22 and providing updates on patients, but no reimbursement was provided by Defendant for
23 such cell phone expenses or for home office expenses when work was done from home.
24 (Declaration of Kyle Nordrehaug, at ¶3).

25 Defendant denied these contentions on various factual and legal grounds. Defendant
26 contended that its clear policy requires travel nurses to record all hours they work so that
27 both the travel nurse and Defendant will be paid all amounts to which they are entitled.
28 Indeed, Defendant contended that as a staffing company, it has no incentive to require its

1 travel nurses (or anyone else) to work off the clock. To the contrary, because Defendant bills
2 its clients and earns its profit based on hours worked by its travelers on assignments,
3 Defendant's intent as well as its legal obligation is for all hours worked by travelers to be
4 fully and accurately recorded. Defendant also asserted that its travel nurses on assignment in
5 California worked at client hospitals and other healthcare facilities, where they were
6 supervised by non-Fastaff managers of the client facility, and subject to each client's unique
7 policies. Defendant contended that at all relevant times it had a compliant California meal
8 and rest policy specifically for its travel nurse employees. Defendant also contended that it
9 provided travel nurses with timesheets to report non-compliant meal and rest periods, if any.
10 *See Rivera v. Ryder Integrated Logistics, Inc.*, No. CV 22-267-GW-EX 2022 WL 18337695,
11 at *13 ((C.D. Cal. 2022) (granting summary judgment on meal period claim because
12 defendants had a compliant policy as well as a form for employees to report situations where
13 they were unable to take timely breaks). Further, Defendant asserted that the travel nurses
14 on assignment in California—including both Thompson and Pankey—agreed to waive their
15 right to one of two meal periods in accordance with the special meal period waiver available
16 under the applicable IWC Wage Order for employees in the health care industry. *See Gerard*
17 *v. Orange Coast Mem'l Med. Ctr.*, 430 P.3d 1226 (Cal. 2018) (upholding meal period
18 waivers signed by healthcare employees based upon provisions of the Wage Order). Given
19 these waivers, Defendant contended that Plaintiffs' assumptions as to meal break violation
20 rates had no basis in fact or law. Defendant also contended that it did not require Plaintiffs
21 and other travel nurses to use their personal cell phones to perform their nursing work (or
22 any other work) during their California assignments.

23 Through arms-length negotiations with the assistance of the mediator, the Parties
24 reached an agreement to settle the PAGA claims in this action leading to the signing of a
25 Memorandum of Understanding memorializing the settlement.² (Declaration of Kyle
26 Nordrehaug, at ¶3).

28 ² In addition to the Gross PAGA Settlement Amount, Defendant has agreed to separately settle
Plaintiffs' individual claims pursuant to separate confidential Individual Settlement Agreements

1 The settlement was negotiated in light of all known facts and circumstances and the
2 uncertainty associated with litigation – including the risk of Plaintiffs not being able to
3 prevail on their legal theories, , the difficulty of proving violations as to all or most
4 employees at issue in an efficient trial, the merits of Defendant’s potential defenses, and the
5 significant delay and potential appellate issues inherent to litigation – and was reached after
6 extensive arm’s length negotiations, with the assistance of Mediator Krivis. (Declaration of
7 Kyle Nordrehaug, at ¶3).

8 **III. TERMS OF THE PAGA SETTLEMENT**

9 The PAGA settlement is subject to Court approval consistent with Labor Code
10 §2699(1)(2). (Agreement at ¶ 6.1). The Agreement negotiated by the Parties provides for a
11 “Gross PAGA Settlement Amount” payment in the amount of \$450,000 to resolve the
12 Released PAGA Claims (the “Gross PAGA Settlement Amount”). From this Gross PAGA
13 Settlement Amount of \$450,000, there is a deduction of attorneys’ fees, subject to Court
14 approval (“PAGA Counsel Fees Payment”) in the amount of \$149,999.00 (which is one-third
15 of the PAGA Settlement), reimbursement of incurred costs (“PAGA Counsel Litigation
16 Expenses Payment”) in an amount not to exceed \$25,000, and Settlement Administration
17 Costs (“Administration Expenses Payment”) not to exceed \$14,000. (Agreement at ¶¶ 3.2.1-
18 3.2.2).³ After these deductions, the amount remaining is the “PAGA Payment”, which is
19 estimated to be no less than \$261,001.

21 (“Individual Settlement”) (Settlement Agreement at ¶ 2.5). The individual claims were not at issue
22 in this action and exist independent and apart from the PAGA claims at issue before the Court. *See*
23 *Kim v. Reins Int’l Cal., Inc.*, 9 Cal. 5th 73, 80 (2020) (the “[s]ettlement of individual claims does not
24 strip an PAGA Settlement Employee of standing, as the state’s authorized representative, to pursue
25 PAGA remedies” nor resolve the PAGA claims.). PAGA Counsel are not receiving any attorneys’
fees or other compensation in connection with the Individual Settlements.

26 ³ If the Court approves a PAGA Counsel Fees Payment and/or a PAGA Counsel Litigation Expenses
27 Payment less than the amounts requested, the Administrator will allocate the remainder of these
28 amounts to the PAGA Payment. (Settlement Agreement at ¶ 3.2.1). To the extent the Administration
Expenses are less, or the Court approves payment less than \$14,000, the Administrator will allocate
the remainder of this amount to the PAGA Payment (*Id.* at ¶ 3.2.2).

Seventy-five percent (75%) of the PAGA Payment (no less than \$195,750.75) will be paid to the LWDA (the “LWDA PAGA Payment”) and the remaining twenty-five percent (25%) of the PAGA Payment (no less than \$65,250.25) will be paid to the PAGA Settlement Employees (Agreement at ¶ 3.2.3).⁴ This 75/25 allocation is required by Labor Code §2699 as explained by *ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019).

The Individual PAGA Payment for each PAGA Settlement Employee shall be based on the number of pay periods each PAGA Settlement Employee worked during the PAGA Period as a PAGA Settlement Employee, as a percentage of the total pay periods worked by all PAGA Settlement Employees during the PAGA Period.⁵ The PAGA Period is the time period from December 29, 2020 to August 6, 2023. (Agreement at ¶ 1.20).

For mediation, Defendant represented that there were approximately 1,725 PAGA Settlement Employees who collectively worked approximately 19,282 pay periods from the beginning of the PAGA Period through May 11, 2023. (Agreement at ¶ 4.1).

Upon entry of final judgment, the Released Parties shall be entitled to a release from the State of California and the PAGA Settlement Employees for any “Released PAGA Claims” only, which means all claims for civil penalties, attorneys’ fees, and costs recoverable under PAGA that were alleged, or reasonably could have been alleged, based on the facts stated in the operative First Amended Consolidated Complaint, and/or the PAGA Notice letters submitted by Plaintiffs to the LWDA, including any amendments thereto, during the PAGA Period for alleged violations of the California Labor Code and applicable Wage Order(s), including for (a) failure to pay minimum wages, (b) failure to pay overtime

⁴ “PAGA Settlement Employees” means all individuals who are or previously were employed by Defendant and who worked in California at a client or clients of Defendant, including through a managed service provider, in a position classified as a non-exempt employee at any time during the PAGA Period. The PAGA Period is the period from December 29, 2020 to August 6, 2023. (Settlement Agreement at ¶¶ 1.20, 1.21).

⁵ See Settlement Agreement at ¶ 3.2.3 (“The Administrator will calculate each Individual PAGA Payment by (a) dividing the amount of the PAGA Settlement Employees’ 25% share of PAGA Payment by the total number of PAGA Period Pay Periods worked by all PAGA Settlement Employees during the PAGA Period and (b) multiplying the result by each PAGA Settlement Employee’s PAGA Period Pay Periods.”)

1 wages, including at the correct regular rate of pay, (c) failure to provide meal periods and
2 associated premium pay, (d) failure to provide rest periods and associated premium pay,
3 (e) failure to provide accurate itemized wage statements, (f) failure to timely pay wages
4 during employment, (g) failure to timely pay wages upon separation of employment,
5 (h) failure to pay sick pay wages at the regular rate of pay, (i) unlawful deductions from
6 employee wages, and (j) expense reimbursement violations. (Agreement at ¶¶ 5.1, 5.2). The
7 Released PAGA Claims expressly excludes all other claims, including claims for vested
8 benefits, wrongful termination, violation of the Fair Employment and Housing Act,
9 unemployment insurance, disability, social security, workers' compensation, and California
10 non-PAGA class claims, and PAGA claims outside of the PAGA Period. (*Id.*)

11 Within fourteen (14) days after Defendant funds the Gross PAGA Settlement
12 Amount, the Administrator will mail checks for all Individual PAGA Payments, the LWDA
13 PAGA Payment, the Administration Expenses Payment, the PAGA Counsel Fees Payment,
14 and the PAGA Counsel Litigation Expenses Payment. (Agreement at ¶ 4.4).⁶ Checks will
15 remain negotiable for one hundred eighty (180) days. (*Id.* at ¶ 4.4.1) For any PAGA
16 Settlement Employee whose Individual PAGA Payment check is uncashed and cancelled
17 after the void date, the Administrator shall transmit the funds represented by such checks to
18 the State of California Unclaimed Property Fund in the name of the individual who failed to
19 cash their check, or if required by the Court, the Parties will agree to a mutually acceptable
20 *cy pres* beneficiary in accordance with California law. (*Id.* at ¶ 4.4.3).

21 Pursuant to California Labor Code Section 2699(1), Plaintiffs are providing a copy of
22 the Agreement and this motion to the LWDA concurrently with the filing of this motion for
23 settlement approval as set forth in the accompanying proof of service in compliance with
24 Labor Code section 2699(1). In addition, Plaintiffs shall submit to the LWDA a copy of the
25 Court's judgment and order approving the Agreement within ten (10) days after entry of
26 judgment or order.

27
28 ⁶ Disbursement of the PAGA Counsel Fees Payment and the PAGA Counsel Litigation Expenses
Payment shall not precede disbursement of the Individual PAGA Payments. (*Id.*).

1 **IV. THE PARTIES HAVE SETTLED THE PAGA CLAIMS**

2 The claims before this Court are solely the representative claims under PAGA on
3 behalf of the State of California and allegedly aggrieved employees of Defendant in
4 California for civil penalties pursuant to the PAGA. The parties have agreed to settle this
5 PAGA action in its entirety after investigation and an arm's length mediation session.
6 (Declaration of Kyle Nordrehaug, at ¶4.) The settlement is intended to fully and finally
7 resolve the Released PAGA Claims asserted by Plaintiffs on behalf of the State of California.
8 This is only a settlement of the PAGA claims for civil penalties and is not a class settlement
9 and does not release the individual claims, if any, of the PAGA Settlement Employees, other
10 than any claims under PAGA. This settlement does not release any claim that is not a PAGA
11 claim.⁷ A PAGA Counsel Fees Payment equal to one-third of the Gross PAGA Settlement
12 amount (\$149,999.00) and a PAGA Counsel Litigation Expenses Payment in an amount not
13 to exceed \$25,000, subject to this Court's approval, will be paid to PAGA Counsel as part of
14 the settlement in accordance with California Labor Code § 2699(g)(1), as set forth in the
15 Agreement.⁸ Lastly, payment to the Administrator in an amount not to exceed \$14,000 to
16 perform the administrative duties to distribute the settlement money shall also be paid.
17 (Declaration of Kyle Nordrehaug, at ¶¶ 4-5.)

18 **V. PLAINTIFFS REQUEST REVIEW AND APPROVAL OF THE SETTLEMENT**
19 **OF THE PAGA CLAIM**

20 Labor Code § 2699(l) requires that the Court "shall review and approve any
21 settlement of any civil [PAGA] action filed pursuant to this part. The proposed settlement
22 shall be submitted to the agency at the same time that it is submitted to the court." While
23 PAGA actions are not class actions, the PAGA approval standard has class action-like
24 components for approval. As a leading appellate court opinion explains, the plain language

25 ⁷ As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th at 196: "Nonparty employees are bound
26 by the judgment in an action under the PAGA, but only with respect to recovery of civil penalties."

27 ⁸ As set forth in the accompanying Declaration of Kyle Nordrehaug, PAGA Counsel incurred costs
28 in the current amount of \$25,585.71, which is more than the cost allocation in the Settlement
Agreement. See Declaration of Nordrehaug at ¶ 9. Subject to this Court's approval, PAGA Counsel
will only recover \$25,000.

1 of PAGA is consistent with “a standard requiring the trial court to determine independently
2 whether a PAGA settlement is fair and reasonable. . . .” *Moniz v. Adecco USA, Inc.*, 72 Cal.
3 App. 5th 56, 76 (2021). Relevant factors for a PAGA settlement include the “strength of
4 plaintiffs’ case, the risk, expense, complexity and likely duration of further litigation . . . the
5 amount offered in settlement, the extent of discovery completed and the stage of the
6 proceedings, the experience and views of counsel, the presence of a governmental
7 participant. . . .” *Id.* The *Moniz* court held that “a trial court should evaluate a PAGA
8 settlement to determine whether it is fair, reasonable, and adequate in view of PAGA’s
9 purposes to remediate present labor law violations, deter future ones, and to maximize
10 enforcement of state labor laws.” *Id.* at 77; see also *Basili v. Allegiant Air, LLC*, 2019
11 U.S. Dist. LEXIS 228250, at *8 (C.D. Cal. July 1, 2019). A PAGA settlement should be
12 approved when “a PAGA plaintiff has adequately represented the state’s interests, and hence
13 the public interest.” *Moniz*, 72 Cal. App. 5th at 89. Consequently, the Parties respectfully
14 ask the Court to review and approve the settlement of the PAGA claims pursuant to the
15 Parties’ Agreement, including the Gross PAGA Settlement Amount to be paid as part of the
16 settlement, for the reasons set forth below.

16 **A. The Gross PAGA Settlement Amount To Be Paid Is Fair And Reasonable**

17 The Gross PAGA Settlement Amount is fair and reasonable and therefore should be
18 approved. Here, the Gross PAGA Settlement Amount of \$450,000 represents a gross per pay
19 period recovery of \$23, which is more than other PAGA settlements approved by courts in
20 California. (Declaration of Nordrehaug, at ¶6.)

21 This PAGA Settlement amount compares favorably to the estimated amount of PAGA
22 civil penalties. With the assistance of an expert, Plaintiffs calculated that the maximum
23 amount of statutory PAGA civil penalties was potentially \$1,928,000 based on 19,282 pay
24 periods applicable to the PAGA Settlement Employees during the PAGA Period.^{9 10}

26 ⁹ Stacking is where more than one civil penalty is imposed in a pay period for the same conduct.
27 The valuation of \$1,928,000 is the civil penalty amount without stacking. If stacking is permitted,
28 then the valuation increases with each additional penalty added to each pay period. Plaintiffs,
however, are not aware of any PAGA award which permitted stacking and in the cases cited herein,
only one penalty per pay period was assessed.

1 (Declaration of Nordrehaug, at ¶6.) Importantly, however, these calculations assumed that
2 Plaintiffs could prove violations every pay period for every employee, and they were
3 performed at the maximum statutory rate for the penalties, when in fact, it is likely that any
4 penalties awarded would be at a lower rate. California Labor Code Section 2699(e)(1)
5 permits a Court to award a lesser amount than the maximum civil penalty if based on the
6 facts and circumstances to do otherwise would result in an award that is “unjust, arbitrary
7 and oppressive or confiscatory.”

8 In *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal
9 affirmed a judgment after trial which only provided for a PAGA penalty of \$5 per pay
10 period. Therefore, at a trial of this action, any PAGA penalties awarded could be
11 significantly less than Plaintiffs’ calculation even if Plaintiffs prevailed on the PAGA claim
12 as to every employee and pay period. If the amount of \$5 per pay period from *Carrington v.*
13 *Starbucks* is used, the potential recovery of civil penalties would be only \$96,410 based on
14 the number of pay periods during the PAGA Period through May 11, 2023, which is far less
15 than this settlement provides.

16 Under PAGA, Courts have considerable discretion to reduce the penalty award. In
17 *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal. Aug. 12, 2011), a federal
18 court reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%, because
19 the court found maximum penalties “unjust” because the employees had suffered no injuries.
20 Some trial courts have actually awarded no civil penalties, even when Labor Code violations
21 are established. See *Makabi v. Gedalia*, 2016 Cal. App. Unpub. 1489, *5-7 (2nd Dist. Ct. of
22 App. Mar. 6, 2016) (no PAGA penalties were awarded by the Los Angeles County Superior
23 Court as to certain defendants) (unpublished decision); *In re Taco Bell Wage & Hour*
24 *Actions*, 2016 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 8, 2016) (PAGA penalties
25 denied after trial).

27 ¹⁰ This is the number of pay periods represented by Defendant through May 11, 2023. Plaintiffs
28 expect this number to increase slightly to account for pay periods worked by the PAGA Settlement
Employees through the end of the PAGA Period, i.e., August 6, 2023.

1 In order to recover any PAGA penalties, Plaintiffs would be required at trial to prove
2 each of the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*,
3 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) (“Given the statutory language [of
4 PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven
5 suffered a violation of the Labor Code by the defendant.”). Here, Plaintiffs would need to
6 prove that each PAGA Settlement Employee suffered a violation for each period the
7 employee worked in relation to meal or rest period violations, failure to pay minimum
8 wages, failure to pay overtime and sick pay wages, failure to provide accurate itemized wage
9 statements, failure to reimburse employees for required expenses and failure to pay wages
10 when due.

11 As set forth above, Defendant maintains that it has compliant policies, that Plaintiffs
12 and the PAGA Settlement Employees were properly compensated, and that it did not violate
13 the Labor Code under any of Plaintiffs’ theories. Accordingly, Defendant disputes and
14 denies Plaintiffs’ allegations and claims asserted in both the PAGA Notice and the Operative
15 Complaint, which are resolved by the Agreement. Defendant asserted additional defenses to
16 the PAGA claim, not only as to liability but also as to the amount of any civil penalties that
17 could be awarded if Plaintiffs prevailed. Even if Plaintiffs were to prevail on any of the
18 claims, Defendant could argue that no penalties prior to the PAGA notification should be
19 awarded because the violations were not intentional, and at least one superior court has so
20 ruled. These defenses present a risk to the PAGA claims and the potential that some or all
21 of the PAGA penalties sought may not be awarded. (Declaration of Nordrehaug, at ¶7.)

22 Given Defendant’s potential defenses to the violations at issue and the risks and costs
23 of continued litigation, Plaintiffs and their attorneys believe that the PAGA Settlement is fair
24 and reasonable. (Declaration of Nordrehaug, at ¶7.) See, e.g., *Hartley v. On My Own, Inc.*,
25 2020 WL 5017608, at *4 (E.D. Cal. Aug. 25, 2020) (approving settlement with PAGA
26 penalty of 3.47% of maximum potential penalties); *Ramirez v. Benito Valley Farms, LLC*,
27 No. 16-cv-4708-LHK, 2017 U.S. Dist. LEXIS 137272, at *14-15 (N.D. Cal. Aug. 25 2017)
28 (approving settlement paying PAGA penalties of less than 4.5% of maximum penalties).

1 Defendant has similarly concluded that it is desirable that the action is settled in the
2 manner and upon the terms and conditions set forth in the Agreement in order to avoid
3 further expense, inconvenience and distraction of further legal proceedings, as well as the
4 uncertainty of litigation. As evidenced by the Agreement, Defendant has determined that it
5 is desirable and beneficial to put to rest the claims in this action and Defendant agrees that
6 the PAGA Settlement is fair, reasonable, and adequate.

7 PAGA Counsel have significant experience litigating wage and hour claims including
8 claims for PAGA penalties, and the PAGA Settlement here is similar to or greater than
9 similar settlements that courts have approved. (Declaration of Nordrehaug, at ¶¶ 7, 10.) The
10 PAGA Settlement, along with the other terms of the proposed settlement, were negotiated by
11 experienced counsel at arm's length with the assistance of a private mediator, Jeffrey Krivis.
12 (Declaration of Nordrehaug, at ¶7.)

13 As set forth in the accompanying proof of service, the LWDA has been provided
14 notice of this motion and the Agreement. The decision of the LWDA to accept the PAGA
15 Settlement and not oppose the motion should be given considerable weight. This is not a
16 situation where the Court needs to be concerned about the rights of absent employees as in a
17 class settlement, as this PAGA-only settlement does not release the individual claims of
18 absent employees other than PAGA claims, and the LWDA is a sophisticated government
19 entity that is more than able to look out for its own rights.

20 **B. The Remaining Settlement Terms Are Fair And Reasonable**

21 Although PAGA requires that a court approve the proposed PAGA settlement, Labor
22 Code § 2699(1) does not require that a court approve any other elements of the proposed
23 settlement. Because there are no class allegations for which Plaintiffs seek approval, the
24 approval provisions applicable to class settlements under Cal. Code Civil Proc. §382 do not
25 apply. Accordingly, the Court only needs to approve the settlement of the civil penalties
26 sought in the PAGA claim. As explained above, the allocation of settlement monies adheres
27 to the requirements of Labor Code § 2699(i) and is fair and reasonable. Additionally, as
28

1 explained below, the settlement terms providing for attorneys' fees and costs are also fair
2 and reasonable.

3 **VI. THE ATTORNEYS' FEES AND COSTS ARE FAIR AND REASONABLE**

4 PAGA Counsel seek approval of attorneys' fees from the PAGA settlement in the
5 amount of \$149,999 representing one-third of the \$450,000 Gross PAGA Settlement
6 Amount. PAGA does not impose any requirements for reviewing attorneys' fees to be
7 awarded pursuant to a settlement, and Plaintiffs submit that the payment of attorneys' fees
8 and costs in this settlement is a matter of contract as payment for a contingent representation.
9 Nevertheless, should this Court review the requested attorneys' fees and costs, it is clear that
10 these amounts are reasonable.

11 First, the requested fees are justified by the result achieved. PAGA Counsel
12 negotiated a recovery of \$450,000, and this result justifies the requested fees equal to one
13 third of this recovery. This percentage is within the standard contingent recovery percentage
14 of one-third, and this percentage was expressly approved as reasonable by the Supreme
15 Court. *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016); *see also Amaro v.*
16 *Anaheim Arena Mgmt., LLC*, 69 Cal. App. 5th 521, 545 (2021) (recognizing that “fee
17 awards in class actions average around one-third of the recovery” regardless of “whether
18 the percentage method or the lodestar method is used.” (quoting *Chavez v. Netflix, Inc.*, 162
19 Cal.App.4th 43, 66, fn. 11 (2008))).

20 Second, the fee award is justified by the work performed and contributions to the
21 case. As detailed in the accompanying Declaration of Kyle Nordrehaug at ¶8, the fee award
22 is less than PAGA Counsel's current lodestar of \$195,496.25, which means the requested
23 award is less than the lodestar incurred by PAGA Counsel (i.e a negative multiplier).

24 Generally, the Ninth Circuit and California Courts award positive multipliers between
25 2 to 4 times the lodestar to reward counsel for accepting the contingent risks of the litigation
26 or obtaining good results. *See, e.g., Laffitte*, 1 Cal. 5th at 506 (approving one-third fee award
27 with multiplier between 2.03 and 2.13); *Pellegrino v. Robert Half Intern., Inc.*, 182
28 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0 are often applied and

1 affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254
2 (2001) (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa*
3 *Capital Corp.*, 8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which
4 was a 2.52 multiplier of lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D.
5 Cal. 2014) (awarding one-third of fund, which was a 2.58 multiplier of lodestar); *Hopkins v.*
6 *Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6,
7 2013) (approving fee award that represented a multiplier of 2.76 as falling within the
8 “majority” range for risk multipliers). Here, where the fee award is less than the lodestar,
9 representing a negative multiplier, there can be no dispute that the fee award is reasonable.¹¹

10 Finally, as to litigation expenses, PAGA Counsel seek approval of litigation expenses
11 in the total amount of \$25,000, which is less than the actual costs incurred by PAGA Counsel
12 which currently total \$25,585.71. These expenses are documented in the accompanying
13 Declaration of Nordrehaug at ¶9.

14 VII. CONCLUSION

15 Based on the foregoing, Plaintiffs respectfully request this Court approve the PAGA
16 settlement as set forth in the Agreement and enter the proposed order and judgment
17 concurrently submitted.

18 Dated: May 17, 2024

**BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP**

By: /s/ Kyle Nordrehaug

Kyle Nordrehaug
Attorney for Plaintiffs

27 ¹¹ “The lodestar amount is presumptively the reasonable fee amount.” *Topete v. Ramos Furniture*,
28 2018 U.S. Dist. LEXIS 142033 (E.D. Cal. 2018), citing *Van Gerwen v. Guarantee Mut. Life Co.*,
214 F. 3d 1041, 1045 (9th Cir. 2000).