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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE**

ENMANUEL DE JESUS LOPEZ TORRES,
an individual, on behalf of the State of
California, as a private attorney general,

PLAINTIFF,

v.

MOUNTAIN VIEW COUNTRY CLUB,
INC.; and DOES 1 thru 50, inclusive,

DEFENDANTS.

Case No. CVRI2105882

[Case Assigned for All Purposes to Hon.
Harold W. Hopp in Dept. 10]

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

*[Filed concurrently with; Declarations of
Liane Katzenstein LyJodey Lawrence of
Phoenix Class Action Settlement
Administration Solutions, and Plaintiff
Enmanuel De Jesus Lopez Torres in Support of
Plaintiff's Motion for Approval of
Representative Action Settlement; [Proposed]
Order]*

Date: May 9, 2024

Time: 8:30 A.M.

Dept.: 10

Complaint Filed: October 21, 2021

FAC Filed: March 3, 2022

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on May 9, 2024 at 8:30 A.M. in Department 10 of the
3 above-entitled court, Plaintiff ENMANUEL DE JESUS LOPEZ TORRES will move the Court for
4 an Order Granting Approval of Representative Action Settlement.

5 The Motion will be made on the grounds that the proposed Settlement is fair, adequate,
6 reasonable, and in the best interest of Plaintiff, all aggrieved employees, and the Parties.

7 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
8 and Authorities, the Declaration of Liane Katzenstein Ly, the Joint Stipulation of PAGA
9 Settlement (Exhibit "1" to the concurrently filed Ly Declaration), all other papers and records on
10 file in this action, and on such oral and documentary evidence as may be presented at the hearing
11 on this Motion.

12
13 DATED: April 17, 2024

KINGSLEY SZAMET & LY

14
15 By: 

16 Liane Katzenstein Ly
17 Attorneys for Plaintiff ENMANUEL DE JESUS
18 LOPEZ TORRES and all aggrieved employees
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Enmanuel De Jesus Lopez Torres (“Plaintiff”) submits this Memorandum of Points and Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiff and Defendant MOUNTAIN VIEW COUNTRY CLUB, INC. (“Defendant”) (collectively, the “Parties”) have reached a proposed settlement documented in the Joint Stipulation of PAGA Settlement (“Settlement” or “Settlement Agreement”), attached to the concurrently-filed declaration of Liane Katzenstein Ly.

This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699, et seq. (“PAGA”). The Gross Settlement Amount is \$189,000.00. After deduction of attorney’s fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration costs as discussed in the Settlement 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 \$100,686.90, with (or 75%) going to the LWDA and (or 25%) distributed to the aggrieved employees.¹

Plaintiff requests 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, Plaintiff requests that the Court: (1) enter an order approving the Settlement; and (2) and enter a Final Judgement thereon.²

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Litigation Overview and Procedural History

Plaintiff initially filed a putative class action Complaint for Damages on October 21, 2021, against Defendant in the San Diego County Superior Court, Case No. 37-2021-00044910-CU-OE - CTL entitled *ENMANUEL DE JESUS LOPEZ TORRES, an individual, on behalf of himself and others*

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 Plaintiff’s 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 Plaintiff’s 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. (Ly Decl. ¶83.)

1 similarly situated, PLAINTIFF v. MOUNTAIN VIEW COUNTRY CLUB, INC.; and DOES 1 thru 50,
2 inclusive, DEFENDANTS., alleging that Defendant: 1) failed to provide meal breaks pursuant to Labor
3 Code §§ 226.7 and 512; 2) failed to provide rest breaks pursuant to Labor Code §226.7; 3) failed to
4 reimburse expenses pursuant to Labor Code § 2802; 4) violated Labor Code§226(a) by failing to
5 provide accurate itemized wage statements; 5) is liable for penalties pursuant to Labor Code § 203;
6 and 6) violated Business & Professions Code § 17200. (Ly Decl. ¶5.)

7 On November 18, 2021, Plaintiff’s counsel learned of an arbitration agreement signed by
8 Plaintiff that included a class action waiver. (Ly Decl. ¶6.) In light of the arbitration agreement,
9 Plaintiff filed a First Amended Representative Action Complaint (“FAC”) to proceed in state court,
10 alleging a single representative cause of action for penalties pursuant to Labor Code §2699, et seq.
11 (hereafter, “PAGA”) seeking penalties based on Defendant’s alleged violations of Labor Code §§ 201,
12 202-203, 204, 201, 226(a), 226.7, 512, and 2802. (Ly Decl. ¶7.) Plaintiff brings this representative
13 action pursuant to PAGA on behalf of a group of aggrieved employees defined as:

14 “all persons who are employed or have been employed as an hourly employee by
15 MOUNTAIN VIEW COUNTRY CLUB, INC., in the State of California who worked
16 one or more pay periods since one (1) year prior to the date of Plaintiff’s notice letter
17 to the Labor & Workforce Development Agency (‘LWDA’) and continuing to the
18 present plus any additional time during which the statutes of limitation for the causes
19 of action herein were tolled pursuant to Emergency Rule 9 of the California Rules of
20 Court, the ‘Emergency Rules Relates to COVID’ (“aggrieved employees”). (Hereafter,
21 the “Action”).

22 On December 13, 2021, the Superior Court of San Diego ordered the action to be transferred
23 to Riverside County Superior Court. Plaintiff filed the First Amended Complaint in Riverside County
24 Superior Court on March 3, 2022, entitled ENMANUEL DE JESUS LOPEZ TORRES, an individual,
25 on behalf of the State of California, as a private attorney general, PLAINTIFF, v. MOUNTAIN VIEW
26 COUNTRY CLUB, INC.; and DOES 1 thru 50, inclusive, DEFENDANTS, Case No. CVRI2105882.
27 Thereafter, after the U.S. Supreme Court issued its decision in *Viking River Cruises River Cruises, Inc.*
28 *v. Moriana* (2022), 596 U.S. 639, Defendant moved to compel arbitration of Plaintiff’s remaining
PAGA claim. Plaintiff opposed, and the Court agreed and issued an order denying Defendant’s motion
to compel on April 24, 2023.

The Parties have begun formal discovery but have since decided to focus on mediation.
Defendant has informally produced all time and pay data for aggrieved employees.

On January 29, 2024, the Parties participated in a mediation before Henry J. Bongiovi of Bongiovi Mediation. (Ly Decl. ¶8.) Shortly thereafter, the Parties formalized the Joint Stipulation of PAGA Settlement. (Ly Decl. ¶9.)

B. The Discovery Process

After the matter was at issue, the Parties engaged in fact discovery and exchange pertinent information to understand the nature of the allegations and the scope of potential liability. (Ly Decl. ¶10.)

Thereafter, the Parties engaged in good faith, arms-length negotiations with Defendant concerning possible resolution of the claims asserted in the Action. (Ly Decl. ¶11.) The Parties negotiated the terms and conditions of the Settlement and now present the agreed-upon Settlement to the Court for Approval. (Ly Decl. ¶12.)

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 plaintiff is 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)

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 it engaged in any knowing or intentional conduct giving rise to liability, and expressly deny that any employees suffered harm.

///

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.

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 settlement should go into effect.

IV. THE SETTLEMENT

Defendant will pay the total sum of \$189,000.00 in full and final settlement of the PAGA claims alleged. (Ly Decl. ¶13., Exhibit 1, ¶15.) Per the Settlement Agreement, the amount is allocated as follows:

Gross Settlement Amount:	\$189,000.00	
PAGA Counsel Fees Payment:	\$63,000.00	
PAGA Counsel Litigation Expenses Payment:	\$20,000.00 ⁴	
Administrator Expenses Payment:	\$4,500.00	
Named Plaintiff Enhancement:	\$7,500.00	
PAGA Penalties:	\$100,686.90 (\$75,515.18 to the LWDA; \$25,171.73 to remain in the Net Settlement Amount)	

(Ly Decl. ¶14., Exhibit 1, ¶44(d).)

Each aggrieved employee shall receive a pro-rata portion of the remaining amount in penalties based by dividing the amount of the aggrieved employees’ 25% share of PAGA Penalties by the total

⁴ The Settlement Agreement provided for counsel to receive cost reimbursement up to \$20,000.00. However, counsel’s final costs come to \$12,770.38. (Ex. 1, ¶9.) Plaintiff anticipates incurring an additional \$600 in future costs associated with filing this motion, appearing at the hearing, etc. so requests costs of \$13,370.38. The extra will remain in the net settlement fund, causing the net amount for distribution to the LWDA and Aggrieved Employees to be slightly higher than contemplated in the settlement agreement. (Ex. 1, ¶44(d).)

number of Pay Periods worked by all aggrieved employees during the PAGA Period⁵, and then multiplying the result by each aggrieved employee’s Pay Periods. (Ly Decl. ¶15., Exhibit 1, ¶44(d).)

For settlement purposes, the Aggrieved Employees are defined as: “all current and former hourly-paid, non-exempt employees who were employed by Defendant in the state of California at any during the PAGA Period.” (“PAGA Member”). (Ly Decl. ¶16, Exhibit 1, ¶7.)

The Parties agreed to a check-mailed settlement. Under the Agreement, every PAGA Member will receive a settlement check. Any checks issued by the Settlement Administrator to PAGA Members will be negotiable for at least one hundred eighty (180) calendar days. If a PAGA Member does not cash his or her PAGA Payment Share check within 180 days, the uncashed funds, subject to Court approval, shall be distributed to the Controller of the State of California to be held pursuant to the Unclaimed Property Law, California Civil Code § 1500, *et. seq.* for the benefit of those PAGA Members who did not cash their checks until such time that they claim their property. The Parties agree that this disposition results in no “unpaid residue” under California Civil Procedure Code § 384, as the entire Net Settlement Amount will be paid out to the LWDA and PAGA Members, whether or not all PAGA Members cash their settlement checks. (Ly Decl. ¶17, Exhibit 1, ¶41.)

V. ARGUMENT

A. The Court Should Approve the Settlement Agreement

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 Settlement Agreement (Exhibit “1” to the Ly Declaration) for Court approval.

B. The Risks of Moving Forward with Plaintiff’s PAGA Claim

To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation and discount taken follows. (Ly Decl. ¶19.) Plaintiff believed that Defendant may persuasively

⁵ The PAGA Period means the period from October 21, 2020 to January 29, 2024. (Ly Decl. ¶16, Exhibit 1, ¶6.)

1 argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether
2 waive any penalties under PAGA. (Ly Decl. ¶20.) Pursuant to Labor Code §226.3, the Labor
3 Commissioner has the discretion to “decide not to penalize an employer for a first violation when
4 that violation was due to a clerical error or inadvertent mistake.” (Ly Decl. ¶21.) And in
5 accordance with PAGA, the court in a PAGA action has the same discretion “to assess a civil
6 penalty” that the Labor Commissioner would have, as well as complete discretion to “award a
7 lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts
8 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
9 arbitrary and oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)). (Ly Decl. ¶22.)

10 Prior to the Parties’ mediation, Defendant informally produced a copy of its wage and hour
11 policies together with a complete set of time and pay records for the putative class for the timeframe
12 of October 20, 2020 to November 23, 2023. (Ly Decl. ¶23.) Defendant’s policies, as stated in its
13 employee handbook, were facially compliant with California meal break requirements. (Ly Decl.
14 ¶24.) Defendant’s time and pay records tend to demonstrate that members of the putative class
15 regularly clocked out for their meal breaks and also show that Defendant regularly paid meal
16 premiums to its non-exempt employees during the PAGA period when those employees were unable
17 to take a meal break. (Ly Decl. ¶25.)

18 Plaintiff’s Counsel anticipated that, at trial, Counsel for Defendant would submit these
19 policies, time and pay records to support a potentially persuasive argument that: (1) the PAGA
20 Members were properly paid and/or reimbursed in accordance with Defendant’s lawful policies and
21 practices, and that any alleged failure to compensate the PAGA Members was the result of
22 inadvertence and clerical error; (2) the PAGA Members were provided with the opportunity to take
23 meal and rest breaks in compliance with California law; (3) until this Action was filed, no employees
24 had compliance about any alleged failure to pay wages, provide meal and/or rest breaks, reimburse
25 expenses, issue accurate itemized wage statements; (4) none of Defendant’s employees suffered any
26 harm from or actual damage as a result of the conduct that forms the basis for Plaintiff’s allegations.
27 (Ly Decl. ¶26.) All of which, Counsel for Defendant would argue, should mitigate in factor of
28 significantly reducing or waiving any PAGA penalties. (*Id.*)

1 While Plaintiff disagrees that this analysis is legal correct or persuasive, PAGA Counsel had
2 to consider the foregoing facts and arguments and how they might impact any judgment ultimately
3 awarded to PAGA Members if the Court were persuaded by them. (Ly Decl. ¶27.) The potentially
4 probative effect of the policies, time and pay records offered by Defendant in support of these
5 arguments at mediation was a substantial factor in the Parties arriving at the agreed-upon settlement,
6 and was material to that determination. (Ly Decl. ¶28.)

7 **1. The Risks Associated with the Meal Period Claim**

8 Under California Labor Code section 512 and IWC Wage Order No. 5, no employer shall
9 employ any person for a work period of more than five hours without providing a meal period of not
10 less than thirty minutes. The first meal period must be permitted to commence no later than after five
11 hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker Rest. Corp. v.*
12 *Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be permitted to
13 commence no later than after ten hours of work, or the start of the eleventh hour of work (10.0 hours
14 on the clock). (*Ibid.*) The California Supreme Court succinctly described Section 512's mandate:
15 "Employers must afford employees uninterrupted half-hour periods in which they are relieved of any
16 duty or employer control and are free to come and go as they please." (*Brinker Rest. Corp. v. Superior*
17 *Court* (2012) 53 Cal.4th 1004, 1037.)

18 Plaintiff contends that he and the aggrieved employees consistently worked over five (5) hours
19 in one day without being provided a compliant thirty (30) minute uninterrupted meal break and not
20 being compensated one (1) hour of pay at their regular rate of compensation for each workday that a
21 meal period was not provided or provided after five (5) hours. (Ly Decl. ¶29.) Because Plaintiff was
22 a maintenance worker, he often had heavy workloads that were urgent or emergencies, and he would
23 need to finish up before he could move on to either take a break, or move onto the next job. (Ly Decl.
24 ¶30.) Thus, Plaintiff estimates he had late meal periods at least 3 times per month.

25 Defendant argued that it maintained an accurate meal period policy and paid penalties when
26 breaks were missed and prior to mediation, its counsel provided time and pay records that tend to
27 support these arguments. If the Court were persuaded by these arguments, the potential penalties to be
28 recovered for meal break violations would be substantially mitigated, if not altogether eliminated.

2. The Risks Associated with the Rest Period Claim

As with meal periods, Defendant maintained a consistent policy of failing to provide Plaintiff and the aggrieved employees with rest breaks of not less than ten (10) minutes per four (4) hour work period or major fraction thereof. 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 work day, 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 has also clarified what steps an employer must take to make rest breaks available to its employees:

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.)

Therefore, 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, § 11050, subd. 12(B).

Here, Plaintiff contends that there were multiple instances throughout the month when his rest breaks were interrupted. (Ly Decl. ¶31.) Plaintiff also contends that he was never told to take a rest break by a supervisor. (Ly Decl. ¶32.) Defendant argued that it maintained an accurate rest period policy and paid penalties when breaks were missed. Defendant further argued that its

1 supervisors and employees in each department are expected to testify that employees were trained
2 to take rest breaks and did actually take uninterrupted rest breaks in compliance with California
3 law. If the Court were persuaded by these arguments, the potential penalties to be recovered for rest
4 break violations would be substantially mitigated, if not altogether eliminated.

5 **3. The Risks Associated with the Reimbursement Claim**

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

9 Here, Plaintiff alleges that Defendant has failed to reimburse Plaintiff and the aggrieved
10 employees for the cost of using their personal cell phones for business related purposes. Plaintiff
11 contends that Defendant required that Plaintiff and the aggrieved employees be available by cell
12 phone and answer/use their cell phones while working as necessary to perform their job duties.
13 (Ly Decl. ¶33.) Plaintiff concedes that towards the end of Plaintiff’s employment, Defendant
14 provided radios for communication, but the radios often did not work and Plaintiff had to resort to
15 using his personal cell phone anyway. (Ly Decl. ¶34.) Defendant alleges that the radios were
16 sufficient to communicate and the use of personal cell phones was not necessary but completely
17 voluntary. If the Court were persuaded by these arguments, the potential penalties to be recovered for
18 unreimbursed expenses would be substantially mitigated, if not altogether eliminated.

19 **4. The Risks Associated with the Wage Statement Claims**

20 California Labor Code §226(a) requires Defendant to provide its employees with an
21 accurate, itemized written wage statement that shows, in relevant part, total hours worked by the
22 employee, the name and address of the legal entity that is the employer, and all applicable hourly
23 rates and the corresponding number of hours worked.

24 Plaintiff alleges that as a result of the claims above, Defendant issued wage statements that
25 violate Labor Code §§ 226(a)(2), and (9). (Ly Decl. ¶35.) Labor Code § 226(a) specifically
26 requires that the employer shall, semimonthly or at the time of each payment of wages, furnish
27 each of his or her employees, an accurate itemized statement in writing showing all applicable
28 hourly rates in effect during the pay period and the corresponding number of hours worked at each

hourly rate by the employee. This is a derivative claim. (*Id.*) Thus, if the Court were persuaded by Defendants primary arguments opposing penalties for meal breaks, rest periods and unreimbursed expenses, the potential penalties to be recovered for this derivative claim would also be substantially mitigated, if not altogether eliminated.

5. The Risks Associated with the Waiting Time Penalties Claim

Under Labor Code section 203, if an employer fails to provide wages at the time of an employee's termination or within seventy-two (72) hours of resignation, then the employee's wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203 reflects a public policy 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.)

Here, Plaintiff and numerous aggrieved employees are no longer employed by Defendant. (Ly Decl. ¶36.) Plaintiff alleges that Defendant failed to pay all wages owed and due upon their termination and/or resignation. (Ly Decl. ¶37.) Plaintiff contends that Defendant's actions were willful, as they have intentionally failed or refused to perform an act which was required to be done. (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.) "The failure to pay is willful if the employer 'knows what [it] is doing [and] intends to do what [it] is doing', and does not also require proof that the employer acted with 'a deliberate evil purpose to defraud work[ers] of wages which the employer knows to be due.'" (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 868.)

Defendant argues that its actions were not willful or intentional because it had an objective good faith belief that it was operating in compliance with the California Labor Code. Defendant further argues that this is also a derivative claim, and that its primary arguments opposing penalties for meal breaks, rest periods and unreimbursed expenses also have the potential to substantially mitigate, if not altogether eliminate any penalties that may be awarded for this claim. In support of these arguments, Defendant references its time and pay records, which tend to demonstrate that Defendant undertook significant effort to implement and manage a system that timely and properly paid wages to its employees.

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.”

In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, 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. (*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, Defendants 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. See *e.g.*, *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).

Here, as explained above, Plaintiff’s counsel anticipated that, at trial, Counsel for Defendant would argue that: (1) the PAGA Members were properly paid and/or reimbursed in accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate the PAGA Members was the result of inadvertence and clerical error; (2) the PAGA Members were provided with the opportunity to take meal and rest breaks in compliance with California law; (3) until this Action was filed, no employees had compliance about any alleged failure to pay wages, provide meal and/or rest breaks, reimburse expenses, issue accurate itemized wage statements; (4) none of Defendant’s employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff’s allegations. All of which, Counsel for Defendant would argue, should mitigate in favor of significantly reducing the civil penalty and would submit Defendant’s policies, time and pay records in support of this argument.

Based on all the foregoing considerations, Plaintiff’s counsel determined that a settlement of \$189,000.00 is reasonable.

D. Based on the Risks Above and the Analysis of the Maximum Penalties Available, Plaintiff Believes this Settlement is Fair and Reasonable

There are approximately 7,255 pay periods at issue in this case. If we assume a \$100.00 violation for each pay period for the reimbursement claim, the total amount in PAGA penalties is **\$725,500.00**. The wage statement claim’s maximum value is also **\$725,500.00** in penalties. When meal penalties are factored in, there are 3,646 pay periods with a potential meal period violation, and that amounts to a maximum exposure on the meal period claim of **\$364,600.00**. The number of pay periods with shifts long enough to necessitate a rest period is 6,780 and that means the potential exposure for the rest period claim is **\$678,000.00**. Finally, for waiting time penalties there are 145 former aggrieved employees and the maximum waiting time penalty amount is **\$14,500.00**. As such, the full exposure for this matter in PAGA penalties is about **\$2,508,100.00**. From here, the Court could reduce the penalties, fail to award penalties for one or more of the claims, or refuse to “stack” penalties and only award one penalty per pay period.

Given these factors and the probative value of the evidence that Defendant intends to submit at trial in support of its potentially persuasive arguments, Plaintiff believes this is a very fair and reasonable settlement.

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 \$189,000.00. (Ly Decl. ¶38; Ex. 1 at ¶15.) From that fund, Plaintiff requests an award of attorneys' fees for Plaintiff's Counsel in the amount of \$63,000.00, or 33.33% of the Gross Settlement Amount, and \$13,370.38 in reimbursement for costs. (*Id.*; Ex. 1 at ¶9.)

A. Plaintiff's 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

1 representative capacity to recover fees when the litigant’s efforts have created a substantial, actual,
2 and concrete benefit for members of an ascertainable class and the court’s jurisdiction over the
3 subject matter makes possible an award which spreads the cost proportionately among the
4 members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th
5 563, 578.)

6 This doctrine rests on the understanding that attorneys should normally be paid by their
7 clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from
8 the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979)
9 23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent
10 this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees against
11 the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano*
12 *III*, 20 Cal.3d at p. 35.) “A court, in the exercise of its equitable discretion, may decree that those
13 receiving the benefit should contribute to the costs of its production.” (*Save El Toro Assn., supra*,
14 98 Cal.App.3d at 548.) As this approach “better approximates the workings of the marketplace
15 than the lodestar approach,” there is “a greater judicial willingness to evaluate a fee award as a
16 percentage of the recovery” in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82
17 Cal.App.4th 19, 31, 48.)

18 B. The Attorneys’ Fees Request Are Well Within the Range of Fees in Comparable
19 Cases

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

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

26 (Newberg on Class Actions, 3rd Ed., 1992, § 14.03; and see *Chavez v. Netflix, Inc.* (2008) 162
27 Cal.App.4th 43, 66, fn. 11 [“Empirical studies show that, regardless whether the percentage
28 method or the lodestar method is used, fee awards in class actions average around one-third of the

recovery.”].) Thus, Plaintiff’s 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. Plaintiff’s 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.)

1. Requested Multiplier

The purpose of using the lodestar/multiplier method is to mirror the legal marketplace. 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. (Ly Decl. ¶47.) Plaintiff’s Counsel have an aggregate lodestar in the amount of \$56,405.00 which represents 80.15 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiff’s instant Motion, and 10 future hours. (*Id.*) As such, PAGA Counsel is not asking for a multiplier. (Ly Decl. ¶48.)

///

1 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR COSTS**

2 71. In addition to their request for fees, Plaintiff's Counsel further request
3 reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred by them in
4 connection with this litigation, in the amount of \$13,370.38. (Ly Decl. ¶72.) To date, Plaintiff's
5 Counsel has incurred \$12,770.38 in costs. (Ly Decl. ¶73.) Plaintiff's Counsel anticipates incurring
6 an additional \$600.00 in costs to file and serve this motion, but the Settlement provides for a
7 reimbursement of litigation costs of up to \$20,000.00. (Ly Decl. ¶74.) As such, counsel is
8 requesting a cost reimbursement of \$13,370.38. (Ly Decl. ¶75.)

9 All of the requested costs are reasonable in amount and were necessarily incurred by
10 Plaintiff's Counsel in prosecuting this litigation. (Ly Decl. ¶76); Exhibit 2 [Cost Report].)
11 Expenses in this matter to date include costs for filing fees, research, mediation, and additional
12 costs for the prosecution of this case evidenced in the costs spreadsheet attached to the Declaration
13 of Liane Katzenstein Ly. All of these costs have been incurred in the course of this litigation, and
14 all costs advanced have already been paid by Plaintiff's Counsel, with the exception of the
15 anticipated cost of filing the present motion. (Ly Decl. ¶77.)

16 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
17 advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court
18 should approve the request for reimbursement in the amount of \$13,370.38. (Ly Decl. ¶78.)

19 **VIII. ENHANCEMENT TO PLAINTIFF**

20 The Settlement calls for an enhancement payment of \$7,500.00 to the named Plaintiff, to
21 be paid from the Gross Settlement Amount. (Ly Decl. ¶79; Ex. 1 at ¶44(a).) Incentive awards "are
22 intended to compensate class representatives for work done on behalf of the class, to make up for
23 financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their
24 willingness to act as a private attorney general." (*Rodriguez v. West Publishing Corp.* (9th Cir.
25 2009) 563 F.3d 948, 958-59. "[I]t is established that named plaintiffs are eligible for reasonable
26 incentive payments to compensate them for the expense or risk they have incurred in conferring a
27 benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
28 (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175

1 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

2 Here, the enhancement takes into consideration the time, effort, and expense incurred by
3 Plaintiff in coming forward to litigate this matter on behalf of the PAGA Members. The time spent
4 by Enmanuel De Jesus Lopez Torres includes identifying competent counsel, providing
5 information to Plaintiff's Counsel regarding Plaintiff's relevant employment experiences,
6 compiling documents, meeting with Plaintiff's Counsel frequently to discuss the status of the case
7 and the theories of liability, reviewing settlement documents, and making himself available for a
8 full day of mediation. (Ly Decl. ¶80.)

9 The enhancement is also intended as consideration offered in exchange for Plaintiff's
10 general release of claims and waiver of California Civil Code Section 1542. Prior to filing this
11 representative action, Plaintiff made a written settlement demand which asserted claims for missed
12 meal and rest breaks and failure to indemnify for business expenses. The demand further claimed
13 that Defendant wrongfully terminated Plaintiff's employment and unlawfully retaliated against
14 Plaintiff in violation of the California Family Rights Act and the Labor Code. However, upon
15 investigating these claims it was determined that they lacked merit and had minimal settlement
16 value.

17 Based on these facts, Plaintiff's Counsel considers this to be a fair and reasonable
18 enhancement. (Ly Decl. ¶81.) The enhancement takes into consideration the time, effort, risks, and
19 expense incurred by Plaintiff in coming forward to litigate this matter on behalf of the PAGA
20 Members, while also compensating him for his agreement to fully and forever release all claims
21 that arise from his employment with Defendant as permitted by California law. (Ly Decl. ¶82.)
22 Accordingly, Plaintiff should be awarded the agreed-upon enhancement of \$7,500.00.

23 **IX. CONCLUSION**

24 Plaintiff and Plaintiff's Counsel submit that the proposed Settlement as documented in the
25 Settlement Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the
26 State of California. Plaintiff respectfully requests that the Court approve the Settlement and Order
27 that the Settlement is carried out according to the terms of the Settlement Agreement.
28

1 DATED: April 17, 2024

KINGSLEY SZAMET & LY

2
3 By:



4 Liane Katzenstein Ly
5 Attorneys for Plaintiff ENMANUEL DE JESUS
6 LOPEZ TORRES and all aggrieved employees
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(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 April 17, 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** placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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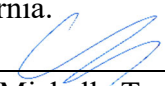
Attorneys for Plaintiff

[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 sent 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 April 17, 2024, at Woodland Hills, California.


Michelle Tanzer