

KINGSLEY & KINGSLEY, APC
ERIC B. KINGSLEY, Esq. (SBN 185123)
eric@kingsleykingsley.com
LIANE KATZENSTEIN LY, Esq., (SBN 259230)
liane@kingsleykingsley.com
JESSICA BULAON, Esq. (SBN 340749)
jessi@kingsleykingsley.com
16133 Ventura Blvd., Suite 1200
Encino, CA 91436
Tel: (818) 990-8300, Fax (818) 990-2903

Attorneys for Plaintiff and all aggrieved employees

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

JEMALYNE BUNO, an individual, on behalf
of the State of California, as a private attorney
general,

PLAINTIFF,

v.

POPULUS GROUP, LLC; and DOES 1 thru
50, inclusive,

DEFENDANTS.

Case No. CIVSB2133954

[Case Assigned for All Purposes to Hon.
David Cohn in Dept. S-26]

**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 Ly and Jodey Lawrence of
Phoenix Settlement Administrators In Support
of Plaintiff's Motion for Approval of
Representative Action Settlement; [Proposed]
Order, and [Proposed] Final Judgment]*

Date: May 12, 2023

Time: 10:00 a.m.

Dept.: S-26

Complaint Filed: December 21, 2021

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** on May 12, 2023 at 10:00 a.m. in Department S-26 of the
3 above-entitled Court, Plaintiff Jemalyne Buno will move the Court for an Order Granting Approval
4 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 PAGA Settlement Agreement, which
9 is attached to the concurrently filed Ly Declaration as Exhibit "1", 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, 2023

KINGSLEY & KINGSLEY, APC

14
15 By: 

Liane Katzenstein Ly

Jessica Bulaon

Attorneys for Plaintiff and all Aggrieved Employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jemalyne Buno (“Plaintiff”) submits this Memorandum of Points and Authorities
4 in support of Motion for Approval of Representative Action Settlement. Plaintiff and Defendant
5 Populus Group, LLC (“Defendant”) (collectively, the “Parties”) have reached a proposed
6 settlement documented in the PAGA Settlement Agreement (“Agreement”) attached to the
7 concurrently-filed declaration of Liane Katzenstein Ly.

8 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699,
9 et seq. (“PAGA”). The Gross Settlement Amount is \$312,500.00. After deduction of attorneys’
10 fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration
11 costs as discussed in the Agreement, the remaining amount to be divided between the Labor and
12 Workforce Development Agency (“LWDA”) and the Aggrieved Employees (as defined in Section
13 1.4 of the Agreement and below) as required by Labor Code section 2699(i) is \$181,833.33, with
14 \$136,374.99 (or 75%) going to the LWDA and \$45,458.33 (or 25%) distributed to the Aggrieved
15 Employees.¹

16 Plaintiff request that the Court “review and approve any settlement of any civil action filed
17 pursuant to [PAGA].” (Lab. Code § 2699(l)(2).) If the Court deems the Settlement fair and
18 acceptable, pg 9 mtn Plaintiff requests that the Court enter an order approving the Settlement and
19 ordering the Parties to carry out the terms of the Agreement and enter a Final Judgment thereon.²

20 **II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY**

21 **A. Litigation Overview and Procedural History**

22 On October 13, 2021, and in compliance with Labor Code § 2699.3(a)(1), Plaintiff gave
23 written notice to Defendant and the Labor and Workforce Development Agency (“LWDA”)
24

25 ¹ Pursuant to PAGA, civil penalties recovered by Aggrieved Employees shall be distributed 75 percent to the
26 Labor and Workforce Development Agency (“LWDA”) and 25 percent to the aggrieved employee(s). Lab.
Code § 2699(i).

27 ² Plaintiff’s Motion for Approval of Representative Action Settlement will be concurrently uploaded to the
28 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 is attached to the Declaration of Liane Katzenstein Ly as Exhibit “3”.

1 regarding her intent to seek civil penalties under PAGA for violation of Labor Code § 432.5.
2 (Declaration of Liane Katzenstein Ly (“Ly Decl.”) ¶5.)

3 Pursuant to Labor Code § 2699.3(a)(2)(A), the sixty-five-day waiting period to commence
4 a civil action as though the LWDA has chosen not to investigate lapsed on December 17, 2021,
5 allowing Plaintiff to file her representative action complaint. (Ly Decl. ¶6.) As such, Plaintiff filed
6 her Complaint on December 21, 2021, seeking penalties pursuant to PAGA for Defendant’s
7 alleged violation of Labor Code § 432.5. (Hereafter, the “Action”). (*Id.*)

8 B. The Discovery Process and Mediation

9 The Parties engaged in extensive pre-mediation discovery. Prior to mediation, Plaintiff’s
10 counsel served a set of Specially Prepared Interrogatories and a set of Requests for Production of
11 Documents to Defendant on March 8, 2022, seeking the identity of the Aggrieved Employees,
12 relevant time and pay data, including wage statements at issue, and relevant wage and hour policies
13 and procedures. (Ly Decl. ¶8.) Accordingly, Defendant provided its responses to Plaintiff’s
14 discovery requests on May 13, 2023. (Ly Decl. ¶9.) The Parties met and conferred, and Defendant
15 produced all versions of the Employment Agreement at issue, and provided the number of pay
16 periods and Aggrieved Employees. (Ly Decl. ¶10.) Based on Defendant’s records, the data reveals
17 that the number of Aggrieved Employees is no more than 3,229 (including Plaintiff) who signed
18 the Employment Agreement and who worked for Defendant during the PAGA Period. (Ly Decl.
19 ¶11.)

20 On April 8, 2022, Defendant served a set of Specially Prepared Interrogatories to Plaintiff.
21 (Ly Decl. ¶12.) Plaintiff provided her responses to Defendant’s formal discovery requests on May
22 25, 2022. (*Id.*)

23 On October 12, 2022, the Parties participated in an all-day mediation presided over by
24 respected wage-and-hour mediator Alan Berkowitz, Esq., of Judicate West. (Ly Decl. ¶13.) While
25 the Parties did not reach a mediated settlement at the close of mediation, the Parties continued to
26 engage in settlement efforts, and reached a settlement. (Ly Decl. ¶14.) The Parties engaged in good
27 faith, arms-length negotiations concerning possible resolution of Plaintiff’s claims. (Ly Decl. ¶15.)
28 The Parties were able to reach a tentative settlement subject to finalization of a formal PAGA

Settlement Agreement and approval of the Court. (*Id.*) The Parties negotiated the terms and conditions of the Settlement and now present the agreed-upon Settlement to the Court for Approval. (Ly Decl. ¶16.)

III. PAGA ACTIONS AND THE REQUIREMENTS

A. The PAGA Statutory Scheme

PAGA creates a means of “deputizing” citizens as private attorneys general 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 do 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 p. 986; *see also Reyes v. Macy’s, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014), 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.* (2015) 234 Cal.App.4th 1109, 1119; *Montano v. The Wet Seal Retail, Inc.* (2015) 232 Cal.App.4th 1214, 1222 [“[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 v. Superior Court* (2009) 46 Cal.4th 969, 986; Lab. Code § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at p. 1119; *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 [“PAGA Plaintiff 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:

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

5 (Lab. Code § 2699.3(a)(1).)

6 As explained above, Plaintiff has complied with the notice requirements and has properly
7 pled a PAGA cause of action. (*Id at Ly Decl.* ¶¶5-6.)

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

9 PAGA provides for penalties in the amount of one hundred dollars (\$100) for each
10 aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for
11 each aggrieved employee per pay period for each subsequent violation. (Lab. Code § 2699(f)(2).)
12 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that
13 Defendant violated the Labor Code.³ (*Amaral v. Cintas Corp. No. 2* (2008), 163 Cal.App.4th
14 1157163 Cal.App.4th 1157, 1213.) However, PAGA does provide the Court with discretion
15 regarding the penalty amount. Labor Code §2699(e)(2) states that “a court may award a lesser
16 amount than the maximum civil penalty amount specified by this part if, based on the facts and
17 circumstances of the particular case, to do otherwise would result in an award that is unjust,
18 arbitrary and oppressive, or confiscatory.” Here, Defendant denies that it violated any law or that
19 it engaged in any knowing or intentional conduct giving rise to liability, and that any employees
20 suffered harm.

21 C. Standards for Settlement Approval

22 When approving a settlement of a PAGA action, the statute simply requires the Court to
23 “review and approve any settlement of any civil action filed pursuant to this part.” (Lab. Code §
24 2699(l)(2).) PAGA does not set forth standards for evaluating such settlements, and the California
25 appellate courts have not weighed in on the issue. However, trial courts have approved PAGA
26 settlements where the penalties are “genuine and meaningful” and “consistent with the underlying
27 purpose” of the statute. (See *O’Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110,
28

³ See also *Willner v. Manpower Inc.* (N.D. Cal. 2014) 35 F.Supp.3d 1116, 1136; *McKenzie v. Federal Exp. Corp.*
(C.D. Cal. 2011) 765 F.Supp.2d 1222, 1232

1113.) Additionally, as explained in *Arias, supra*, 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 \$312,500.00 in full and final settlement of the PAGA claims. (Ly Decl. ¶17., Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount:	\$312,500.00
PAGA Counsel Fees Payment (1/3):	\$104,166.67
PAGA Counsel Litigation Expenses Payment:	\$9,000.00 ⁴
Administrator Expenses Payment:	\$12,500.00
Named Plaintiff Service Payment:	\$5,000.00
PAGA Penalties:	\$181,833.33 (\$136,374.99 to the LWDA; \$45,458.33 to Aggrieved Employees)

(Ly Decl. ¶18., Exhibit 1, ¶4.)

Each Aggrieved Employee shall receive a pro-rata portion of employees' share of PAGA penalties based on the number of times the Aggrieved Employees signed the Employment Agreement and who worked for Defendant during the PAGA Period.⁵ (Ly Decl. ¶19., Exhibit 1, ¶¶1.14 and 3.2.3.1.)

For settlement purposes, the Aggrieved Employees are defined as "a person employed by Populus Group in California who signed the Employment Agreement and who worked for Populus Group during the PAGA Period." (Ly Decl. ¶20., Exhibit 1, ¶1.4.)

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⁴ The settlement agreement provides for counsel to receive cost reimbursement of \$9,000.00. However, counsel's final costs come to \$7,488.96. (Ly Decl., Ex. 2.) The extra \$1,511.04 will remain in the net settlement fund, causing the net amount for distribution to the LWDA and Aggrieved Employees to be slightly higher than the \$181,833.33 contemplated in the settlement agreement. (See Ly Decl., Ex. 1 ¶3.2.3.)

⁵ The PAGA Period means the period from October 13, 2020 through the Effective Date. (Ly Decl. ¶20., Exhibit 1, ¶1.21.)

1 **V. ARGUMENT**

2 A. The Court Should Approve the Agreement

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

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

11 To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation
12 and discount taken follows. (Ly Decl. ¶21.) Plaintiff believed that Defendant may persuasively
13 argue that the Court should exercise its discretion under PAGA to significantly reduce any
14 penalties. (Ly Decl. ¶22.) The court in a PAGA action has the same discretion “to assess a civil
15 penalty” that the Labor Commissioner would have, as well as complete discretion to “award a
16 lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts
17 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
18 arbitrary and oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)).

19 This PAGA action only involved one claim: a violation of Labor Code § 432.5. Labor Code
20 § 432.5 provides that no employer shall require any employee to agree, in writing, to any term or
21 condition which is known by the employer to be prohibited by law.

22 Defendant requires, as a condition of employment, that Plaintiff and other Aggrieved
23 Employees sign an “Employment Agreement” which includes numerous terms that are Plaintiff
24 alleges are prohibited by law. (Ly Decl. ¶23.) These provisions are including, but not limited to
25 the following:

- 26 1. employees agree to indemnify Populus Group for any and all claims,
27 matters, suit or other liabilities that arise directly or indirectly as a result
28 of an employee’s breach of the Information Security Matters section of
the addendum.

2. employees agree to indemnify and save harmless Populus Group from any and all liability, loss, damage, or expense which may be caused by an employee's negligence or failure to perform duty under the terms of the agreement.
3. employees agree to provide a minimum fourteen (14) day notice should an employee decide to terminate position with Populus Group.
4. employees agree that should Populus Group take legal action as a result of non-payment of owed wages, employees are responsible for attorney's fees and costs that Populus Group may incur in recovering such payment as compensation for Populus Group's efforts and costs incurred in connection with an employee's employment.
5. employees agree to look solely to Populus Group for all employee benefits and worker's compensation benefits and waive any right to make claims or bring a lawsuit for damages based upon injuries which are covered under such Workers' Compensation statutes.
6. employees agree to waive any and all rights to claim or assert a claim, suit, action or demand of any kind, nature or description, including without limitation, claims, suits, actions or demands for personal injury or death whether arising in tort, contract or otherwise.
7. employees agree to file any discrimination suit within 180 days and agree to waive their right to file a claim if the 180-day time limit is not met. Employees further agree the filing of a charge with an administrative agency or a complaint internally does not toll or extend the 180 day period for filing an action and that the continuing violations doctrine cannot be applied to extend the 180 day filing period.

Given that the employees sign this Employment Agreement at the beginning of their employment, each employee likely only has one pay period with a violation. (Ly Decl. ¶24.)

PAGA Counsel anticipated that, at trial, Counsel for Defendant would argue: 1) that its Agreement was not in fact unlawful and maintained in compliance with California law as among other reasons, the Employment Agreement contains severability and savings provisions intended to avoid provisions being found unlawful or invalid if, as in the situation here, such provisions were not, in fact, applied to cause damage(s) to any employee(s); 2) until this Action was filed, no employees had complained about any alleged unlawful employment agreements; and 3) none of Defendant's employees suffered any harm from or actual damages as a result of the conduct that forms for the basis for Plaintiff's allegations. (Ly Decl., ¶25.) If the Court determined that this was the policy,

1 Defendant could argue that it had adopted legally compliant agreements as a condition of employment
2 in which no employees suffered any harm. (Ly Decl., ¶26.) While Plaintiff disagrees that this analysis
3 is legally correct or persuasive, PAGA Counsel had to consider the foregoing facts and arguments
4 and how they might impact any judgment ultimately awarded to Aggrieved Employees if the Court
5 were persuaded by them. (Ly Decl. ¶27.)

6 The Agreement also includes an arbitration provision. (Ly Decl. ¶28.) Plaintiff believed the
7 arbitration provision was unconscionable, but the existence of the arbitration provision also created a
8 substantial risk that had to be considered. (Ly Decl. ¶29.)

9 In light of all these significant risks and the fact that PAGA gives the Court broad discretion
10 to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement
11 Amount of \$312,500.00 was fair and reasonable. (Ly Decl. ¶30., Exhibit 1, ¶1.13.)

12 C. There is a Strong Risk the Higher \$200 Civil Penalty Triggered for “Subsequent”
13 Violations Will Not Apply

14 Plaintiff believes there is a strong risk that the Court will not award the \$200 civil penalty
15 triggered for “subsequent” violations. (Lab. Code § 2699(f)(2).) If this case were to proceed to
16 trial, Plaintiff would argue that a “subsequent” violation simply means that Defendant violated
17 section 432.5 more than once for a given employee. Plaintiff is not aware of any case law that
18 interprets “subsequent” in the context of section 2699. However, Defendant is likely to rely on
19 *Amaral*, which rejected a purely temporal understanding of the term “subsequent” and interpreted
20 its use in Labor Code sections 210 and 225.5 to require that “the employer has been notified that
21 it is violating a Labor Code provision” before higher penalties are triggered. (*Amaral, supra*, 163
22 Cal.App.4th at 1209; *see also Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144.)
23 Defendant presumably will take the position that it has not been notified that it actually violated a
24 Wage Order until the Labor Commissioner issues a formal citation or the Court makes a finding
25 that a violation existed. Even if the Court would agree with Plaintiff that Defendant was put on
26 notice on October 13, 2021, the date Defendant was served with Plaintiff’s PAGA letter, the \$200
27 civil penalty would only apply to violations for a period of 3 months, occurring between October
28 13, 2021 and the date the Court enters a Judgment on its Approval Order and the Judgment is final

1 (the end of the Release Period).

2 D. A Court May Exercise Discretion to Reduce the Maximum Civil Penalty Award

3 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a
4 showing that Defendant violated the Labor Code. (*Amaral, supra*, 163 Cal.App.4th at 1213;
5 *Moreno, supra*, 2007 WL 1650942, at *3.) However, PAGA does provide the Court with discretion
6 when it awards these penalties. Labor Code section 2699(e)(2) states that “a court may award a
7 lesser amount than the maximum civil penalty amount specified by this part 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.”

10 In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, the
11 Court exercised its discretion to reduce the PAGA penalty amount. There, the Plaintiff brought a
12 PAGA claim for violations of section 226(a) based on the following issues: (a) the statements did
13 not show either an employee identification number or the last four digits of the social security
14 number of the employee; (b) the statements did not show the beginning date of the pay period for
15 which the employee was paid; (c) the statements identified Covidien as the employee’s employer.
16 (*Id.* at *2). There were approximately 28,000 wage statements at issue. (*Id.* at *3). The *Fleming*
17 court calculated the maximum potential civil penalty exposure at \$2.8 million (\$100 per wage
18 statement). (*Ibid*; see also Labor Code § 2699(f)(2)). After a bench trial, the court reduced the
19 civil penalty per wage statement to \$18 per wage statement, reflecting 18% of the potential
20 exposure. (*Fleming, supra*, 2011 WL 7563047, at *4). The Court reasoned:

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

28 (*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 Starbuck’s

“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) that its Agreement was not in fact unlawful and maintained in compliance with California law; 2) until this Action was filed, no employees had complained about any alleged unlawful employment agreements; and 3) none of Defendant’s employees suffered any harm from or actual damages as a result of the conduct that forms for the basis for Plaintiff’s allegations. After significant discovery in this action, Plaintiff’s counsel determined that a settlement of \$312,500.00 is reasonable given the above risks.

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

Based on these figures, the maximum potential exposure for the PAGA claims for Aggrieved Employees is \$322,900 (3,229 Aggrieved Employees at issue (with only one violative pay period at issue) × \$100 = \$322,900). Given that this Settlement is for \$312,500.00, Plaintiff believes this is a very fair and reasonable settlement.

VI. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS’ FEES

As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to create a Gross Settlement Amount of \$312,500.00. (Ly Decl. ¶34; Ex. 1 at ¶4.1.) From that fund, Plaintiff requests an award of attorneys’ fees for PAGA Counsel in the amount of \$104,166.67, or 33.33% of the Gross Settlement Amount, and \$9,000.00 in reimbursement for litigation costs. (*Id*; Ex. 1 at ¶4.2.1.)

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

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

1 Cal.App.4th 19, 31, 48.)

2 B. The Attorneys' Fees Request Are Well Within the Range of Fees in Comparable
3 Cases

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

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

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

16 C. PAGA Counsel’s Fee Request is Reasonable Under a Lodestar Crosscheck

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

25 i. Requested Multiplier

26 The purpose of using the lodestar/multiplier method is to mirror the legal marketplace.
27 Counsel will not handle cases for straight hourly fees payable only if they win; therefore, an
28 enhancement is often awarded so that the fee received is commensurate with what attorneys could

1 expect to be compensated for services in similar circumstances. (*See San Bernardino Valley*
2 *Audubon Soc., Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 755 [an award must
3 be large enough “to entice competent counsel to undertake difficult public interest cases”].) No
4 specific findings reflecting the court’s calculations are required. (*Wershba, supra*, 91 Cal.App.4th
5 at 254; *Rebney, supra*, 232 Cal.App.3d at p. 1349.) “The record need only show that the attorney
6 fees were awarded according to the ‘lodestar’ or ‘touchstone’ approach.” (*Ibid.*)

7 Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Ly Decl.
8 ¶43.) PAGA Counsel have an aggregate lodestar in the amount of \$60,785.00, which represents
9 80 hours of attorney work on this litigation from its inception through the date of this filing of
10 Plaintiff’s instant Motion. (*Id.*) PAGA Counsel also anticipates an additional ten hours of future
11 time through the hearing and the administration process. (Ly Decl. ¶68.) As such, PAGA Counsel
12 is asking for a lodestar multiplier of 1.71. (Ly Decl. ¶69.) Typically, the lodestar is merely the
13 starting point of the calculation of a reasonable fee, and courts often multiply the lodestar by a
14 factor to account for the risk of non-payment, delay in payment, the quality of work, and the
15 novelty and difficulty of the issues involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253;
16 *Beasley v. Wells Fargo Bank*, (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning*
17 *v. Bd. of Supervisors*, (1997) 76 Cal.App.3d 24 1, 251.)

18 This case dealt with difficult legal and factual questions. (Ly Decl. ¶70.) Significantly,
19 the risk attendant to the underlying claims in this matter was great considering Defendant’s
20 defenses as discussed in detail above. (*Ibid.*) Were this case to proceed, Defendant would have a
21 strong incentive to litigate tenaciously. (*Ibid.*) There are genuine issues in dispute. (*Ibid.*)
22 Furthermore, PAGA Counsel was able to obtain close to the full value for this case. (Ly Decl.
23 ¶71.)

24 As discussed above and in the Motion, PAGA Counsel are skilled wage and hour
25 practitioners with decades of experience who diligently prepared and litigated this matter. (Ly
26 Decl. ¶72.) To achieve the ultimate result in this case, my firm had to incur substantial risk and
27 expense, and were precluded from taking other fee generating employment for 80 hours of attorney
28 time. (Ly Decl. ¶73.) This matter had been handled purely on a contingency fee basis and my

1 firm has advanced many thousands of dollars in costs while deferring all payment of fees, with no
2 guarantee that any of the fees incurred or costs advanced would ever be recovered, and diverting
3 significant firm resources to prosecution of this matter. (Ly Decl. ¶74.) PAGA Counsel believe
4 this is an exceptional result that has been well received by the Aggrieved Employees. (Ly Decl.
5 ¶75.)

6 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF**
7 **COSTS**

8 In addition to their request for fees, PAGA Counsel further request reimbursement of the
9 reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this
10 litigation, in the amount of \$7,488.96. (Ly Decl. ¶76.) To date, Kingsley and Kingsley has incurred
11 \$6,888.96 in costs. (Ly Decl. ¶77.) PAGA Counsel anticipates incurring an additional \$600.00 in
12 costs to file and serve this motion. (Ly Decl. ¶78.) As such, counsel is requesting a cost
13 reimbursement of \$7,488.96. (Ly Decl. ¶79.)

14 All of the requested costs are reasonable in amount and were necessarily incurred by Class
15 Counsel in prosecuting this litigation. (Ly Decl. ¶80; Exhibit 2 [Cost Report].) Expenses in this
16 matter to date include costs for filing fees, research, mediation, and additional costs for the
17 prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Liane
18 Katzenstein Ly. All of these costs have been incurred in the course of this litigation, and all costs
19 advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of
20 filing the present motion. (Ly Decl. ¶81.)

21 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
22 advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court
23 should approve the request for reimbursement in the amount of \$7,488.96. (Ly Decl. ¶82.)

24 **VIII. THE COURT SHOULD AWARD ENHANCEMENTS TO THE NAMED**
25 **PLAINTIFF**

26 The Settlement Agreement calls for a service payment of \$5,000.00 to the named Plaintiff,
27 to be paid from the Gross Settlement Amount. (Ly Decl. ¶83; Ex. 1 at ¶3.2.4.) Incentive awards
28 “are intended to compensate class representatives for work done on behalf of the class, to make up

1 for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize
2 their willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.* (9th
3 Cir. 2009) 563 F.3d 948, 958-59). “[I]t is established that named Plaintiff are eligible for
4 reasonable incentive payments to compensate them for the expense or risk they have incurred in
5 conferring a benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los*
6 *Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC*
7 (2009) 175 Cal.App.4th 785, 805-06; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

8 Here, the enhancement takes into consideration the time, effort, and expense incurred by
9 Plaintiff in coming forward to litigate this matter on behalf of all Aggrieved Employees. The time
10 spent by Jemalyne Buno includes identifying competent counsel, providing information to PAGA
11 Counsel regarding their relevant employment experience, compiling documents, conducting
12 several meetings and conferences with PAGA Counsel to discuss the status of the case and the
13 theories of liability, attending an all-day mediation, and reviewing settlement documents. (Ly
14 Decl. ¶84.)

15 PAGA Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶85.)
16 The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiff
17 in coming forward to litigate this matter on behalf of all Aggrieved Employees. (Ly Decl. ¶86.)
18 Accordingly, Plaintiff should be awarded the agreed-upon enhancement of \$5,000.00. (*Id.*)

19 **IX. CONCLUSION**

20 Plaintiff submits that the proposed Settlement as documented in the Agreement is fair,
21 adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiff
22 respectfully requests that the Court approve the Settlement and Order that the Settlement is carried
23 out according to the terms of the Agreement.

1 DATED: April 17, 2023

KINGSLEY & KINGSLEY, APC

2
3 By:


Liane Katzenstein Ly

Jessica Bulaon

Attorneys for Plaintiff and all Aggrieved Employees

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

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On April 17, 2023, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SCHERER SMITH & KENNY LLP

Denis S. Kenny
denis@sfcounsel.com

Ryan W. Stahl
rws@sfcounsel.com

John B. Lough, Jr.
john@sfcounsel.com

140 Geary Street, Seventh Floor
San Francisco, CA 94108

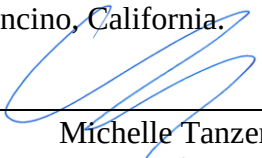
[] (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Encino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

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

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

Executed on April 17, 2023, at Encino, California.



Michelle Tanzer