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8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN BERNARDINO**

11 SERGIO P. DANCEL JR on behalf of the
general public as private attorney general,

12 Plaintiff,

13 v.

14 EMPLOYBRIDGE HOLDING COMPANY, a
Delaware Corporation doing business as
15 SELECT STAFFING and PROLOGISTIX;
EMPLOYBRIDGE MIDWEST 3, INC., a
16 Georgia Corporation; and DOES 1-50,
inclusive,
17

18 Defendants.
19

CASE NO.: CIVSB2201533
assigned for all purposes to the
Honorable Jessica Morgan, Dept. S-26

**NOTICE OF MOTION AND MOTION
TO APPROVE OF SETTLEMENT OF
PRIVATE ATTORNEYS GENERAL
ACT CLAIMS, AND ENTERING
JUDGMENT THEREON AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION**

Date: August 13, 2024
Time: 8:30 a.m.
Dept.: S-26

Action Filed: January 20, 2022

1 **I. INTRODUCTION**

2 Plaintiff Sergio P. Dancel Jr., ("Plaintiff") reached a settlement of the California Private
3 Attorneys General Act, Cal. Labor Code §2699, et seq. ("PAGA") claim asserted in this action
4 against Defendants EmployBridge Holding Company and EmployBridge Midwest 3, Inc., as well
5 as Real Time Staffing Services, LLC dba Select Staffing and ProLogistix, ("Defendants"). The
6 only claim in this action is the representative PAGA claim. In accordance with California Labor
7 Code §2699(l), Plaintiff now asks this Court to review and approve the settlement of Plaintiff's
8 PAGA claims. This is only a settlement of the PAGA claims for civil penalties, and is not a class
9 settlement and does not release the individual claims, if any, of the affected employees other than
10 the Plaintiff. Cal. Labor Code § 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 381
11 (2014).

12 The PAGA settlement is set forth in the accompanying Settlement Agreement and Release
13 ("Settlement", "Agreement" or "Settlement Agreement"). A true and correct copy of the
14 Settlement Agreement, which sets forth the terms for the settlement of the PAGA claims, is
15 attached as Exhibit 1 to the Declaration of James Hawkins, filed herewith. Capitalized terms
16 shall have the same meaning as defined in the Settlement Agreement. The LWDA was served
17 notice of this Settlement and this motion as set forth in the accompanying proof of service. The
18 Notice of Settlement to PAGA Members is attached to the James Hawkins declaration as Exhibit
19 A.

20 A proposed order confirming review and approval of the PAGA settlement is submitted
21 herewith.

22 **II. RELEVANT FACTS**

23 On October 8, 2021 Plaintiff transmitted a letter to the California Labor & Workforce
24 Development Agency ("LWDA") and Defendant in compliance with the exhaustion requirements
25 of the California Labor Code Private Attorneys General Act ("PAGA"), articulating claims
26 related to the failure to (a) accurately pay wages including overtime wage, (b) failure to provide
27 meal periods for every work period exceeding more than ten (10) hours per day and failure to pay
28 an additional hour's of pay or accurately pay an additional hour's of pay in lieu of providing a

1 meal period; (c) failure to authorize and permit rest breaks for every four hours or major fraction
2 thereof worked and failure to pay an additional hour's of pay or accurately pay an additional
3 hour's of pay in lieu of providing a rest period; (d) failing to pay all wages earned and owed upon
4 separation from Defendant's employ, (e) failing to provide accurate itemized wage statements, (f)
5 for issuing payment of wages in the form of a non-Labor Code-compliant instrument, and (g)
6 failure to reimburse business expenses. An amended letter clarifying the scope of claims was
7 served on or about November 12, 2021. (Hawkins Decl., at ¶ 3, Exhs. B, C).

8 On January 20, 2022, Plaintiff filed a Representative Action Complaint in the Superior
9 Court of the State of California for the County of San Bernardino, entitled *Sergio P. Dancel, Jr. v.*
10 *XPO Logistics, Inc., et al*, case number CIVSB2201533. Plaintiff filed the Complaint on behalf
11 of the State of California and other purportedly aggrieved employees as a PAGA action based on
12 violations of Labor Code 201-203, 212, 213, 510, 512, 558, 226, 226.3, 226.7, 1174, 1174.5,
13 1175, 1194, 1197, 1197.1, 1198, 2698, 2699, 2699.5, and related IWC Wage Orders. (Hawkins
14 Decl., at ¶ 4).

15 On March 8, 2022, Plaintiff filed a First Amended Complaint against Defendants
16 EmployBridge Holding Company dba Select Staffing and Prologistix and EmployBridge
17 Midwest 3, Inc. only (effectively dismissing the XPO and GXO-related defendants). (Hawkins
18 Decl., at ¶ 5).

19 During the course of the litigation, the Parties engaged in an informal discovery and fully
20 shared the information necessary for all sides to conduct a legitimate investigation into the
21 allegations of the action and potential defenses thereto including payroll and time keeping
22 sampling for approximately 15% of the purported Aggrieved Employees along with policies and
23 relevant data points. The Parties have reached this settlement only after discovery and
24 investigation was performed. (Hawkins Decl. at ¶ 6).

25 On March 17, 2023, the Parties participated in a day-long mediation with the mediator
26 Jeffrey Krivis, a well-respected wage and hour class action and PAGA action mediator. In
27 preparation for the mediation, Plaintiff's counsel requested and Defendants' counsel provided
28 sample time and payroll data for the purported Aggrieved Employees, personnel and employment

documents. With Mr. Krivis' assistance, the Parties agreed to fully and finally resolve the Action and the PAGA Released Claims as to Plaintiff, the State of California, the LWDA and the purported Aggrieved Employees. (Hawkins Decl. at ¶ 7).

Being fully apprised of the value and strength of the PAGA theories alleged in the action, counsel for Plaintiff and Defendants successfully negotiated a settlement through arm's-length negotiations. The terms and conditions of the settlement are set forth in the Settlement Agreement ("Settlement" or "Settlement Agreement"). The Settlement Agreement resolves all claims asserted in the Complaint and contemplates that the settlement will be approved and the Court will enter judgment. (Hawkins Decl. at ¶ 8).

Defendants disputes and denies the allegations and claims asserted in this action. It was also Defendants' position that Plaintiff could not maintain this PAGA Action because there is no evidence of a common policy or practice that makes a trial manageable. (Hawkins Decl. at ¶ 9).

III. TERMS OF THE AGREEMENT

The Agreement negotiated by the parties provides for Defendants to pay \$80,000.00 as the Gross Settlement Amount ("GSA"). (Agreement at § 1.9). The "Net Settlement Amount" ("NSA") is the amount remaining of the GSA minus the Court-approved amounts awarded for the Attorneys Fees and Costs, Settlement Administration Fees, Enhancement Award to Plaintiff (if any), and the LWDA Payment. (Agreement at § 1.11). The Net Settlement Amount is estimated to be \$23,070.24. (Hawkins Decl. ¶ 11).

The NSA is calculated as follows: (1) \$26,666.66 (i.e. 33% of the GSA) shall be paid to Plaintiff's Counsel for payment of attorneys' fees; (2) Plaintiff's Counsel's litigation expenses not to exceed \$15,763.10; (3) \$7,500.00 Enhancement Award to the Plaintiff for Plaintiff's time and risks in prosecuting this case and Plaintiff's service to the PAGA Members as well as for Plaintiff's general release of Plaintiff's Released Claims; (4) Settlement Administration Expenses not to exceed (\$7,000) to APEX Class Action Administration (the Settlement Administrator). The remaining Net Settlement Amount is estimated to be \$23,070.24 and will be distributed to the LWDA and purported Aggrieved Employees. An estimated \$5,767.56 (25% of the NSA) will be distributed to the purportedly Aggrieved Employees on a pro rata basis, amounting to an average

1 of \$15.05 per Aggrieved Employee. The remaining \$17,302.68 (75% of the NSA) is to be
2 distributed to the LWDA. Any difference from these maximum amounts will be added to the Net
3 Settlement Amount. (Hawkins Decl., ¶ 12). The 75/25 allocation is required by Labor Code §
4 2699 as explained by *ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019). (Hawkins Decl. ¶ 12).

5 The “PAGA Members” are defined as “ all current and former non-exempt employees of
6 Defendants who were placed on assignment at the operative facility operated by GXO Logistics
7 Supply Chain, Inc. (formerly known as XPO Logistics Supply, Chain, Inc. (“GXO Facility”) in
8 California during the PAGA Period.” (Agreement § 1.16); (Hawkins Decl. ¶ 13).

9 The “PAGA Period” is defined as “the period from October 8, 2020 through the date the
10 Court approves this settlement or May 17, 2023 (60 days from the date of the March 17, 2023
11 mediation), whichever is earlier.” (Agreement § 1.17); (Hawkins Decl. ¶ 14).

12 Defendants provided Plaintiff’s Counsel with information concerning the PAGA
13 Members, including statistical data concerning the weeks and pay periods worked. Defendants
14 represented that PAGA Group Members consisted of approximately 383 employees who worked
15 approximately 2,211 pay periods during the PAGA Period. (Agreement at § 5.6).

16 Within fifteen (15) days of the Effective Date ¹ Defendant will provide the Settlement
17 Administrator with the Gross Settlement Amount. (Agreement at § 7.1).

18 Within 30 calendar days of the Effective Date, the Administrator will pay to Settlement
19 Group Members, their Individual Settlement Payments via first-class regular U.S. Mail; to PAGA
20 Counsel, the Court-awarded Attorneys’ Fees and Litigation Expenses Payment; to the LWDA, the

21
22 ¹ Effective Date shall be the later of the time when: (i) the date of final affirmance of the Judgment
23 on an appeal of the Judgment, the expiration of the time for, or the denial of, a petition to review
24 the Judgment, or if review is granted, the date of final affirmance of the Judgment following
25 review pursuant to that grant, (ii) the date of final dismissal of any appeal from the Judgment or
26 the final dismissal of any proceeding to review the Judgment, provided that the Judgment is
27 affirmed and/or not reversed in any part, (iii) the final resolution (or withdrawal) of any filed
28 appeal in a way that affirms the Final Approval Order and Judgment in a form substantially
identical to the form of the Final Approval Order entered by the Court, and the time to petition for
review with respect to any appellate decision affirming the Final Approval Order has expired; or
(iv) if no appeal is filed (including if an appeal is filed, but then withdrawn),
the sixty-first (61st) day after the Court enters final approval of the settlement and the Judgment
approving this Agreement (Agreement at § 1.8).

1 Court-approved LWDA Payment; Enhancement Award to Plaintiff (if any); and to the
2 Administrator, the Court-awarded Administration Fees and Expenses. (Agreement at § 7.2).

3 Settlement Group Members shall have one hundred eighty days (180) to cash their checks.
4 Any funds associated with uncashed checks after one hundred eighty (180) days will be sent to
5 the Controller of the State of California to be held pursuant to the Unclaimed Property Law,
6 California Civil Code § 1500 et seq., for the benefit of those Settlement Group Members whose
7 checks were voided.. (Agreement at § 7.3).

8 Each PAGA Member will grant in favor of each Released Party, and be subject to,
9 the settlement Release. The Released Claims means:

10 [A]ll claims and theories that were set forth, or that could have been set forth
11 based on the facts alleged in the Action during the PAGA Period, including but
12 not limited to under California Labor Code sections 201-203, 212, 213, 510, 512,
13 558, 226, 226.3, 226.7, 1174, 1174.5, 1175, 1194, 1197.1, 1198, 2698, 2699,
14 2699.5 and related IWC Wage Orders, based on the various theories of liability,
15 including, but not limited to, Defendants' alleged failure to: (a) accurately pay
16 wages, including overtime, (b) provide meal periods, (c) provide rest periods, (d)
17 pay all wages earned and owed upon separation, (e) provide accurate written wage
18 statements, (f) allegedly issuing payment of wages in the form of a non-
19 Labor Code-compliant instrument, and (g) failure to provide cool down recovery
20 periods. (Agreement at §1.22).

21 The California Labor Workforce Development Agency ("LWDA") is being served with a
22 copy of this motion with the Settlement Agreement through the online process as required by
23 Labor Code § 2699(l). This service on the LWDA is verified in the separately filed proof of
24 service. (Hawkins Decl., ¶ 47).

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

26 The claim before this court is the representative claim under PAGA on behalf of the State
27 of California for civil penalties pursuant to the PAGA. The parties have agreed to settle this
28 PAGA claim in its entirety after discovery and arm's length mediation. (Hawkins Decl., at ¶¶ 7-

8.) The settlement is intended to fully and finally resolve the PAGA claims asserted by Plaintiff on behalf of the State of California. This is only a settlement of the PAGA claims for civil penalties, and is not a class settlement and does not release the individual claims, if any, of the PAGA Members. Attorneys' fees equal to \$26,666.66 and actual litigation costs in the amount of \$15,763.10 will also be paid to Plaintiff's Counsel, subject to Court approval as part of the settlement in accordance with California Labor Code § 2699(g)(1) as set forth in the Agreement. There is also payment of up to \$7,000.00 to the Settlement Administrator to perform the administrative duties to distribute the settlement money and a \$7,500.00 Enhancement Award to Plaintiff. (Hawkins Decl., ¶¶ 11-12.)

V. THE PARTIES REQUEST REVIEW AND APPROVAL OF THE SETTLEMENT OF THE PAGA CLAIM

Labor Code § 2699(l) requires that the Court "shall review and approve any settlement of any civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court." Consequently, the parties respectfully ask the Court to review and approve the settlement of the PAGA claims and the Maximum and Net Settlement Amounts to be paid as part of the proposed settlement.

A. The PAGA Group Recovery to Be Paid Is Fair and Reasonable

The Parties believe that the PAGA Group Recovery is fair and reasonable and therefore "shall" be reviewed and approved. The Labor and Workforce Development Agency has released data on PAGA settlement amounts. The Gross Settlement Amount of \$80,000 constitutes approximately \$15.05 to each PAGA Member after deductions for fees, costs, enhancement award, and administration costs. The Gross Settlement Amount accounts for approximately 36% of the maximum potential recovery (i.e. \$221,100.00). (Hawkins Decl., ¶15).

Since the filing of the complaint, the Parties have exchanged extensive discovery and engaged in numerous discussions regarding the factual and legal issues surrounding this case. Throughout the litigation, Defendants produced voluminous pages of information and data, including policies, handbooks, time and payroll records for the PAGA Members reflecting time punches at the start of employees' shifts, and at the end of the shift, and meal period punches as

1 well as the applicable pay rates. Defendant also provided Plaintiff's personnel file, records
2 regarding documents identifying the non-exempt positions and information regarding the number
3 of employees holding these positions during the relevant time period. Defendants also provided
4 substantial information concerning the total number of potential size of the PAGA group, the total
5 number of workweeks and pay periods at issue, and the applicable hourly rates and other
6 summary data related to the alleged PAGA Members. The Parties have conducted themselves in
7 informed, good faith arms-length negotiations after conducting discovery and exchanging
8 extensive evidence and information about the claims and defenses of this lawsuit and engaging in
9 pre-mediation discussions, telephone conferences, and correspondence all aimed at settling their
10 dispute. (Hawkins Decl., ¶ 17.).

11 In preparation for the mediation, Plaintiff reviewed the entire discovery produced. The
12 information had to be extrapolated and processed to figure out the amount of compensation
13 Plaintiff contends are due to the PAGA Members. Defendants also provided substantial
14 information concerning the total number of potential PAGA Members, the total number of
15 workweeks and pay periods at issue, and the applicable hourly rates and other summary data
16 related to the alleged class. The evidence and information gathered and reviewed by Plaintiff's
17 counsel provided a factual framework for a comprehensible and reliable damage model pertaining
18 to all Settlement PAGA Members. The mediation and subsequent negotiations included
19 discussion and examination of the PAGA Members and the Parties' respective positions on the
20 legal and factual issues raised in the Complaint. This was both a thorough and exhaustive process.
21 (Hawkins Decl., ¶ 18).

22 The PAGA Members recovery compares favorably to the estimated amount of PAGA
23 penalties. With the assistance of an expert, Plaintiff calculated that the maximum amount of
24 statutory PAGA civil penalties was potentially \$221,100.00 based on 2,211 pay periods
25 multiplied by a maximum per pay period violation rate of \$100. These were for penalties for
26 violations of Labor Code § 226.7/ 512/ (meal periods) at a 26% pay period violation rate,
27 penalties for violation of Labor Code § 226.7/ 512 (rest periods) also valued at a 25% violation
28 rate, penalties for violation of Labor Code § 226, penalties under Labor Code § 510/558 at a 60%

1 violation rate assessment. Importantly, however, it is likely that any penalties awarded would be
2 at a much lower rate given the facts of this case. California Labor Code Section 2699(e)(1)
3 permits a Court to award a lesser amount than the maximum civil penalty if based on the facts
4 and circumstances to do otherwise would result in an award that is "unjust, arbitrary and
5 oppressive or confiscatory." (Hawkins Decl., ¶ 12).

6 The maximum exposure here would be approximately \$221,100,000 if the Court awarded
7 100% penalties for each and every pay period at \$100 per pay period. Of course, these amounts
8 would probably have been reduced given the policies in place, and manageability issues, the issues
9 of why someone missed a meal break on any occasion or worked off the clock, and the issues of
10 payment of meal period premiums. Given the risks involved, such as manageability issues, not
11 prevailing on the merits, prevailing on certain claims for certain periods, reduced penalty amounts
12 awarded by the trial Court, and reversal on appeal, the resulting settlement is fair, adequate, and
13 reasonable. (Hawkins Decl. ¶¶ 15-33).

14 Defendants dispute that the penalties assessed by Plaintiff and his expert would have
15 been awarded. Further, it is Defendants' contention that PAGA penalties cannot be stacked,
16 and that at most just one PAGA penalty can be awarded to an aggrieved employee in
17 any one pay period. See Labor Code section 2699 (f)(2) (authorizing awardable PAGA
18 penalties to be measure by "each "each aggrieved employee per pay period"); *Smith v. Lux*
19 *Retail North America, Inc.*, 2013 WL 2932243, at *1, *4 (N.D. Cal. 2013) (rejecting a pleading
20 that sought the "stacking of penalties"; "[f]or the single mistake of failing to include
21 commissions in the overtime base, plaintiff has asserted *five* (count them, five) separate labor
22 code violations that could lead to statutory penalties;" "is it plausible that we would really pile
23 one penalty on another for a single substantive wrong?"; noting that "no actual holding in any
24 judicial decision has ever blessed such stacking"). As such, and for this initial reason,
25 Defendant contends that the maximum potential recovery in this action is significantly lower
26 than as stated by Plaintiff. (Hawkins Decl. ¶ 27).

27 Further, Defendants argue that Plaintiff's calculation of penalties as applicable to any
28

1 employee and for any pay period, is inflated for an additional reason. Defendants argue that
2 even were liability established, one does not reach the second-tier penalty for that violation
3 unless and until the employer is first cited for the violation, and that Defendant has never been
4 cited. *See Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*,
5 2009 WL 2448430 *1, *9 (S.D. Cal. 2009) (“For the purposes of subsequent violation penalties,
6 the issue is not whether [defendant] willfully violated the Labor Code, but rather whether a
7 court or commissioner had notified it of any violation.”); *Amaral v. Cintas Corp. No. 2*, 163
8 Cal. App. 4th 1157, 1209 (2008) (“[u]ntil the employer has been notified that it is violating a
9 Labor Code provision (whether or not the Commissioner or court chooses to impose penalties),
10 the employer cannot be presumed to be aware that its continuing underpayment of employees is
11 a ‘violation’ subject to penalties” at a second tier); *Robinson v. Open Top Sightseeing San*
12 *Francisco, LLC*, No. 14-CV-00852-PJH, 2018 WL 895572, at *20 (N.D. Cal. Feb. 14, 2018)
13 (applying “initial” penalty to each violation of § 226 and § 2699(f)(2) because there was no
14 evidence showing defendant was previously notified its practice violated § 226); *Willis v. Xerox*
15 *Bus. Servs., LLC*, 2013 WL 605383, at *1, *6 (E.D. Cal. 2013) (“for a plaintiff to recover for a
16 ‘subsequent violation,’ an employer must have notice that it has violated the Labor Code”). As
17 such, Defendants contends that Plaintiff’s calculation are inflated not only because the “stack”
18 penalties for a single person during a single pay period, but because the penalties Plaintiff would
19 award in each instances are at an inapplicable (doubled) rate. (Hawkins Decl. ¶ 28).

20 Defendants further argue that Plaintiff would still face significant practical problems in
21 any material exposure, as each violation would need to be proven as to each person and for each
22 period for which recovery is sought.² As an example, for purposes of section 226, “a good faith

23 ² Defendant argues that claims of this sort tend to require individualized proof sets, and
24 are not the subject of “common proof.” *See e.g., Mateo v. V.F. Corp.* 2009 WL 3561539, at *6
25 (N.D. Cal. Oct. 27, 2009) (denying collective treatment of off-the-clock (OTC) and overtime
26 claims as involving individualized proof); *Lawrence v. City of Philadelphia* (E.D. Pa. 2004) WL
27 945139 at *1-3 (rejecting OTC claims for collective treatment; “each of the plaintiffs potentially
28 may claim that on any given day he or she arrived early or departed outside their regularly
scheduled hours and were not compensated for such. The circumstances of those individual
claims potentially vary too widely to conclude that in regard to their OTC claim, the plaintiffs
are similarly situated. The questions of fact will likely differ for each Plaintiff and will be unduly
burdensome to both Defendants and to the Court in managing as a collective action.”); *Basco v.*
Wal-Mart Stores, Inc. (E.D. La. 2002) 216 F.Supp.2d 592, 603 (individual issues arise from

1 dispute presents when there is (1) uncertainty in the law; (2) representations by an authority that
2 compliance was not required; or (3) an employer’s good faith mistaken belief grounded in a good
3 faith dispute.” *Magadia v. Wal-Mart Assocs., Inc.*, 384 F. Supp. 3d 1058 (N.D. Cal. 2019).
4 “Mere recklessness” is not a basis for liability. *Pedroza*, 2012 WL 9506073, *5. (Hawkins Decl.
5 ¶ 29).

6 Defendants also note that PAGA grants the Court discretion to lower any PAGA penalty
7 otherwise due. See Labor Code section 2699 (e)(2). Defendants also argue that the Court could
8 reduce any penalty potentially due where, as Defendants contend, any technical violation of law
9 would have been inadvertent and in good faith, particularly where the law is undefined and
10 capable of differing interpretations. Section 226, for example, is not violated where the employer
11 acted in “good faith.” See *Pedroza v. PetSmart, Inc.*, 2012 WL 9506073 (C.D. Cal. June 14,
12 2012) (“The good faith defense to the willfulness element of these sections [226, 203] is clearly
13 established under California law); *Woods v. Vector Mktg. Corp.*, 2015 WL 2453202, at *3 (N.D.
14 Cal. May 22, 2015) (“The ‘good faith dispute’ rule has been extended by courts to apply to
15 California Labor Code Section 226. (Hawkins Decl. ¶ 29).

16 In *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), the Court of Appeal

17
18 “myriad of possibilities that could be offered to explain why any one of the plaintiffs worked
19 OTC” and predominate; rejecting collective treatment of such claims); *Chavez v. Zaldivar*, 2012
20 U.S. Dist. LEXIS 40984 *1, at *23-24 (N.D. Cal. 2012) (“To determine whether staffing levels
21 resulted in missed meal periods, the Court would need to engage in individualized questions
22 concerning the staffing requirements at each of [defendants’] locations. Additionally, these
23 staffing requirements would vary from day to day.”); *Washington v. Joe’s Crab Shack*, 271
24 F.R.D. 629, 641 (N.D. Cal. 2010) (“an individualized inquiry will be required to determine
25 whether any single employee failed to take a meal break because he/she was too busy and also to
26 determine whether a particular employee signed a waiver based on a decision not to take meal
27 breaks. For this reason alone, common issues do not predominate with regard to the meal break
28 claim”); *Ruiz v. Affinity Logistics Corp.*, 2009 WL 648973, *7-8 (S.D. Cal. 2009) (holding that
inquiry into the reasonableness and necessity of the expenses required a “case-by-case analysis
in which common questions did not predominate over individual questions.”). See also
Nikmanesh v. Wal-Mart Stores, Inc., No. 8:15-cv-00202-AG-JCG, ECF Dkt. 200, slip op. at 4-5
(C.D. Cal. Mar. 22, 2017) (dismissing uncertified PAGA claim “as unmanageable,” where court
previously “pointed to other examples of individualized variables when it denied class
certification for failure of common questions to ‘predominate over questions affecting only
individual class members’”); *Salazar v. McDonald’s Corp.*, No. 14-CV-02096-RS, 2017 WL
88999, at *7-9 (N.D. Cal. Jan. 5, 2017) (striking representative PAGA claims as unmanageable
where underlying claims would require individualized determinations).

1 affirmed a judgment after trial which only provided for a PAGA penalty of \$5 per pay period.
2 Therefore, at trial, any PAGA penalties awarded could be significantly less than Plaintiffs'
3 calculation even where Plaintiffs prevailed on the PAGA claim. If the amount of \$5 per pay
4 period from *Carrington v. Starbucks* is used, the potential recovery of civil penalties would be
5 only \$65,000, which is less than this settlement provides.

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

15 In order to recover any PAGA penalties, Plaintiff would be required at trial to prove each
16 of the underlying Labor Code violations. See *Cardenas v. McLane Foodservice, Inc.*, 2011 U.S.
17 Dist. LEXIS 13126, *10 (C.D. Cal. 2011) ("Given the statutory language [of PAGA], a plaintiff
18 cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation of
19 the Labor Code by the defendant."). Here, Plaintiff would need to prove that each PAGA Group
20 Member suffered all violations for each pay period the employee worked.

21 The claims in this PAGA action are based upon the wage and hour practices of
22 Defendant. Upon approval, approximately \$17,302.68 will be sent to the State of California and
23 approximately \$5,767.56 will be shared with aggrieved employees. This equates to
24 approximately \$15.05 to each aggrieved employee. (Hawkins Decl. ¶ 12).

25 The claims in this action are regarding meal periods, rest periods and off the clock work
26 during meal periods due to work interruptions and as a result of limited staffing ratios. Plaintiff
27 alleges that Defendants' practices do not provide proper payment for missed meal periods, rest
28 periods and pay for all overtime for off the clock work and due to off-the-clock work performed.

1 Defendants contend that it had compliant meal and rest period policies in place and such policies
2 also prohibited employees from working off the clock. (Hawkins Decl. ¶¶ 15-33).

3 Defendants contend that Plaintiff and the PAGA Members were properly compensated,
4 and that they did not violate the Labor Code as to any of them. Defendants asserted additional
5 defenses to the PAGA claim as discussed above. These defenses present a risk to the
6 PAGA claim and the potential that some or all of the PAGA penalties sought may not be
7 awarded. (*Id.*)

8 Given Defendants' potential defenses to the violations at issue, the risks and costs of
9 continued litigation, Plaintiff and his attorneys believe that the PAGA Settlement is fair and
10 reasonable. (Hawkins Decl., ¶ 36.) Plaintiff's Counsel have significant experience litigating
11 wage and hour claims including claims for PAGA penalties, and the PAGA Group Recovery here
12 is similar to or greater than similar settlements that courts have approved. (Hawkins Decl., ¶ 36-
13 41.) The PAGA employees recovery, along with the other terms of the proposed settlement, were
14 negotiated by experienced counsel at arm's length with the assistance of a private mediator,
15 Jeffrey Krivis. (Hawkins Decl., at ¶ 7)

16 As set forth in the accompanying proof of service, the LWDA has been provided notice of
17 this motion and the PAGA settlement. (Hawkins Decl., at ¶ 47) The decision of LWDA to
18 accept the PAGA settlement and not oppose the motion should be given considerable weight.
19 This is not a situation where the Court needs to be concerned about the rights of absent employees
20 as in a class settlement, as this PAGA-only settlement does not release the individual claims of
21 absent employees, and the LWDA is a sophisticated government entity that is more than able to
22 look out for its own rights.

23 **B. The Remaining Settlement Terms Are Fair and Reasonable**

24 Although PAGA requires that a court approve the proposed PAGA settlement, Labor
25 Code § 2699(1) does not require that a court approve any other elements of the proposed
26 settlement. Because there are no class allegations, the approval provisions applicable to class
27 settlements under Cal. Code Civil Proc. §382 do not apply. Accordingly, the Court only needs to
28 approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as

1 explained herein, the settlement terms for attorneys' fees and costs are reasonable.

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

3 PAGA does not have any requirements for reviewing attorneys' fees, and Plaintiffs'
4 position is that the payment of attorneys' fees and costs in this settlement is a matter of contract
5 for a contingent representation. Nevertheless, should this Court review the requested attorneys'
6 fees, it is clear that the requested fees and costs are reasonable.

7 First, the requested fees are justified by the result achieved. Plaintiff's Counsel negotiated
8 a recovery of \$80,000.00 and this result justifies the requested fees equal to 33% of this recovery.
9 This percentage is within the standard contingent recovery. Second, the fee award is justified by
10 the work performed. As detailed in the accompanying Declaration of Plaintiff's Counsel, the fee
11 award is reasonable as Plaintiff's Counsel represents its current lodestar far exceeds the requested
12 amount of \$26,666.66. (Hawkins Decl. ¶¶ 42-43).

13 Generally, the Ninth Circuit and California Courts award multipliers between 2 to 4 times
14 the lodestar to reward counsel for accepting the contingent risks of the litigation or obtaining
15 good results. *See, e.g., Laffitte*, 1 Cal. 5th at 506 (approving one-third fee award with multiplier
16 between 2.03 and 2.13); *Pellegrino v. Robert Half Intern., Inc.*, 182 Cal.App.4th 278 (2010)
17 (noting reasonable multipliers of 2.0 to 4.0 are often applied and affirming 1.75 multiplier);
18 *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001) (noting that multipliers can
19 range from 2 to 4 or higher); *Vandervort v. Balboa Capital Corp.*, 8 F.Supp. 3d 1200, 1210 (C.D.
20 Cal. 2014) (awarding one-third of fund, which was a 2.52 multiplier of lodestar); *Boyd v. Bank of*
21 *America*, 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-third of fund, which was a
22 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL
23 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented a multiplier of 2.76
24 as falling within the "majority" range for risk multipliers). Here, no multiplier is requested as
25 Plaintiff's Counsel's lodestar exceeds the amount of requested fees.

26 Finally, the award of litigation expenses is based upon the actual expenses incurred by the
27 Plaintiff's Counsel. (Hawkins Decl., at ¶ 44). Plaintiff's Counsel will be recovering litigation
28 expenses in the total amount of \$15,763.10. These expenses are documented in the billing

statement attached to the Declaration of Hawkins as Exhibit E.

VII. THE ENHANCEMENT TO THE PLAINTIFF IS REASONABLE

“[T]he rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class.” *Clark v. American Residential Services LLC*, 175 Cal. App. 4th 785 (2009).

Approximately 383 PAGA Members will share a \$80,000.00 settlement fund due entirely to the effort and commitment of Plaintiff. Subject to Court approval, therefore, the Settlement provides for an Enhancement Payment of \$7,500.00. The Enhancement Payment is fair and reasonable compensation for Plaintiff's efforts in pursuing the action, serving as private attorneys general under PAGA, assisting counsel with the litigation and settlement, regularly conferring with counsel on the status of their case and the strategies for prosecuting the claims, and reviewing the proposed settlement to ensure that its terms are fair and provide adequate relief for the Settlement Class. (Hawkins Decl. ¶¶ 34-35; see generally Declaration of Plaintiff Dancel Jr. filed concurrently herewith.)

Based on the foregoing, Plaintiff respectfully request this Court approve the PAGA enhancement to Plaintiff in the amount of \$7,500.00.

VIII. CONCLUSION

Based on the foregoing, Plaintiff respectfully request this Court approve the PAGA settlement and the PAGA Member recovery as set forth in the Agreement and enter the proposed order submitted herewith.

Dated: July 22, 2024

JAMES HAWKINS APLC



By: _____

GREGORY MAURO, ESQ.
JAMES HAWKINS, ESQ.
MICHAEL CALVO, ESQ.

Attorneys for Plaintiff SERGIO P. DANCEL
JR., individually and on behalf of the general
public as Private Attorney General

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On July 22, 2024, I served on the interested parties in this action the following document(s) entitled:

- [XX] BY ELECTRONIC SERVICE: Based on a court Order or an agreement by the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from the email address Alma@jameshawkinsaplc.com to the persons at the e-mail addresses listed in the Service List below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Alma Chavarin
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