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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF KERN

BEAU LANINOVICH, an individual, on
behalf of himself and others similarly situated

PLAINTIFF,

v.

BEAR VALLEY SPRINGS ASSOCIATION;
and DOES 1 thru 50, inclusive,

DEFENDANTS.

Case No. BCV-21-102750-BCB

[Case Assigned for All Purposes to Hon.
Bernard C. Barmann, Jr. in Div. H]

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

*[Filed concurrently with Declarations of
Kelsey M. Szamet and Jonathan Paul of Xpand
Legal Consulting LLC In Support of Plaintiff's
Motion for Approval of Representative Action
Settlement; [Proposed] Order, and Judgment]*

Date: January 10, 2024

Time: 8:30 a.m.

Div.: H

Complaint Filed: January 20, 2022

Trial Date: None Set

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

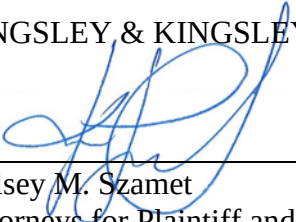
2 **PLEASE TAKE NOTICE** on January 10, 2024, at 8:30 a.m. in Division H of the above-
3 entitled Court, located at 1215 Truxtun Ave., Bakersfield, CA 93301, Plaintiff Beau Laninovich
4 will move the Court for an Order Granting Approval of Representative Action Settlement.

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 Kelsey M. Szamet, the PAGA Settlement Agreement, which is
9 attached to the concurrently filed Szamet Declaration as Exhibit "1", all other papers and records
10 on 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: December 18, 2023

KINGSLEY & KINGSLEY, APC

14
15 By: 

Kelsey M. Szamet

16 Attorneys for Plaintiff and all Aggrieved Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Beau Laninovich (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiff and
5 Defendant Bear Valley Springs Association (“Defendant”) (collectively, the “Parties”) have
6 reached a proposed settlement documented in the PAGA Settlement Agreement (“Agreement”)
7 attached to the concurrently-filed declaration of Kelsey M. Szamet.

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 \$75,000.00. After deduction of attorneys’
10 fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration
11 costs as discussed in the Agreement, the anticipated 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 \$30,984.83, with
14 \$23,238.62 (or 75%) going to the LWDA and \$7,746.21 (or 25%) distributed to the Aggrieved
15 Employees.¹

16 Plaintiff requests that the Court “review and approve any settlement of any civil action
17 filed pursuant to [PAGA].” (Lab. Code § 2699(l)(2).) If the Court deems the Settlement fair and
18 acceptable, Plaintiff requests that the Court enter an order approving the Settlement and ordering
19 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 November 19, 2021, and in compliance with Labor Code § 2699.3(a)(1), written notice
23 to Defendant and the Labor and Workforce Development Agency (“LWDA”) was provided
24 seeking civil penalties under PAGA for violation of Labor Code §§ 201, 202, 203, 226(a), 226.7,

25 ¹ Pursuant to PAGA, civil penalties recovered by Aggrieved Employees shall be distributed 75 percent
26 to the 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
28 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.

510, 512, 1194, 1194.2, 1199, and 2802. (Declaration of Kelsey M. Szamet (“Szamet Decl.”) ¶5.)

On November 19, 2021, Plaintiff commenced this Action by filing a Complaint alleging causes of action against Defendant for violations of: (1) failure to pay wages and/or overtime; (2) failure to provide meal breaks; (3) failure to reimburse expenses; (4) violation of Labor Code section 226(a); (5) penalties pursuant to Labor Code section 203; and, (6) violations of Business & Professions Code section 17200 et seq. (Hereafter the “Action.”) (Szamet Decl. ¶6.)

Plaintiff did not receive any response from the LWDA to his formal written notice and waited more than sixty-five (65) days from the November 19, 2021 postmark date of his written notice before filing his action, Plaintiff has complied with all of the requirements set forth in Labor Code § 2699.3 to commence a representative action under PAGA. (Szamet Decl. ¶7.) On January 24, 2022, Plaintiff filed a First Amended Class and Representative Action Complaint (“FAC”), adding an additional claim for penalties under PAGA. (Szamet Decl. ¶8.)

On December 20, 2022, the Plaintiff filed a Request for dismissal of the class claims due to a signed arbitration agreement with class action waivers agreed by Plaintiff and entered between Plaintiff and Defendant. The Court entered an order for the dismissal of the class claims on April 4, 2023. (Szamet Decl. ¶9.) The First Amended Complaint, without the class claims, is the operative complaint in the Action (the “Operative Complaint”). (*Id.*)

B. The Discovery Process and Mediation

The Parties engaged in informal pre-mediation discovery. Prior to mediation, Defendant produced sample time and pay data, including information regarding the number of Aggrieved Employees. (Szamet Decl. ¶10.) Based on Defendant’s records, the data reveals that the number of Aggrieved Employees is no more than 343 (including Plaintiff) and there is a total of 7,774 PAGA Pay Periods at issue. (Szamet Decl. ¶11.)

On June 28, 2023, the Parties participated in an all-day mediation presided over by mediator Russ J. Wunderli, which led to this formal PAGA Settlement Agreement that is subject to approval of the Court. (Szamet Decl. ¶12.) The Parties negotiated the terms and conditions of the Settlement and now present the agreed-upon Settlement to the Court for Approval. (Szamet Decl. ¶13.)

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:

“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.”

1 (Lab. Code § 2699.3(a)(1).)

2 As explained above, Plaintiff has complied with the notice requirements and have properly
3 pled a PAGA cause of action.

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

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

17 C. Standards for Settlement Approval

18 When approving a settlement of a PAGA action, the statute simply requires the Court to
19 “review and approve any settlement of any civil action filed pursuant to this part.” (Lab. Code §
20 2699(l)(2).) PAGA does not set forth standards for evaluating such settlements, and the California
21 appellate courts have not weighed in on the issue. However, trial courts have approved PAGA
22 settlements where the penalties are “genuine and meaningful” and “consistent with the underlying
23 purpose” of the statute. (See *O’Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110,
24 1113.) Additionally, as explained in *Arias, supra*, 46 Cal.4th 969, class action procedural rules do
25 not apply in PAGA cases, including the two-step preliminary and final approval process. Rather,
26 the approval process consists of one step where the court decides if the settlement should go into
27

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

effect.

IV. THE SETTLEMENT

Defendant will pay the total sum of \$75,000.00 in full and final settlement of the PAGA claims. (Szamet Decl. ¶14, Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount:	\$75,000.00
PAGA Counsel Fees Payment (1/3):	\$25,000.00
PAGA Counsel Litigation Expenses Payment:	\$9,015.17 ⁴ ,
Litigation Enhancement to Plaintiff:	\$5,000.00
Administrator Expenses Payment:	\$5,000.00
PAGA Penalties:	\$30,984.83
	<i>(\$23,238.62 to the LWDA; \$7,746.21 to Aggrieved Employees)</i>

(Szamet Decl. ¶15, Exhibit 1, ¶¶3.1-3.2.)

Each Aggrieved Employee shall receive a pro-rata portion of employees' share of PAGA penalties based on the number of PAGA Pay Periods worked by all Aggrieved Employees for Defendant during the PAGA Period.⁵ (Szamet Decl. ¶16, Exhibit 1, ¶3.2.3.)

For settlement purposes, the Aggrieved Employees are defined as "all non-exempt employees employed by BVSA in California at any time between November 19, 2020 and July 19, 2023." (Szamet Decl. ¶18., Exhibit 1, ¶1.4.)

V. ARGUMENT

A. The Court Should Approve the 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

⁴ The Agreement provides for counsel to receive cost reimbursement of up to \$20,000.00. However, counsel's costs to date are \$8,415.17, and Plaintiff anticipates incurring an additional \$600 in future costs associated with filing this motion, appearing at the hearing, etc. (Szamet Decl., Ex. 5.) Thus, Plaintiff requests reimbursement of costs in the amount of \$9,015.17. Because the original cost estimate was higher, the delta 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 \$7,500 contemplated in the settlement agreement. (See Szamet Decl., Ex. 1 ¶3.2.1.)

⁵ The PAGA Period or Covered Period means the period from November 19, 2020 to July 19, 2023. (Szamet Decl. ¶17., Exhibit 1, ¶1.19.)

1 explained in *Arias, supra*, 46 Cal.4th 969, the Parties are not obligated to follow the class action
2 procedural rules in PAGA cases and therefore need not obtain approval of the PAGA settlement
3 through a motion for primary or final approval. Nonetheless, in order to comply with the
4 requirements of Labor Code §2699, the Parties submit the instant Motion and the Agreement
5 (Exhibit “1” to the Szamet Declaration) for Court approval.

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

7 To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation
8 and discount taken follows. (Szamet Decl. ¶19.) Plaintiff believed that Defendant may persuasively
9 argue that the Court should exercise its discretion under PAGA to significantly reduce any
10 penalties. (Szamet Decl. ¶20.) The court in a PAGA action has the same discretion “to assess a
11 civil penalty” that the Labor Commissioner would have, as well as complete discretion to “award
12 a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts
13 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
14 arbitrary and oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)).

15 Furthermore, in accordance with the PAGA statute, the Court in a PAGA action has the same
16 discretion to “assess a civil penalty” that the Labor Commissioner would have, as well as complete
17 discretion to “award a lesser amount than the maximum civil penalty amount specified [by PAGA]
18 if, based on the facts and circumstances of the particular case, to do otherwise would result in an
19 award that is unjust, arbitrary and oppressive, or confiscatory.” (Labor Code §2699(e)(1) and (e)(2).
20 (Ex. 1 at ¶23(c).)

21 Here, Plaintiff alleges that: (1) he and the aggrieved employees were forced to work on a
22 regular consistent basis without receiving compensation for all hours worked at the proper overtime
23 rate because Defendant failed to include bonus and premium pay when calculating the regular rate;
24 (2) Defendant failed to maintain a lawful meal period policy and inform Plaintiff and the aggrieved
25 employees of their rights; (3) Defendant also failed to pay meal premiums at the proper rate and
26 instead paid premiums at an employee’s base rate; (4) Defendant failed to reimburse for necessary
27 business expenses, specifically for personal cell phone use; (5) Defendant failed to issue accurate and
28 itemized wage statements; and (6) Defendant owes waiting time penalties for failing to pay all wages

1 due at termination/resignation. (Szamet Decl. ¶21.)

2 PAGA Counsel anticipated that, at trial, Defendant would argue: (1) all aggrieved employees
3 were properly paid and/or reimbursed in accordance with Defendant’s lawful policies and practices,
4 and that any alleged failure to compensate aggrieved employees was the result of inadvertence and
5 clerical error; (2) all aggrieved employees were provided with the opportunity to take meal breaks in
6 compliance with California law; (3) until this Action was filed, no employees had complained about
7 any alleged failure to pay wages, reimburse expenses, provide meal breaks, and/or issue accurate
8 itemized wage statements; (4) none of Defendant’s employees suffered any harm from or actual
9 damage as a result of the conduct that forms the basis for Plaintiff’s allegations. (Szamet Decl. ¶22.)
10 All of which, Defendant would argue, should mitigate in favor of significantly reducing any PAGA
11 penalties. (*Id.*)

12 Additionally, Defendant raised the argument that Plaintiff’s claims were outside of the one-
13 year statute of limitations for PAGA. However, Plaintiff maintains that all that is needed “[t]o have
14 PAGA standing, a Plaintiff must be an “aggrieved employee” — that is, (1) “someone ‘who was
15 employed by the alleged violator’ ” and (2) “ ‘against whom one or more of the alleged violations
16 was committed.’ ” (*Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1114 [citing *Kim v.*
17 *Reins International California, Inc.* (2020) 9 Cal.5th 73, 83-84].)

18 While Plaintiff disagrees that Defendants’ analyses are legally correct or persuasive, PAGA
19 Counsel had to consider the foregoing facts and arguments and how they might impact any judgment
20 ultimately awarded to aggrieved employees if the Court were persuaded by them. (Szamet Decl. ¶23.)

21 In addition to the fact that liability was vigorously disputed by Defendant, and as discussed in
22 further detail below, the main issue driving resolution here was Defendant’s ability to pay any
23 meaningful settlement or judgment against it. (Szamet Decl. ¶24.)

24 In light of all these significant risks and the fact that PAGA gives the Court broad discretion
25 to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement
26 Amount of \$75,000.00 was fair and reasonable. (Szamet Decl. ¶25., Exhibit 1, ¶3.1.)

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

3 Plaintiff believes there is a strong risk that the Court will not award the \$200 civil penalty
4 triggered for “subsequent” violations. (Lab. Code § 2699(f)(2).) If this case were to proceed to
5 trial, Plaintiff would argue that a “subsequent” violation simply means that Defendant violated
6 sections 201-203, 226(a), 226.7, 510, 512, 1194, 1194.2, 1199, and 2802, more than once for a
7 given employee. Plaintiff is not aware of any case law that interprets “subsequent” in the context
8 of section 2699. However, Defendant is likely to rely on *Amaral*, which rejected a purely temporal
9 understanding of the term “subsequent” and interpreted its use in Labor Code sections 210 and
10 225.5 to require that “the employer has been notified that it is violating a Labor Code provision”
11 before higher penalties are triggered. (*Amaral, supra*, 163 Cal.App.4th at 1209; *see also Bernstein*
12 *v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144.) Defendant presumably will take the position
13 that it has not been notified that it actually violated a Wage Order until the Labor Commissioner
14 issues a formal citation or the Court makes a finding that a violation existed. Even if the Court
15 would agree with Plaintiff that Defendant was put on notice on November 19, 2021, the date
16 Defendant was served with Plaintiff’s PAGA letter, the \$200 civil penalty would only apply to
17 violations for a period of 3 months, occurring between November 19, 2021 and July 19, 2023 (the
18 end of the PAGA Period).

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

20 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a
21 showing that Defendant violated the Labor Code. (*Amaral, supra*, 163 Cal.App.4th at 1213;
22 *Moreno, supra*, 2007 WL 1650942, at *3.)

23 However, PAGA does provide the Court with discretion when it awards these penalties.
24 Labor Code section 2699(e)(2) states that “a court may award a lesser amount than the maximum
25 civil penalty amount specified by this part if, based on the facts and circumstances of the particular
26 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
27 confiscatory.” A court exercising its discretion to significantly reduce the civil penalty awarded
28 under PAGA is not a rare occurrence. (See e.g., *Carrington v. Starbucks Corp.* (2018) 30

Cal.App.5th 504, 529 [awarding only 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]; *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135–1136, disapproved on another ground in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 196, fn. 8 [considering the defendant’s inability to pay as a factor in reducing the penalties imposed]; see also *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 681 [noting that a court should consider whether a violation was inadvertent when assessing penalties].)

Here, as explained above, Plaintiffs’ counsel anticipates that should the matter go to trial and the Court find that violations occurred, Defendant would argue that the Court should exercise its authority to reduce any civil penalties awarded.

E. Based on the Risks Above, the Analysis of the Maximum Penalties Available, And Defendant’s Inability to Pay a Larger Settlement, Plaintiff Believes this Settlement is Fair and Reasonable.

For purposes of mediation, Plaintiff retained an expert to analyze the time and pay data produced by Defendant. Plaintiff’s expert determined that given the alleged violations, the total Defendant’s maximum potential exposure of “stacked” PAGA penalties for all aggrieved employees is \$2,562,000. However, there is no authority that permits a Court would permit “stacking” “of multiple PAGA penalties. If a Court determined it is not permissible, the maximum potential recovery is approximate \$777,400 (7,774 pay periods x \$100 per pay period, Defendant’s maximum exposure at trial would be \$777,400 (\$100 penalty × 7,774 pay periods). From there, a court has further discretion to reduce the amount accordingly.

The settlement here represents approximately 10% of the maximum exposure at trial, which is in line with judgments reached in other PAGA cases. (See e.g. *See e.g., Carrington, supra*, 30 Cal.App.5th 504, 529 [affirming the trial court’s reduction from the maximum penalty of \$50 per initial violation to only \$5]; *Thurman, supra*, at 203 Cal.App.4th at 1135–1136, [affirming trial court’s decision to reduce penalties by 30%].)

Moreover, during negotiation efforts, Defendant raised the issue of its inability to pay a larger any sizeable settlement that the amount agreed upon or judgment against it. Defendant is a

1 small private homeowner’s association governed by the Davis-Sterling Act and is a non-profit
2 corporation. (Declaration of Guy Munday, ¶¶ 2-3.) Defendant is funded through annual
3 assessments/dues. (Munday Decl. at ¶ 5.) Under the Davis-Sterling Act, Defendant is required to
4 “zero out” every year so that revenues do not exceed expenses. (*Id.*) It also cannot impose an
5 assessment that exceeds the amount necessary to defray the costs for which it is levied. (*Id.*)

6 Therefore, while Defendant has indicated that while it vigorously denies any liability of
7 the PAGA claims, even if liability were found, it cannot afford to continue this litigation or pay a
8 larger settlement. (Munday Decl. at ¶ 6.) Due to the legal restrictions that apply under the Davis-
9 Sterling Act, Defendant also does not have the authority to increase the annual assessments of the
10 member residents to compensate for a larger settlement. (*Id.*)

11 Plaintiff also acknowledges the risk of litigating this case through to trial. Given
12 Defendant’s financial inability to pay a larger settlement at this stage of the litigation, Plaintiff also
13 considered that continuing to litigate this case would only further result in additional attorneys’
14 fees and costs that could result in Defendant’s insolvency and/or exacerbate its inability to pay any
15 judgment achieved at trial.

16 In light of Defendant’s inability to pay a larger settlement, and the risks of litigating this
17 case through trial, Plaintiff believes that the settlement for \$75,000 is fair and reasonable.

18 **VI. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS’ FEES**

19 As detailed fully in the Agreement, the settlement provides for Defendant to create a Gross
20 Settlement Amount of \$75,000.00. (Szamet Decl. ¶29; Ex. 1 at ¶¶1.10; 3.1.) From that fund,
21 Plaintiff requests an award of attorneys’ fees for PAGA Counsel in the amount of \$25,000.00, or
22 33.33% of the Gross Settlement Amount, and \$9,015.17 in reimbursement for litigation costs. (*Id.*;
23 Ex. 1 at ¶3.2.1.)

24 **A. Plaintiff’s Counsel are Entitled to a Fee from the Common Fund**

25 On August 11, 2016, the California Supreme Court decided *Laffitte v. Robert Half*
26 *International*, which addressed the correct methodology for awarding fees in a class action
27 settlement. (*Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 205 Cal.Rptr.3d 555, 573.) The *Laffitte*
28 Court approved awarding fees as a percentage of the settlement fund in cases like the present one,

1 where a settlement results in the creation of a common fund on behalf of a class:

2 We join the overwhelming majority of federal and state courts in
3 holding that when class action litigation establishes a monetary fund
4 for the benefit of the class members, and the trial court in its
5 equitable powers awards PAGA 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.

6 (*Id.* at 573.) The Court then set out several reasons why the percentage-of-the-fund method is
7 preferred over the alternative lodestar-multiplier approach in California courts:

8 The recognized advantages of the percentage method—including relative ease of
9 calculation, alignment of incentives between counsel and the class, a better
approximation of market conditions in a contingency case, and the encouragement
10 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
11 should not be denied our trial courts.

12 (*Id.* at 573.)

13 An award of 33.33% of the common fund is appropriate here under the “substantial benefit”
14 theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer,*
15 *Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a
16 representative capacity to recover fees when the litigant’s efforts have created a substantial, actual,
17 and concrete benefit for members of an ascertainable class and the court’s jurisdiction over the
18 subject matter makes possible an award which spreads the cost proportionately among the
19 members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th
20 563, 578.)

21 This doctrine rests on the understanding that attorneys should normally be paid by their
22 clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from
23 the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979)
24 23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent
25 this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees against
26 the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano*
27 *III*, 20 Cal.3d at p. 35.) “A court, in the exercise of its equitable discretion, may decree that those
28 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 Cal.App.4th 19, 31, 48.)

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

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

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

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

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1 i. No Multiplier Is Requested

2 The purpose of using the lodestar/multiplier method is to mirror the legal marketplace.
3 Counsel will not handle cases for straight hourly fees payable only if they win; therefore, an
4 enhancement is often awarded so that the fee received is commensurate with what attorneys could
5 expect to be compensated for services in similar circumstances. (*See Tulare Valley Audubon Soc.,*
6 *Inc. v. County of Tulare* (1984) 155 Cal.App.3d 738, 755 [an award must be large enough “to
7 entice competent counsel to undertake difficult public interest cases”].) No specific findings
8 reflecting the court’s calculations are required. (*Wershba, supra*, 91 Cal.App.4th at 254; *Rebney,*
9 *supra*, 232 Cal.App.3d at p. 1349.) “The record need only show that the attorney fees were awarded
10 according to the ‘lodestar’ or ‘touchstone’ approach.” (*Ibid.*)

11 Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Szamet
12 Decl. ¶38.) PAGA Counsel have an aggregate lodestar in the amount of \$38,990.00, which
13 represents 57.50 hours of attorney work on this litigation from its inception through the date of
14 this filing of Plaintiff’s instant Motion. (*Id.*) PAGA Counsel also anticipates an additional five
15 hours of future time through the hearing and the administration process. (Szamet Decl. ¶39.) As
16 such, PAGA Counsel has billed more hours than the fee, and no multiplier is requested. (Szamet
17 Decl. ¶40.)

18 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF**
19 **COSTS**

20 In addition to their request for fees, PAGA Counsel further request reimbursement of the
21 reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this
22 litigation, in the amount of \$9,015.17. (Szamet Decl. ¶60.) To date, Kingsley and Kingsley has
23 incurred \$8,415.17 in costs. (Szamet Decl. ¶61.) PAGA Counsel anticipates incurring an
24 additional \$600.00 in costs to file and serve this motion. (Szamet Decl. ¶62.) As such, counsel is
25 requesting a cost reimbursement of \$9,015.17. (Szamet Decl. ¶63.)

26 All of the requested costs are reasonable in amount and were necessarily incurred by PAGA
27 Counsel in prosecuting this litigation. (Szamet Decl. ¶64; Exhibit 5 [Cost Report].) Expenses in
28 this matter to date include costs for filing fees, research, mediation, and additional costs for the

1 prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Kelsey
2 M. Szamet. All of these costs have been incurred in the course of this litigation, and all costs
3 advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of
4 filing the present motion. (Szamet Decl. ¶65.)

5 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
6 advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court
7 should approve the request for reimbursement in the amount of \$9,015.17. (Szamet Decl. ¶66.)

8 **VIII. THE COURT SHOULD APPROVE THE PROPOSED ENHANCEMENT TO**
9 **PLAINTIFF**

10 The Agreement calls for an enhancement payment of \$5,000.00 to the named Plaintiff, to
11 be paid from the Gross Settlement Amount. (Szamet Decl. ¶67; Ex. 1 at ¶3.2.4.) Incentive awards
12 “are intended to compensate class representatives for work done on behalf of the class, to make up
13 for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize
14 their willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.* (9th
15 Cir. 2009) 563 F.3d 948, 958-59. “[I]t is established that named plaintiffs are eligible for
16 reasonable incentive payments to compensate them for the expense or risk they have incurred in
17 conferring a benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los*
18 *Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC*
19 (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

20 Here, the enhancement takes into consideration the time, effort, and expense incurred by
21 Plaintiff in coming forward to litigate this matter on behalf of all Aggrieved Employees. The time
22 spent by Beau Laninovich includes identifying competent counsel, providing information to
23 PAGA Counsel regarding his relevant employment experiences, compiling documents, meeting
24 with PAGA Counsel frequently to discuss the status of the case and the theories of liability, and
25 reviewing settlement documents. (Szamet Decl. ¶68; Declaration of Beau Laninovich ¶¶5-14.)
26 Plaintiff has also agreed to a broader release than the Aggrieved Employees and expressly waived
27 the rights provided under California Civil Code section 1542. (*Id*; Ex. 1 at ¶¶5-5.1.)

28 PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶69.)

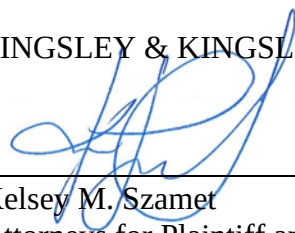
1 The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiff
2 in coming forward to litigate this matter on behalf of all Aggrieved Employees. (Szamet Decl.
3 ¶70.) Accordingly, Plaintiff should be awarded the agreed-upon enhancement of \$5,000.00.

4 **IX. CONCLUSION**

5 Plaintiff submits that the proposed settlement as documented in the Agreement is fair,
6 adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiff
7 respectfully requests that the Court approve the Settlement and Order that the Settlement is carried
8 out according to the terms of the Agreement.

9
10 DATED: December 18, 2023

KINGSLEY & KINGSLEY, APC

11
12 By: 

Kelsey M. Szamet

13 Attorneys for Plaintiff 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 December 18, 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:

Reyna E. Macias
rmacias@wfbm.com
WFBM LLP
19900 MacArthur Blvd, Suite 1150
Irvine, CA 92612-2445

ABRAMSON LABOR GROUP
William Zev Abramson
Wza@abramsonlabor.com
11846 Ventura Blvd., Suite 100
Studio City, CA 91604

[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 December 18, 2023, at Encino, California.



Michelle Tanzer