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

ERIC HERRERA, an individual, on behalf of
the State of California, as a private attorney
general,

PLAINTIFF,

v.

RCI ELECTRIC, INC.; and DOES 1 thru 50,
inclusive,

DEFENDANTS.

Case No. 34-2021-00311447-CU-OE-GDS

[Case Assigned for All Purposes to Hon. Jill
H. Talley in Dept. 23]

**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, Sean Hartranft of Apex
Class Action Administration and Plaintiff Eric
Herrera in Support of Plaintiff's Motion for
Approval of Representative Action Settlement;
[Proposed] Order and Judgment]*

Date: September 20, 2024

Time: 9:00 AM

Dept.: 23

Complaint Filed: November 10, 2021

Trial Date: None Set

Reservation No. #A-311447-002

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

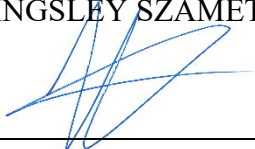
2 **PLEASE TAKE NOTICE** that on September 20, 2024 at 9:00 AM in Department 23 of
3 the above-entitled court, Plaintiff ERIC HERRERA will move the Court for an Order Granting
4 Approval of Representative Action Settlement.

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

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

12
13 DATED: July 8, 2024

KINGSLEY SZAMET & LY

14
15 By: 

16 Liane Katzenstein Ly
17 Attorneys for Plaintiff ERIC HERRERA and all
18 aggrieved employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Eric Herrera (“Plaintiff”) submits this Memorandum of Points and Authorities in
4 support of Motion for Approval of Representative Action Settlement. Plaintiff and Defendant RCI
5 ELECTRIC, INC. (“Defendant”) (collectively, the “Parties”) have reached a proposed settlement
6 documented in the PAGA Settlement Agreement (“Agreement”), attached to the concurrently-
7 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 \$325,000.00. After deduction of attorney’s
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 required by Labor
13 Code section 2699(i) is \$194,032.22, with \$145,524.16 (or 75%) going to the LWDA and
14 \$48,508.06 (or 25%) distributed to the aggrieved employees.¹

15 Plaintiff requests that the Court “review and approve any settlement of any civil action
16 filed pursuant to this part” (*See* Lab. Code § 2699(1)(2).) If the Court deems the Settlement fair
17 and acceptable, Plaintiff requests that the Court: (1) enter an order approving the Settlement and
18 ordering the Parties to carry the terms of the Settlement Agreement; and (2) and enter a Final
19 Judgement thereon.²

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

21 A. Litigation Overview and Procedural History

22 Defendant RCI ELECTRIC, INC.’s, main headquarters is in California and is primarily
23 part of the commercial and industrial electric service industry, operating in California, and does
24 business within Sacramento County.

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

28 ² Plaintiff’s Motion for Approval of Representative Action Settlement will be concurrently uploaded to the
LWDA’s website on the date this Motion is filed. Proof of submission of Plaintiff’s Motion for Approval of
Representative Action Settlement, all related documents, and copy of the email from the LWDA confirming
receipt can be provided to the Court upon request. (Ly Decl. ¶105.)

1 On November 10, 2021, Plaintiff filed a Class Action Complaint seeking recovery for: (1)
2 failure to provide rest breaks pursuant to Labor Code section 226.7; (2) violation of Labor Code
3 section 2802; (3) violation of Labor Code section 226(a); (4) penalties under Labor Code section
4 203; and (5) violation of Business & Professions Code section 17200. (Declaration of Liane
5 Katzenstein Ly ¶5) (“Ly Decl.”)

6 On November 10, 2021, Plaintiff sent a notice letter, pursuant to Labor Code section 2699
7 (“PAGA”), to the Labor Workforce Development Agency (“LWDA”) regarding his intent to seek
8 civil penalties for the same Labor Code violations above. (Ly Decl. ¶6.)

9 After the matter was at hand, Plaintiff’s Counsel learned that there is an existing arbitration
10 agreement signed by Plaintiff that includes a class action waiver. (Ly Decl. ¶7.)

11 On January 18, 2022, Plaintiff filed a First Amended Representative Action Complaint,
12 alleging a single cause of action for penalties pursuant to PAGA based upon the underlying Labor
13 Code violations set forth in the original Complaint. (Ly Decl. ¶8.)

14 On July 28, 2022, Defendant filed a Petition to Compel Plaintiff’s individual PAGA claim
15 to arbitration and dismiss Plaintiff’s representative PAGA claim. (Ly Decl. ¶9.) Plaintiff opposed,
16 and instead sought a stay of Plaintiff’s representative PAGA claim pending the California Supreme
17 Court’s review of *Adolph v. Uber. (Id.)* On October 11, 2022, the Court ordered Plaintiff’s
18 individual PAGA claim to arbitration but declined to dismiss Plaintiff’s representative PAGA
19 claim. (Ly Decl. ¶10.) Instead, the Court stayed the representative PAGA claim pending the
20 outcome of arbitration and *Adolph. (Id.)*

21 Plaintiff has settled his individual claims in arbitration, including his individual PAGA
22 Claim. (Ly Decl. ¶11.) After the California Supreme Court’s decision in *Adolph* was published,
23 the Parties filed a joint stipulation to lift the stay of Plaintiff’s Representative PAGA Claim on
24 September 12, 2023. (Ly Decl. ¶12.) The Court signed the order to lift the stay on September 26,
25 2023. (*Id.*)

26 B. The Discovery Process and Mediation

27 The Parties engaged in formal and informal pre-mediation discovery. Prior to mediation,
28 Plaintiff obtained, through formal discovery, Plaintiff’s personnel records and extensive time and pay

1 data, and rest period policies, relevant to both Plaintiff and the aggrieved employees. (Ly Decl. ¶13.)

2 On May 10, 2024, the Parties participated in an all-day mediation presided over by mediator
3 Kendall J. Newman, Esq. which led to an Agreement to settle the action. (Ly Decl. ¶14.) Thereafter,
4 the Parties engaged in good faith, arms-length negotiations concerning possible resolution of the
5 claims asserted in the Litigation. (Ly Decl. ¶15) The Parties were able to reach a tentative settlement
6 subject to finalization of a formal PAGA Settlement Agreement and the approval of the Court. (*Id.*)

7 Although Defendant denies that it violated any pertinent law, it recognized the risks and
8 attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to
9 finalization of a formal PAGA Settlement Agreement and the approval of the Court. (Ly Decl.
10 ¶16.) The Parties negotiated the terms and conditions of the Agreement and now present the
11 agreed-upon Settlement to the Court for Approval. (*Id.*)

12 **III. PAGA ACTIONS AND THE REQUIREMENTS**

13 A. The PAGA Statutory Scheme

14 PAGA creates a means of “deputizing” citizens as private attorney generals to enforce the
15 Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489,
16 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A
17 plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own
18 behalf as an individual claim, but “as the proxy or agent of the state’s labor law enforcement
19 agencies.” *Id.*, at 986; *see also Reyes v. Macy’s, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011);
20 *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380).

21 When an aggrieved employee brings a PAGA claim, “the government is always the real
22 party in interest.” *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th
23 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) (“[A]
24 PAGA action is a dispute between an employer and the State agency.”). Accordingly, a plaintiff
25 that brings a PAGA claim represents “the same legal right and interest as state labor law
26 enforcement agencies,” in that the plaintiff is seeking to recover those civil penalties that otherwise
27 would have been assessed and collected by the LWDA. *Arias, supra*, 46 Cal.4th at 986; Lab. Code
28 § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D.

Cal. 2015) 523 B.R. 820, 825 (holding “PAGA plaintiffs do not have property rights in their cases.”). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties recovered; thus, recoveries are principally for the state and only secondarily for aggrieved employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a PAGA claim, he or she is properly conceived of as a private attorney general prosecuting violations of California’s labor laws on behalf of the state.

An employee may commence a PAGA action by fulfilling the requirements of Cal. Lab. Code § 2699.3 (a)(1), which simply states:

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

Lab. Code § 2699.3 (a)(1)

As explained above, Plaintiff has complied with the notice requirements and has properly pled a PAGA cause of action. (Ex. 1, ¶ 2.2.)

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

PAGA provides for penalties in the amount of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2).

“PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that Defendant violated the Labor Code.³ *Amaral v. Cintas Corp.* No. 2 163 Cal. App. 4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code §2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Here, Defendant denies that it violated any law or that it engaged in any knowing or intentional

³ See also *Willner v. Manpower Inc.*, *supra*. 35 F. Supp. 3d at 1136; *McKenzie v. Federal Exp. Corp.*, *supra*, 765 F.Supp.2d at 1232.

conduct giving rise to liability, and expressly deny that any employees suffered harm.

C. Standards for Settlement Approval

When approving a settlement of a PAGA action, the statute simply requires the Court to “review and approve any settlement of any civil action filed pursuant to this part.” (Lab. Code § 2699(l)(2).) PAGA does not set forth standards for evaluating such settlements, and the California appellate courts have not weighed in on the issue. However, trial courts have approved PAGA settlements where the penalties are “genuine and meaningful” and “consistent with the underlying purpose” of the statute. (See *O'Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1113.) Additionally, as explained in *Arias v. Superior Court* (2009) 46 Cal.4th 969, class action procedural rules do not apply in PAGA cases, including the two-step preliminary and final approval process. Rather, the approval process consists of one step where the court decides if the settlement should go into effect.

IV. THE SETTLEMENT

Defendant will pay the total sum of \$325,000.00 in full and final settlement of the PAGA claims alleged. (Ly Decl. ¶17., Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount:	\$325,000.00
PAGA Counsel Fees Payment:	\$108,333.33
PAGA Counsel Litigation Expenses Payment:	\$11,134.45 ⁴
Administrator Expenses Payment:	\$6,500.00
Named Plaintiff Enhancement:	\$5,000.00
PAGA Penalties:	\$194,032.22 (\$145,524.16 to the LWDA; \$48,508.06 to remain in the Net Settlement Amount)

(Ly Decl. ¶18., Exhibit 1, ¶3.)

Each aggrieved employee shall receive a pro-rata portion of the remaining amount in PAGA

⁴ The Agreement provided for counsel to receive cost reimbursement up to \$13,000.00. However, counsel’s final costs come to \$11,134.45. (Ly Decl. ¶ 19, Ex. 5) The extra \$1,865.55 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 \$192,166.67 contemplated in the settlement agreement. (Ly Decl., Ex. 1, ¶3.2.2)

penalties based by dividing the amount of the aggrieved employees’ 25% share of PAGA Penalties by the total number of PAGA Pay Periods worked by all aggrieved employees during the PAGA Period, and then multiplying the result by each aggrieved employee’s PAGA Pay Periods. (Ly Decl. ¶20., Exhibit 1, ¶3.2.4.1.)

For settlement purposes, the Aggrieved Employees are defined as: “all non-exempt employees employed by Defendant at any time from November 9, 2020 to May 10, 2024” (“Aggrieved Employees”). (Ly Decl. ¶21., Exhibit 1, ¶1.4.) The PAGA Period means the period from November 9, 2020 to May 10, 2024. (Ly Decl. ¶22, Exhibit 1, ¶1.19).

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 explained in *Arias v. Superior Court* 46 Cal.4th 969 (2009), the Parties are not obligated to follow the class action procedural rules in PAGA cases and therefore need not obtain approval of the PAGA settlement through a motion for primary or final approval. Nonetheless, in order to comply with the requirements of Labor Code §2699, the Parties submit the instant Motion and the Agreement (Exhibit “1” to the Ly Declaration) for Court approval.

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

To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation and discount taken follows. (Ly Decl. ¶23) Plaintiff believed that Defendant may persuasively argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether waive any penalties under PAGA. (Ly Decl. ¶24.) Pursuant to Labor Code §226.3, the Labor Commissioner has the discretion to “decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake.” (Ly Decl. ¶25.) And in accordance with PAGA, the court in a PAGA action has the same discretion “to assess a civil penalty” that the Labor Commissioner would have, as well as complete discretion to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,

arbitrary and oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)). (Ly Decl. ¶26.)

PAGA Counsel anticipated that, at trial, Counsel for Defendant could make a potentially persuasive argument that Defendant: (1) the Aggrieved Employees were properly reimbursed in accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate the Aggrieved Employees was the result of inadvertence and clerical error; (2) the Aggrieved Employees were provided with the opportunity to take rest breaks in compliance with California law; (3) until this Action was filed, no employees had compliance about any alleged failure to provide rest breaks, reimburse expenses, issue accurate itemized wage statements; (4) none of Defendant’s employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff’s allegations. (Ly Decl. ¶27.) All of which, Counsel for Defendant would argue, should mitigate in factor of significantly reducing or waiving any PAGA penalties. (*Id.*) While Plaintiff disagrees that this analysis is legal correct or persuasive, PAGA Counsel had to consider the foregoing facts and arguments and how they might impact any judgment ultimately awarded to Aggrieved Employees if the Court were persuaded by them. (Ly Decl. ¶28.)

1. The Risks Associated with the Rest Period Claim

Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour of compensation for each workday the employer fails to provide a rest period according to law.

Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11160, subd. 12(A).)

Plaintiffs and the aggrieved employees’ rest period claims arise from an alleged common course of conduct wherein Defendant did not provide employees with the opportunity to take a 10-minute rest break during their shifts in compliance with California law. (Ly Decl. ¶29.) The California Supreme Court has held: “Employees are entitled to 10 minutes’ rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on.” (*Brinker Rest. Corp. v. Superior Court*, supra, 53 Cal.4th at 1029.) In an eight-hour workday, being denied the two paid rest breaks in a day is “essentially perform[ing] 20 minutes of ‘free’ work.” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104.)

1 The Court also clarified what steps an employer has to take to “make available” rest breaks
2 to its employees. Under *Brinker*,

3 An employer is required to authorize and permit the amount of rest
4 break time called for under the wage order for its industry. If it does
5 not—if, for example, it adopts a uniform policy authorizing and
6 permitting only one rest break for employees working a seven-hour
7 shift when two are required—it has violated the wage order and is
8 liable. No issue of waiver ever arises for a rest break that was
9 required by law but never authorized; if a break is not authorized, an
10 employee has no opportunity to decline to take it.

11 (*Brinker Rest. Corp. v. Superior Court*, supra, 53 Cal.4th at 1033 (emphasis added).)

12 Employers must authorize and permit a net ten-minute paid rest period for every four hours,
13 or major fraction thereof, of work for its employees. If an employer does not, then the employer
14 must pay the employee one hour of pay at the employee’s regular rate of pay for each workday
15 that the rest period is not provided. (Cal. Code Regs., tit. 8, § 11160, subd. 12(B).)

16 Here, Defendant failed to apprise Plaintiff and the Aggrieved Employees of their rights
17 associated with rest periods and failed to provide compliant rest periods. (Ly Decl. ¶30.) In fact,
18 Defendant’s crew leaders would reprimand Plaintiff and other employees for taking even water
19 breaks. (Ly Decl. ¶31.) Plaintiff was working on homes that were still in construction and therefore
20 had no insulation or air conditioning. (Ly Decl. ¶32.) Plaintiff would try to take his 10-minute rest
21 period to drink water and cool off, but crew leaders would tell him and the other employees to get
22 back to work and to stop taking breaks. (*Id.*) Plaintiff complained about this issue numerous times
23 but it was never resolved. (*Id.*) Thus, Defendant maintained a consistent policy of failing to provide
24 Plaintiff and the Aggrieved Employees with rest breaks of not less than ten (10) minutes per four
25 (4) hour work period or major fraction thereof. Plaintiff and the Aggrieved Employees are required
26 to work four-hour increments (or major fractions thereof) without being provided with a ten (10)
27 minute rest period.

28 Defendant again raised the defense that employees received their rest breaks and presented
evidence that employees would testify as such. (Ly Decl. ¶33.) Given that the rest period policy
was accurate, Plaintiff considered this a viable risk. (Ly Decl. ¶34.)

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2. The Risks Associated with the Reimbursement Claim

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

Here, Plaintiff and the Aggrieved Employees were required to incur substantial expenses in direct consequent of the discharge of their duties for Defendant without reimbursement. (Ly Decl. ¶35.) Specifically, Defendant has failed to reimburse Plaintiff and the Aggrieved Employees the cost of using their personal cell phones, purchasing tools, or use of their personal vehicles for business related purposes. (Ly Decl. ¶36.) Defendant required that Plaintiff and the Aggrieved Employees purchase their own tools and be available by cell phone and answer/use their cell phones while working. (Ly Decl. ¶37.) Each time Plaintiff was assigned to a new jobsite, which changed frequently, he was sent a text by management informing him of the assignment and location. (Ly Decl. ¶38.) Cell phones were also the primary method of communication between Plaintiff and crew leaders/supervisors. (*Id.*)

Additionally, Plaintiff had to purchase tools necessary for electrician work. (Ly Decl. ¶39.) Plaintiff did not use these tools after his employment with Defendant ended. (Ly Decl. ¶40.) Moreover, Plaintiff used his own personal vehicles to travel between jobsites. (Ly Decl. ¶41.) Plaintiff was not reimbursed for this mileage. (*Id.*) Plaintiff was assigned to jobsites in Sacramento, Manteca, Folsom, and Lathrop. (*Id.*) If Plaintiff was assigned to more than one job site a day, he was not reimbursed for the mileage between job sites. (*Id.*)

One risk that Plaintiff considered was the fact that not all Aggrieved Employees used their cell phones for every pay period. (Ly Decl. ¶42.) This meant that the damages were relatively small. (Ly Decl. ¶43.)

3. The Risks Associated with the Wage Statement Claims

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

1 employers to furnish accurate itemized wage statements in writing that show total hours worked
2 by the employee and all applicable hourly rates in effect during the pay period and the
3 corresponding number of hours worked at each hourly rate by the employee. (Labor Code §§
4 226(a)(2) and (9) respectively.)

5 Defendant has failed to comply with Industrial Welfare Commission (“IWC”) Wage Order
6 16-2001 and Labor Code § 226(a) by failing to issue Plaintiff and the Aggrieved Employees
7 accurate itemized wage statements that show all applicable hourly rates in effect during the pay
8 period and the corresponding number of hours worked at each hourly rate by the employee. (Ly
9 Decl. ¶44.) Plaintiff and the Aggrieved Employees are issued wage statements that do not include
10 rest premiums at the correct rate when rest premiums are provided as a result of the claims alleged
11 above. (Ly Decl. ¶45.)

12 As this is a derivative claim, the same risks present for the above claims were present for
13 this claim. (Ly Decl. ¶46.)

14 **4. The Risks Associated with the Waiting Time Penalties Claim**

15 Under Labor Code section 203, if an employer fails to provide wages at the time of an
16 employee’s termination or within seventy-two (72) hours of resignation, then the employee’s
17 wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203
18 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g.,
19 *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68
20 Cal.App.4th 487, 492.)

21 Here, Plaintiff and numerous Aggrieved Employees are no longer employed by Defendant.
22 Defendant failed to pay all wages owed and due upon their termination and/or resignation. (Ly
23 Decl. ¶47.) Defendant’s actions were willful, as they have intentionally failed or refused to
24 perform an act which was required to be done. (See *Amaral v. Cintas Corp. No. 2* (2008) 163
25 Cal.App.4th 1157, 1201.) “The failure to pay is willful if the employer ‘knows what [it] is doing
26 [and] intends to do what [it] is doing’, and does not also require proof that the employer acted with
27 “a deliberate evil purpose to defraud work[ers] of wages which the employer knows to be due.”
28 (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 868.)

1 Plaintiff factored in the risk of establishing that any violation was “willful” and the fact
2 that this claim is derivative. (Ly Decl. ¶48.)

3 In light of all these significant risks and given that PAGA gives the Court broad discretion to
4 reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement
5 Amount of \$325,000.00 was fair and reasonable. (Ly Decl. ¶49, Exhibit 1, ¶3.1.)

6 C. A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty
7 Awarded for Technical Violations of the Labor Code

8 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a
9 showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp. No. 2 163 Cal. App 4th*
10 *1157, 1213 (2008)*; *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007
11 WL 1650942, at *3.

12 However, PAGA does provide the Court with discretion when it awards these penalties.
13 Labor Code section 2699(e)(2) states that “a court may award a lesser amount than the maximum
14 civil penalty amount specified by this part if, based on the facts and circumstances of the particular
15 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
16 confiscatory.”

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

28 Here, the aggrieved employees suffered no injury due to the erroneous wage
statements, and made no complaint of the errors or omissions contained

therein prior to filing suit. Also, Defendants were not aware that the wage statements violated the law and took prompt steps to correct all violations once notified. Given these circumstances, the Court finds a \$2.8 million penalty unjust according to § 2699(e)(2). Accordingly, in its discretion, the Court reduces the penalty to \$500,000.

Id. at *4. A court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence. *See e.g., Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbucks’ “good faith attempts” to comply and because the violations were minimal).

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

After engaging in pertinent informal discovery in this Action, Plaintiff’s counsel determined that a settlement of \$325,000.00 is reasonable given the above risks.

D. 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 the Aggrieved Employees is \$1,900,000.00 (19,000 pay periods at issue multiplied by \$100 a pay period). If the Court stacks pay periods, the full value could balloon up, but in light of the immense discretion available, Plaintiff believes the Settlement is reasonable. The reimbursement claim did not occur every pay period and the failure to provide rest periods was also not every pay period. Given that this Settlement is for \$325,000.00, Plaintiff believes this is a very fair and reasonable settlement.

1 **VI. THE REQUEST FOR ATTORNEYS' FEES AND COSTS**

2 As detailed fully in the Settlement, the settlement provides for Defendant to create a Gross
3 Settlement Amount of \$325,000.00. (Ly Decl. ¶XX; Ex. 1 at ¶¶3.2.2.) From that fund, Plaintiff
4 requests an award of attorneys' fees for PAGA Counsel in the amount of \$108,333.33, or 33.33%
5 of the Gross Settlement Amount, and \$11,134.45 in reimbursement for litigation costs. (*Id.*; Ex. 1
6 at ¶3.2.2.)

7 A. Plaintiff's Counsel are Entitled to a Fee from the Common Fund

8 On August 11, 2016, the California Supreme Court decided *Laffitte v. Robert Half*
9 *International*, which addressed the correct methodology for awarding fees in a class action
10 settlement. (*Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 205 Cal.Rptr.3d 555, 573.) The *Laffitte*
11 Court approved awarding fees as a percentage of the settlement fund in cases like the present one,
12 where a settlement results in the creation of a common fund on behalf of a class:

13 We join the overwhelming majority of federal and state courts in
14 holding that when class action litigation establishes a monetary fund
15 for the benefit of the class members, and the trial court in its
16 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.

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

19 The recognized advantages of the percentage method—including relative ease of
20 calculation, alignment of incentives between counsel and the class, a better
21 approximation of market conditions in a contingency case, and the encouragement
22 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.

23 (*Id.* at 573.)

24 An award of 33.33% of the common fund is appropriate here under the “substantial benefit”
25 theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer,*
26 *Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a
27 representative capacity to recover fees when the litigant's efforts have created a substantial, actual,
28 and concrete benefit for members of an ascertainable class and the court's jurisdiction over the

1 subject matter makes possible an award which spreads the cost proportionately among the
2 members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th
3 563, 578.)

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

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

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

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

24 (Newberg on Class Actions, 3rd Ed., 1992, § 14.03; and see *Chavez v. Netflix, Inc.* (2008) 162
25 Cal.App.4th 43, 66, fn 11 ["Empirical studies show that, regardless whether the percentage method
26 or the lodestar method is used, fee awards in class actions average around one-third of the
27 recovery."].) Thus, PAGA Counsel's requested fee of 33.33% is not only well within the range of
28 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.)

i. Requested Multiplier

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

Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Ly Decl. ¶63.) PAGA Counsel have an aggregate lodestar in the amount of \$65,770.00 which represents 75.9 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiff’s instant Motion, and 10 future hours. (*Id.*) As such, PAGA Counsel is asking for a lodestar multiplier of 1.65. (Ly Decl. ¶64.) Typically, the lodestar is merely the starting point of the calculation of a reasonable fee, and courts often multiply the lodestar by a factor to account for the risk of non-payment, delay in payment, the quality of work, and the novelty and difficulty of the issues involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253; *Beasley v. Wells Fargo*

1 *Bank*, (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of Supervisors*,
2 (1997) 76 Cal.App.3d 24 1, 251.)

3 This case dealt with difficult legal and factual questions. (Ly Decl. ¶65.) Significantly, the
4 risk attendant to the underlying claims in this matter was great considering Defendant's defenses
5 as discussed in detail above. (*Ibid.*) Were this case to proceed, Defendant would have a strong
6 incentive to litigate tenaciously. (*Ibid.*) There are genuine issues in dispute. (*Ibid.*) Furthermore,
7 PAGA Counsel was able to obtain close to the full value for this case. (Ly Decl. ¶66.)

8 As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades
9 of experience who diligently prepared and litigated this matter. (Ly Decl. ¶67.) To achieve the
10 ultimate result in this case, my firm had to incur substantial risk and expense, and were precluded
11 from taking other fee generating employment for 75.9 hours of attorney time. (Ly Decl. ¶68.) This
12 matter had been handled purely on a contingency fee basis and my firm has advanced many
13 thousands of dollars in costs while deferring all payment of fees, with no guarantee that any of the
14 fees incurred or costs advanced would ever be recovered, and diverting significant firm resources
15 to prosecution of this matter. (Ly Decl. ¶69.) PAGA Counsel believe this is an exceptional result
16 that has been well received by the Aggrieved Employees. (Ly Decl. ¶70.)

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

19 In addition to their request for fees, PAGA Counsel further request reimbursement of the
20 reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this
21 litigation, in the amount of \$13,000.00. (Ly Decl. ¶94.) To date, PAGA Counsel has incurred
22 \$10,534.45 in costs. (Ly Decl. ¶95.) PAGA Counsel anticipates incurring an additional \$600.00 in
23 costs to file and serve this motion, but the Settlement provides for a reimbursement of litigation
24 costs of up to \$13,000.00. (Ly Decl. ¶96.) As such, counsel is requesting a cost reimbursement of
25 \$11,134.45. (Ly Decl. ¶97.)

26 All of the requested costs are reasonable in amount and were necessarily incurred by PAGA
27 Counsel in prosecuting this litigation. (Ly Decl. ¶98.); Exhibit 5 [Cost Report].) Expenses in this
28 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 Liane
2 Katzenstein Ly. 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. (Ly Decl. ¶99.)

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 \$11,134.45. (Ly Decl. ¶100.)

8 **VIII. ENHANCEMENT TO PLAINTIFF**

9 The Settlement calls for an enhancement payment of \$5,000.00 to the named Plaintiff, to
10 be paid from the Gross Settlement Amount. (Ly Decl. ¶101; Ex. 1 at ¶3.2.1.) Incentive awards “are
11 intended to compensate class representatives for work done on behalf of the class, to make up for
12 financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their
13 willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.* (9th Cir.
14 2009) 563 F.3d 948, 958-59. “[I]t is established that named plaintiffs are eligible for reasonable
15 incentive payments to compensate them for the expense or risk they have incurred in conferring a
16 benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
17 (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175
18 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

19 Here, the enhancement takes into consideration the time, effort, and expense incurred by
20 Plaintiff in coming forward to litigate this matter on behalf of the Aggrieved Employees. The time
21 spent by Eric Herrera includes identifying competent counsel, providing information to PAGA
22 Counsel regarding Plaintiff’s relevant employment experiences, compiling documents, meeting
23 with PAGA Counsel frequently to discuss the status of the case and the theories of liability,
24 reviewing settlement documents, and making himself available for a full day of mediation. (Ly
25 Decl. ¶102.)

26 PAGA Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶103.)
27 The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiff
28 in coming forward to litigate this matter on behalf of the Aggrieved Employees. (Ly Decl. ¶104.)

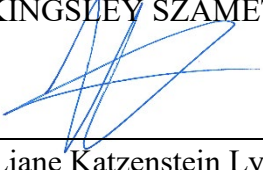
1 Accordingly, Plaintiff should be awarded the agreed-upon enhancement of \$5,000.00.

2 **IX. CONCLUSION**

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

7
8 DATED: July 8, 2024

KINGSLEY SZAMET & LY

9
10 By: 

11 Liane Katzenstein Ly
12 Attorneys for Plaintiff ERIC HERRERA and all
13 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 July 8, 2024, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

PALMER KAZANJIAN WOHL HODSON LLP

Larry M. Kazanjian

lkazanjian@pkwhlaw.com

Cassandra Viscia

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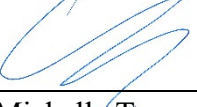
Attorneys for Defendant

[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 July 8, 2024, at Woodland Hills, California.



Michelle Tanzer