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SUPERIOR COURT OF THE STATE OF CALIFORNIA

**FOR THE COUNTY OF SANTA CLARA
(UNLIMITED JURISDICTION)**

ERASMO GOMEZ,

Plaintiff,

vs.

A-1 JAY'S MACHINING, INC.; JAMES K.
MACHATHIL; and DOES 1 to 25, inclusive,

Defendants.

Case no.: 22CV394795

**NOTICE OF PLAINTIFF'S MOTION AND
MOTION FOR APPROVAL OF PAGA
SETTLEMENT AND RELEASE**

Action filed: February 15, 2022
Hearing Date: September 21, 2023
Hearing Time: 1:30 p.m.
Hearing Dept: 1, Hon. Sunil R. Kulkarni

Submitted Herewith Under Separate Cover:

1. Memorandum of Point and Authorities;
2. Declaration of Harout Messrelian;
3. Declaration of Maralle Messrelian;
4. Declaration of Erasmo Gomez;
5. Declaration of Michael Sutherland; and
6. [Proposed] Order and Judgment Approving PAGA Settlement.

1 TO ALL PARTIES, THE CALIFORNIA LABOR AND WORKFORCE DEVELOPMENT
2 AGENCY, AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on September 21, 2023 at 1:30 p.m., or as soon thereafter
4 as the matter may be heard, in Department 1 of the Santa Clara County Superior Court, located at
5 191 N. First St., San Jose, CA 95113, Plaintiff Erasmo Gomez ("Plaintiff" or "Gomez") will and
6 hereby does move this Court for an order approving the Private Attorneys General Act (Labor
7 Code § 2698 *et seq.*) Settlement and Release Agreement (the "Agreement" or "PAGA
8 Settlement") and entering the [Proposed] Order and Judgment Approving PAGA Settlement.

9 The PAGA Settlement is on behalf of Gomez and all persons within the State of California
10 who are or were employed by Defendants A-1 Jay's Machining, Inc. and James K. Machathil
11 (collectively "Defendants" or "A-1 JAY'S") from November 8, 2020 through Court approval of
12 this Settlement Agreement (the "PAGA Members"). Plaintiff alleges that Defendants are liable to
13 him and other PAGA Members for (1) failure to compensate for all hours worked, including
14 minimum and overtime wages; (2) failure to provide accurate, itemized wage statements; (3)
15 failure to pay all wages owed during and at the end of employment; (4) failure to maintain accurate
16 records; (5) failure to give rest breaks and meal breaks; and (6) failure to reimburse for business
17 expenses.

18 The Motion is based on this Notice of Motion and Motion, the attached Memorandum of
19 Points and Authorities, the declarations of Harout Messrelian, Maralle Messrelian, Erasmo
20 Gomez, and Michael Sutherland, the PAGA Settlement, all papers and pleadings on file with the
21 Court in this action, all matters judicially noticeable, and on such oral and documentary evidence
22 as may be presented in connection with the hearing on the Motion.

23 Respectfully submitted,

24 MESSRELIAN LAW INC.

25 Dated: August 29, 2023

26 By: Maralle Messrelian
27 Harout Messrelian
28 Maralle Messrelian (Of Counsel)
Attorneys for Plaintiff, Erasmo Gomez

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AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR APPROVAL
OF PAGA SETTLEMENT**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Erasmo Gomez (“Plaintiff” or “Gomez”) submits this memorandum of points
4 and authorities in support of his motion for approval of the Private Attorneys General Act (Labor
5 Code § 2698 *et seq.*) Settlement and Release Agreement (the “Agreement” or “PAGA
6 Settlement”)¹ for the civil penalties claim he brought against Defendants A-1 Jay’s Machining,
7 Inc. and James K. Machathil (collectively “Defendants” or “A-1 JAY’S”) under the Labor Code
8 Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). Plaintiff brings
9 this motion because Labor Code section 2699(l) of the PAGA requires Court-approval of any
10 civil penalties sought as part of a proposed settlement agreement. Through this motion, Plaintiff
11 respectfully requests for this Court to approve the PAGA Settlement.

12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 A-1 Jay’s, headquartered in the heart of Silicon Valley in San Jose, provides precision
14 machining and product assembly and finishing. Plaintiff first started working for A-1 Jay’s in or
15 around June 2015. Plaintiff’s employment ended on or around September 15, 2021. At all times
16 during his employment with Defendants, Plaintiff was considered an hourly, non-exempt
17 employee. HM, ¶ 5.

18 **A. Plaintiff’s Written Notice to the State of California**

19 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under the
20 Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). On
21 November 8, 2021, Plaintiff, on behalf of himself and Defendants’ other California non-exempt
22 hourly employees (hereafter collectively the “PAGA Members”) gave written notice by electronic
23 service to the California Labor and Workforce Development Agency (“LWDA”) and via certified
24 mail to Defendants of the specific provisions of the California Labor Code alleged to have been
25 violated, including the facts and theories to support the alleged violations. HM, ¶ 6, Ex. 3.

26 ///

27 _____
28 ¹ The PAGA Settlement is attached as Exhibit (“Ex.”) 1 to the Declaration of Harout Messrelian
 (“HM”), which is submitted herewith under a separate cover.

1 **B. Plaintiff's Lawsuit**

2 On February 15, 2022, Plaintiff filed a lawsuit for his individual wage and hour violations
3 and the PAGA claim in Santa Clara County Superior Court (the "Lawsuit"). HM, ¶ 7, Ex. 4.
4 Plaintiff asserted on behalf of himself and the PAGA Members that Defendants (1) failed to pay
5 for all hours worked, including but not limited to, minimum and overtime wages (California Labor
6 Code sections 510, 1194, 1197, 1197.1); (2) failed to provide all required timely and duty-free
7 meal and rest periods (California Labor Code sections 226.7 and 512); (3) failed to pay wages
8 owed every pay period (California Labor Code section 204); (4) failed to provide accurate,
9 itemized wage statements (California Labor Code section 226a); (5) failed to pay all wages owed
10 at the end of employment (California Labor section 203); (6) failed to maintain accurate records
11 (California Labor Code section 1174d); (7) failed to reimburse business expenses (California
12 Labor Code sections 2800 and 2802); and (8) engaged in unfair competition (California B&P
13 Code section 17200). *Id.*

14 In response to Plaintiff's assertions, Defendants filed their answer on April 19, 2022. HM,
15 ¶ 8, Ex. 5. Defendants deny any liability or wrongdoing of any kind whatsoever associated with
16 the lawsuit. It is the desire of the parties to fully, finally, and forever compromise, and discharge
17 all claims known or unknown related to those alleged in Plaintiff's lawsuit. HM, ¶ 9.

18 **C. Mediation With Hon. James Lambden (Ret.)**

19 The parties met and conferred and agreed that it may be in their mutual interests to discuss
20 Plaintiff's allegations informally, rather than through litigation, and scheduled private mediation.
21 HM, ¶ 10.

22 On June 15, 2023, the parties attended a full day mediation session with the Honorable
23 James Lambden (Ret.). At the mediation, the parties agreed to settle Plaintiff's PAGA Claim for
24 violation of Labor Code § 2698, *et seq.* Before agreeing to the terms of the Settlement, the Parties
25 engaged in informal discovery regarding Defendants' policies, practices, operations, time and
26 payroll information and other topics. In advance of mediation, Defendants produced Plaintiff's
27 personnel file, including time and payroll data through data sampling. Moreover, prior to the
28 mediation, Defense counsel provided Plaintiff's counsel with information and documents relating

1 to other PAGA Members, including time and payroll data. Through extensive arm's length
2 negotiations at the mediation and only after discovery and investigation were performed, the
3 Parties agreed to settlement terms. Now that the parties have finalized the PAGA Settlement,
4 Plaintiff submits it to this Court for approval. HM, ¶ 10.

5 **III. OVERVIEW OF SETTLEMENT**

6 **A. "PAGA Members" Definition**

7 The PAGA Members are all persons within the State of California who are or were
8 employed by Defendants A-1 Jay's Machining, Inc. and James K. Machathil during the PAGA
9 Period. Agreement, ¶ 1. The PAGA Period means the period of time from November 8, 2020
10 through Court approval of the Settlement Agreement. Agreement, ¶ 2.

11 **B. Monetary Terms Of The Settlement**

12 Defendants have agreed to pay a total of \$500,000.00 ("Gross Settlement Amount" or
13 "GSA") to settle the PAGA lawsuit. In consideration for the release of all claims of Plaintiff and
14 the PAGA Members against Defendants (described more fully below), Defendants agreed to pay
15 \$500,000.00 toward the GSA from which all settlement payments for the Net Settlement Amount,
16 Court approved attorneys' fees and costs, and Settlement Administration Costs shall be paid. Each
17 PAGA Member will receive a portion of the civil penalties on a pro-rata basis calculated based
18 on the total number of pay periods each PAGA Member worked as a non-exempt hourly employee
19 in California during the PAGA Period. Agreement, ¶¶ 4,6. The GSA will be divided as follows:

- 20 1. PAGA Counsel's Fees amounting to \$165,000 (33% of the GSA), and
21 PAGA Counsel's Costs in the amount of \$8,284.98 (the Agreement
22 provides up to \$9,000);
- 23 2. "Settlement Administration Costs" of \$4,250.00 to ILYM Group, Inc.
24 ("ILYM" or "Settlement Administrator") to administer the Settlement;
- 25 3. Approximately \$322,465.02 ("Net Settlement Fund"), divided as follows:
26 a. \$ 241,848.76 to the LWDA (75%); and
b. \$ 80,616.26 to the PAGA Members (25%)

27 Agreement, ¶¶ 4, 6.

28 ///

1 **C. Funding and Distribution of the Settlement**

2 Within forty-five (45) calendar days after the Effective Date², Defendants shall deposit
3 the Gross Settlement Amount with the Settlement Administrator. Agreement, ¶ 10.

4 Within ten (10) calendar days after the Effective Date, Defendants shall provide the
5 Settlement Administrator with a list of all PAGA Members, which states each PAGA Member's
6 full name, hiring, and if applicable, termination dates in connection with the employee's
7 employment with Defendant during the PAGA Period, last known mailing address, and social
8 security number. Agreement, ¶ 10.

9 Within twenty (20) calendar days of receipt of the list of all PAGA Members, the
10 Settlement Administrator shall run the addresses of PAGA Members through the United States
11 Postal Service NCOA database to obtain current address information, and issue payments to (a)
12 the PAGA Members, (b) the LWDA, (c) PAGA Counsel for PAGA Counsel's Fees and Costs,
13 and (d) itself for the Settlement Administration Costs. The Settlement Administrator will issue
14 each PAGA Member a check for his or her share of the NSA along with the Notice of PAGA
15 Settlement (Exhibit 2 to HM Declaration) by first-class United States mail, postage prepaid, with
16 directions to the Postmaster to forward the Notice of PAGA Settlement and return all
17 undeliverable Notices to the Settlement Administrator. The Settlement Administrator will skip
18 trace return mail and re-mail within five (5) calendar days. Agreement, ¶ 10.

19 **D. Individual PAGA Payments and Uncashed Checks**

20 The settlement checks issued to PAGA Members will remain valid for one hundred eighty
21 (180) days. Any settlement checks remaining uncashed for more than one hundred eighty (180)
22 days after issuance will be distributed to the California State Controller's Office Unclaimed
23 Property Fund with an identification of the amount of unclaimed funds attributable to each PAGA
24 Member. All settlement payments to PAGA Members will be treated as miscellaneous income
25 for which an IRS Form 1099 will be issued by the Settlement Administrator if required by law.
26 Agreement, ¶ 10.

27 _____
28 ² "Effective Date" means the date the Court has signed an order approving the motion or joint stipulation
of settlement for approval of this PAGA Settlement, and enters an order thereon.

1 **E. Release of Claims For PAGA Members Limited To Those That Could**
2 **Reasonably Arise From the Facts Alleged In The Action.**

3 Upon the Effective Date of this Settlement, Plaintiff, the State of California (including,
4 but not limited to, the LWDA), and the PAGA Members will be deemed to have fully, finally,
5 and forever released, settled, compromised, relinquished, and discharged the Released PAGA
6 Claims with respect to Defendant and its past and present officers, directors, shareholders, unit
7 holders, managers, employees, agents, principals, heirs, representatives, accountants, auditors,
8 consultants, and its respective successors and predecessors in interest, subsidiaries, affiliates,
9 parents and attorneys. The Released PAGA Claims include:

10 all known or unknown claims for civil penalties, attorneys' fees and costs, or any
11 other relief under PAGA arising out of the Labor Code claims and allegations
12 expressly plead in the operative Complaint and all other Labor Code claims that
13 could have been asserted based on the facts and allegations plead in the operative
14 Complaint, including but not limited to: California Labor Code Sections 201-203,
15 204, 226, 226.3, 226.7, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1197, 1198, and
16 2802.

17 Agreement, ¶ 12.

18 **IV. ARGUMENT**

19 **A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT**

20 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(l)(2). The
21 Court necessarily has broad discretion in making the decision to approve or reject a settlement
22 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain
23 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of
24 penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2),
25 Although the PAGA does not set forth the particular standards against which a PAGA settlement
26 should be evaluated, the LWDA has provided guidance for approval that mirrors the standards
27 for evaluating class action settlements. HM, ¶ 12; *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*,
28 2017 U.S. Dist. LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA's
guidance, that approval of PAGA settlements may be had where the statutory requirements of
the PAGA are met and the terms of the settlement are fundamentally fair, reasonable, and
adequate). The established standards for evaluating whether class action settlements are fair,

1 reasonable, and adequate provide a familiar, useful framework for the Court to evaluate PAGA
2 settlements and have been adopted by several courts. *Id.*, See *Juarez v. Villafan*, 2017 U.S. Dist.
3 LEXIS 137205, *5 n.4 (E.D. Cal. 2017) (citing *Officers for Justice v. Civil Serv. Comm'n of City*
4 *& Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms,*
5 *LLC*, 2017 U.S. Dist. LEXIS 137272, *8-9 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*,
6 150 F.3d 1011, 1026 (9th Cir. 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7,
7 n.4 (E.D. Cal. 2017); *Smith v. H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal.
8 2018); *Rincon v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal.
9 2018).

10 In making the determination whether a settlement taken as a whole is fair, reasonable,
11 and adequate, the Court should be careful to still give “proper deference to the private consensual
12 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual
13 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
14 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
15 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at, 1027. The law favors
16 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
17 conserved by avoiding the time, expense, and rigors of formal litigation. See *Neary v. Regents*
18 *of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
19 1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

20 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**
21 **PAGA**

22 PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.
23 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as
24 follows: 75 percent to the LWDA, and the remaining 25 percent to the aggrieved employees. See
25 *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).
26 The parties’ Settlement so provides. HM, ¶ 13, Ex. 1. Second, the LWDA must be given notice
27 of the settlement so that it may be heard before the Court decides whether to grant approval. Cal.
28 Lab. Code § 2699(l)(2). Here, notice is being given to the LWDA concurrently with the filing of

1 this motion. HM, ¶¶ 13, 43, Ex. 11. As a result, Plaintiff has met all procedural statutory
2 requirements for settling a PAGA action.

3 **C. THIS COURT SHOULD APPROVE THE PAGA SETTLEMENT BECAUSE**
4 **IT IS FAIR, REASONABLE AND ADEQUATE**

5 To make its determination that the PAGA settlement is fair, reasonable, and adequate, the
6 Court may consider several factors, including:

7 the strength of the Plaintiff’s case, the risk, expense, complexity and
8 likely duration of further litigation, the risk of maintaining class
9 action status through trial, the amount offered in settlement, the
extent of discovery completed and the stage of the proceedings, and
the experience and views of counsel.

10 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS
11 137205, *5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, *8-9; *Gutilla*, 2017 U.S. Dist. LEXIS
12 41655, *7, n.4; *Smith*, 2018 U.S. Dist. LEXIS 67192, *6; *Rincon*, 2018 U.S. Dist. LEXIS 22886,
13 *6. However, this Court should begin its analysis with a presumption that the proposed
14 settlement is fair. “A presumption of fairness exists where: (1) the settlement is reached through
15 arm’s length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
16 court to act intelligently; (3) counsel is experienced in similar litigation” *Dunk*, 48 Cal.
17 App. 4th at 1802.

18 The PAGA Settlement warrants a presumption of fairness for several reasons: (1) The
19 parties reached the Settlement through arm’s-length bargaining with the aid of a respected
20 mediator; (2) The parties conducted sufficient investigation and discovery to allow Counsel and
21 the Court to act intelligently. Plaintiff requested and Defendants provided the number PAGA
22 Members, the total number of pay periods during the PAGA Period, all policies in effect during
23 the PAGA Period, and a sampling of time records; and (3) Counsel for the Parties are experienced
24 with PAGA cases. HM, ¶ 14. Moreover, neither Plaintiff nor Plaintiff’s Counsel have any
25 conflicts of interest with the absent PAGA Members and there are no issues of ascertainability.
26 HM, ¶ 14. For the reasons discussed below, this Court should approve the PAGA Settlement.

27 ///

28 ///

1 **1. The PAGA Settlement Is A Result of Extensive, Non-Collusive Arm's Length**
2 **Negotiations Between The Parties.**

3 The PAGA Settlement was reached only after litigation and arms' length negotiations
4 between experienced attorneys, which included a full day mediation with Steve Serratore, Esq.
5 At all times, the negotiations were adversarial and contentious, although still professional in
6 nature. HM, ¶ 10.

7 Counsel for the Parties have further investigated the applicable law as applied to the facts
8 discovered regarding Plaintiff's claims, the defenses thereto, and the Labor Code violations
9 claimed by Plaintiff. Plaintiff's counsel is experienced in prosecuting PAGA lawsuits. Counsel
10 for the Defendants are experienced in defending PAGA cases. Based on the parties' own
11 independent investigations and evaluations, the parties and their respective counsel are of the
12 opinion that the Settlement for the consideration and on the terms set forth in the Agreement are
13 fair, reasonable and adequate and are in the best interests of Plaintiff, the PAGA Members, the
14 State, and Defendants in light of all known facts and circumstances and the risks inherent in
15 litigation, especially in this post pandemic era, where businesses are struggling to remain afloat,
16 much less prosper and make a large profit. HM, ¶ 11.

17 **2. The Extent of Investigation and Discovery Completed Provided Ample**
18 **Information to Enter into an Informed and Reasonable Settlement**

19 Plaintiff considered various sources of information in the lead-up to and during the
20 mediation of June 15, 2023 that enabled him to achieve the PAGA Settlement at issue. HM, ¶ 15.
21 Among other things, Plaintiff considered the following:

- 22 • Defendants produced and Plaintiff's counsel reviewed Plaintiff's personnel file.
- 23 • Plaintiff's counsel requested that Defendants provide any and all policies regarding
24 overtime and double-time wages, off the clock work, expense reimbursement, meal
25 periods, rest breaks, meal period waivers and agreements, compensation plans, and
26 complaints about working conditions in effect during the relevant time period beginning
27 in November of 2020. Defendants produced those policies as part of their employee
28 handbook.
- Plaintiff's counsel requested that Defendants provide the total number of employees,
 paychecks, and the pay cycles during the relevant period. Defendants provided the
 answers to each of these questions.

- Plaintiff's counsel requested a 20% sample of time and payroll records for the relevant time period. Defendants provided a sampling of time and pay records for 26 of their employees. This represents 20% of the total employees that Defendants employed during the PAGA Period based on data available at the time.
- Plaintiff's counsel then retained a professional data analyst, James Toney, to examine the records and determine the meal period violation rates, if there was any pay discrepancy in timesheet hours versus paid hours, and if there was any rounding/time shaving issues. Plaintiff is prepared to provide the Court with the data analysis for *in camera* inspection upon its request.
- Plaintiff's counsel analyzed the state of caselaw on PAGA claims, meal and rest break violations, claims for "off the clock" work and business expense reimbursement, especially as it relates to "manageability" arguments brought up by the defense.

HM, ¶ 15.

3. The Settlement Is Fair and Reasonable Based on the Risks and Costs of Further Litigation

Defendants estimated for purposes of mediation that as of June 15, 2023, there were approximately 150 PAGA Members and 8,000 pay periods for all PAGA Members during the PAGA Period. Based on this information, Plaintiff's counsel prepared an estimate of the maximum possible civil penalties under the PAGA. HM, ¶ 16. The maximum possible civil penalties under the PAGA is the total number of pay periods with one or more violations multiplied by the maximum possible civil penalty amount per pay period. Under the civil penalty formulas applicable under PAGA, Plaintiff's counsel estimated a maximum possible exposure of approximately **\$4,875,000** for civil penalties as follows:

TYPE OF VIOLATION	LABOR CODE SECTION VIOLATED/ CIVIL PENALTY STATUTE	INITIAL PENALTY AMOUNT/PAY PERIOD	PAY PERIODS	CIVIL PENALTIES
Unpaid Minimum Wages	1197/1197.1	\$100	8000	\$800,000.00
Unpaid Overtime	510/558	\$50	8000	\$400,000.00
Inaccurate Wage Statements	226/226.3	\$100	8000	\$800,000.00
Inaccurate Pay Records	1174/1174.5	\$500	150	\$75,000.00
Untimely Wages	201-204/210, 2699(f)(2)	\$100	8000	\$800,000.00
Unreimbursed Expenses	2802/2699(f)(2)	\$100	8000	\$800,000.00

Unprovided Meal Breaks	512/558	\$50	8000	\$400,000.00
Unprovided Rest Breaks	1198/2699(f)(2)	\$100	8000	\$800,000.00
MAXIMUM CIVIL PENALTIES				\$4,875,000.00

The potential for recovery of this maximum possible civil penalties depends on circumstances that are highly unlikely and not in line with reality. It would depend on the Court stacking the maximum recoverable civil penalties for unpaid wages violations, inaccurate wage statements violations, inaccurate pay records violations, untimely wages violations, unreimbursed expenses violations, unprovided meal breaks violations, and unprovided rest breaks violations, per pay period for all 8,000 pay periods for all 150 potential PAGA Members during the PAGA Period. Plaintiff's counsel is unaware of any California State court decision awarding a plaintiff and the other PAGA Members he represents multiple civil penalties for the same pay period under different Labor Code provisions. As such, one of the risks Plaintiff faces is that the Court would refuse to "stack" civil penalties arising under the various Labor Code statutes. Plaintiff's counsel had to substantially discount the value of these claims in the settlement negotiations for this and a variety of other reasons. At best, Plaintiff could hope to recover one penalty for each pay period (regardless of the different Labor Code violations that potentially occurred for the same employee, during the same pay periods). Assuming that Plaintiff could prove that there was at least one violation of a Labor Code section per pay period, Plaintiff could expect to recover approximately \$400,000.00 (8,000 pay periods x \$50 = \$400,000.00). HM, ¶ 16.

The PAGA action brought forth in this case by Plaintiff had two main substantive arguments: 1) unprovided meal and rest periods, 2) no concomitant change in the regular rate of pay and/or the overtime rate of pay for bonuses. HM, ¶ 17. Under the civil penalty formulas applicable under PAGA, Plaintiff estimated a maximum exposure of approximately \$1.6 million for civil penalties for Plaintiff's strongest disputed claims of failure to provide meal and rest periods and unpaid overtime. Plaintiff's analysis, which Defendants vehemently dispute, revealed a 99.5% violation rate for either late, short, or no meal periods. As such, with the 99.5% violation rate, the maximum exposure would be \$398,000, which is calculated as \$50 penalty multiplied by 7960 pay periods (99.5% of the 8000 pay periods). Plaintiff extrapolated the same 99.5% rate for rest break violations, which would equate to an exposure of \$800,000 (\$100

1 penalty per pay period multiplied by 7960 pay periods). Plaintiff discounted this amount by 50%
2 since Gomez and the other PAGA Members did receive at least one rest break during their work
3 shifts. In terms of the overtime issue, Plaintiff discounted this violation rate by 50%. At a 50%
4 violation rate, the penalties would amount to \$200,000, which is calculated as \$50 penalty
5 multiplied by 4000 pay periods (50% of the 8000 pay periods). As such, a GSA of \$500,000 here
6 is a great result. The other arguments for PAGA penalties, including inaccurate paystubs, not
7 paying all wages owed every pay period and at the end of employment, and not keeping accurate
8 time records, are all derivative claims that have no value on their own. *See Naranjo v. Spectrum*
9 *Security Services, Inc.*, 40 Cal App5th 444. HM, ¶ 17.

10 There are risks to Plaintiff’s meal and rest period claims. HM, ¶ 18. Defendants contend
11 that, to establish a violation for missed meal periods, a plaintiff must do more than show that a
12 meal break was not taken. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.
13 So long as an employer provides employees with a “reasonable opportunity” to take a duty-free
14 meal period, it has no further duty to “police meal breaks and ensure no work thereafter is
15 performed.” *Id.* at 1040-41. Instead, a plaintiff must show the employer impeded, discouraged,
16 or prohibited the employee from taking a proper break, or otherwise failed to release the
17 employee of all control. *Id.* “Thus, the crucial issue with regard to the meal break claim is the
18 reason that a particular employee may have failed to take a meal break.” *Washington v. Joe’s*
19 *Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. Determining by a review of Defendants’ time
20 records the exact reasons why a meal period appears to be short or late would be difficult and
21 pinpointing those days in which Plaintiff and the PAGA Members worked during their meal
22 periods will be a challenge. Additionally, Defendants provided evidence that they provide
23 employees with the opportunity to take meal and rest breaks. A-1 Jay’s’ Handbook contains
24 legally compliant meal period and rest break policies. HM, ¶ 18.

25 Defendants contend they provided their non-exempt employees with the opportunity to
26 take rest periods in accordance with California law, and, accordingly, Plaintiff’s rest break claim
27 has no support. Additionally, there are other risks to Plaintiff’s rest period claim. Employers are
28 not required to record rest periods and such periods are paid. Unlike meal periods, where there

1 are often records showing whether an employee clocked out or not, there is no such evidence to
2 prove a missed rest period or that the employer refused to authorize and permit one. HM, ¶ 19.

3 There are risks to Plaintiff's claim for unreimbursed expenses. Plaintiff alleges that
4 Defendants did not reimburse him or the other PAGA Members for the use of personal cell
5 phones for work purposes as well as mileage reimbursement for use of personal vehicles for work
6 purposes. There is a risk that the Court may consider Plaintiff's claims as to Defendants' alleged
7 failure to indemnify for business expenses to be individual in nature. As such, Plaintiff's counsel
8 had to significantly discount the value of this claim during settlement negotiations. HM, ¶ 20.

9 Additionally, PAGA states a court has discretion to award a lesser amount than the
10 maximum penalty. See Lab. Code § 2699(e)(2) ("...a court may award a lesser amount than the
11 maximum civil penalty amount specified by this part if, based on the facts and circumstances of
12 the particular case, to do otherwise would result in an award that is unjust, arbitrary and
13 oppressive, or confiscatory."); see also *Thurman v. Bayshore Transit Management, Inc.* (2012)
14 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the Court
15 could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's evidence
16 of willful and intentional conduct. HM, ¶ 21. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504
17 ("*Carrington*") illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily
18 discounted award of only \$5 per violation because it was within the Court's discretion to
19 significantly reduce PAGA penalties even when there is a finding that a violation of the
20 California Labor Code occurred. The plaintiff in *Carrington* had requested penalties in excess of
21 \$70 million and was successful in proving the PAGA claim during a bench trial. However, the
22 trial court reduced the total award after trial to only \$150,000 (30,000 violations x \$5) and stated
23 that this reduction was warranted because imposing the maximum penalty would be "unjust,
24 arbitrary, and oppressive", based on Starbucks's "good faith attempts" to comply with meal break
25 obligations and because the Court found the violations were minimal. Applying the same formula
26 here and assuming there was one violation during each pay period, the award of civil penalties
27 could not exceed \$40,000.00 in PAGA penalties (8,000 violations x \$5). As such, this Settlement
28 is a great result based solely on the risk the Court chooses to apply the *Carrington* formula.

1 Defendants have also posed formidable defenses to the Labor Code claims underlying Plaintiff's
2 allegations. Thus, the chance of Plaintiff recovering a higher amount than the Gross Settlement
3 Amount is uncertain. HM, ¶ 21.

4 Further, although, class certification is not required for a PAGA claim, Defendant could
5 contend that Plaintiff should show that the PAGA claims are manageable, especially as it relates
6 to the business expense reimbursement claim for mileage and cell phones, which will invariably
7 be an individualized assessment. As such, Defendant could also convince the Court to dismiss
8 the claims due to unmanageability. In *Ortiz v. CVS Caremark Corp.*, the court dismissed a PAGA
9 claim because it was unmanageable. 2014 WL 1117614, at *3–4 (N.D. Cal. 2014). The Ortiz
10 court cited the “multitude of individualized assessments” that case would have required in
11 ordering dismissal. *Id.* at *4. Several other courts have adopted *Ortiz*, and dismissed PAGA
12 claims where, as here, there are a large number of allegedly aggrieved individuals whose claims
13 require individual assessments. *See, e.g., Litty v. Merrill Lynch & Co.*, 2014 WL 5904904, at *3
14 (C.D. Cal. 2014); *Bowers v. First Student, Inc.*, 2015 WL 1862914, at *4 (C.D. Cal. 2015); *see*
15 *also Stafford v. Dollar Tree Stores, Inc.*, 2014 WL 6633396, at *2–4 (E.D. Cal. 2014) (bifurcating
16 trial of plaintiff's claim from representative claims: “in light of the number of potential aggrieved
17 employees, judicial economy favors deferring the representative portion of the PAGA claim”);
18 *Amey v. Cinemark USA Inc.*, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015). HM, ¶ 22.

19 Furthermore, on September 9, 2021, the California Court of Appeal issued a significant
20 decision in *Wesson v. Staples the Office Superstore, LLC*, No. B302988, 2021 Cal. App. LEXIS
21 743 (Ct. App. Sep. 9, 2021) (“*Wesson*”), holding that courts have authority to ensure that PAGA
22 claims are manageable, and that courts may limit or strike unmanageable PAGA claims.³ HM,
23 ¶ 23.

24 The Parties further recognize that the issues presented in the representative PAGA claim
25 are likely only to be resolved with extensive and costly pretrial and trial proceedings, and that
26 further litigation will cause inconvenience, distraction, disruption, delay, and expense

27 ³ The *Wesson* decision marks the first time an appellate court has weighed in on whether PAGA claims
28 must be manageable.

1 disproportionate to the maximum potential benefits to the PAGA Members and Plaintiff from
2 continued litigation, especially in the post pandemic era where further and extensive litigation
3 may cause businesses to shut down, resulting in no monetary compensation to Plaintiff,
4 Plaintiff's attorneys, other PAGA Members, and the State of California. HM, ¶ 24.

5 The settlement of the representative PAGA claim involves monetary relief to all PAGA
6 Members, Plaintiff, his attorneys, and the State of California. The Settlement is reasonable given
7 the uncertainties this lawsuit entails. It is also reasonable given the structure and purpose of the
8 PAGA, since the PAGA is not a restitution statute. Rather, it is essentially a punishment statute.
9 It provides for civil penalties only. Within the PAGA framework he is bound by, Plaintiff,
10 considering the evidence he faced, achieved a great result for the employees concerned.
11 Furthermore, any employees who are dissatisfied with the amount they received in civil penalties
12 can pursue any damages they believe they are owed by the Defendants. The Settlement does not
13 require them to opt out to do so. HM, ¶ 25.

14 Furthermore, Plaintiff recognizes that continued litigation presents significant risks that
15 support a significant downward departure from Plaintiff's estimated civil penalties amount. In
16 view of the risks, the Settlement represents a fair, adequate, and reasonable compromise amount
17 for these claims and is in the best interest of Plaintiff and PAGA Members and thus, warrants
18 approval. *See Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
19 WL 2465049, * 3. The PAGA settlement and its terms are fair, just, reasonable, adequate, and
20 equitable to Defendants, Plaintiff, and the State, especially in light of the current economic
21 climate, and are the product of good faith, and informed arms-length negotiations between the
22 Parties consistent with public policy and fully comply with applicable provisions of law. HM, ¶
23 26.

24 As such, the settlement of PAGA penalties in the gross sum of \$500,000.00, of which
25 75% of the net amount after attorney's fees, litigation costs, and settlement administration costs
26 (\$241,848.76) will be paid to the LWDA and 25% (\$80,616.26) will be distributed to the PAGA
27 Members, is reasonable and appropriate under the circumstances. HM, ¶ 27.

28 ///

1 **4. Each PAGA Member Will Be Paid Based on the Potential Extent of His or Her**
2 **Injury Compared to Other PAGA Members**

3 Each PAGA Member will receive a portion of the civil penalties on a pro-rata basis
4 depending on the number of pay periods Defendants employed them for during the PAGA Period.
5 Agreement, ¶ 6. With a total of 150 PAGA Members, the average estimated individual PAGA
6 payment for each PAGA Member is approximately \$537.44 (25% of the estimated Net Settlement
7 of \$322,465.02) / 150 PAGA Members). This is a great result given the uncertainties this lawsuit
8 entails. HM, ¶ 28.

9 **5. Counsel for the Parties Are Experienced in Similar Litigation**

10 Plaintiff's counsel has considerable experience in wage and hour litigation and is
11 qualified to evaluate the PAGA claims, the value of settlement versus moving forward with
12 litigation, and viability of possible affirmative defenses. Similarly, Defendants' counsel, William
13 F. Burns, has vast experience in handling employment matters and wage and hour litigation. See
14 HM, ¶¶ 2, 39-40.

15 **6. The Proposed Attorneys' Fees and Costs Are Fair, Adequate, and Reasonable**
16 **and Should Be Approved.**

17 Of the \$500,000.00 allocated towards the GSA, Plaintiff's counsel requests \$165,000.00
18 (33% of the GSA) in attorney's fees and \$8,284.98.94 in litigation expenses, which is fair and
19 reasonable. HM, ¶ 34.

20 It is an accepted practice in wage and hour class action settlements to award attorneys'
21 fees to Plaintiff's counsel based on a percentage of the total settlement value agreed upon by the
22 parties. California courts have long recognized that an appropriate method for awarding
23 attorneys' fees in class actions is to award a percentage of the common fund. (*Serrano v. Priest*
24 (1977) 20 Cal.3d 25, 48-49 ["when a number of persons are entitled in common to a specific
25 fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation
26 or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the
27 fund"]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Lealao v. Beneficial*
28 *California, Inc.* (2000) 82 Cal.App.4th 19, 26-30.)

 California courts have the discretion to employ (or decline to employ) a "lodestar cross-

1 check” on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)
2 1 Cal. 5th 480, 505 (“*Laffitte*”). However, the California Supreme Court in *Laffitte* has now made
3 clear that this cross-check is not required and approved one-third of the class action settlement
4 fund as reasonable attorney fees as “[t]he percentage of the fund method survives in California
5 class action cases....” *Id.* at 574. As other courts have acknowledged since *Laffitte*, “California
6 courts routinely award attorneys’ fees of one-third of the common fund.” *Lopez v. Mgmt. &*
7 *Training Corp.*, 2020 U.S. Dist. LEXIS 70029. The *Lopez* court explained that it need not “engage
8 in a full-blown lodestar analysis when the primary basis remains the percentage method...” The
9 lodestar calculation is merely a “useful perspective on the reasonableness of a given percentage
10 award.” *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638 (“Trial courts ‘also
11 retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
12 reasonableness of a requested percentage fee.’”⁴ *Id.* (citing *Laffitte*)).

13 “[R]egardless whether the percentage method or the lodestar method is used, fee awards
14 in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008)
15 162 Cal.App.4th 43, 66, fn.11 (“*Chavez*”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d
16 373, 379 (“*Pacific*”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.*
17 (9th Cir. 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount).) This is
18 also consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA
19 settlements. HM, ¶ 34.

20 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding
21 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s
22 fee request of \$165,000 (33% of GSA) is fair and reasonable based on their lodestar as cross-
23 checked against the percentage of the recovery. HM, ¶¶ 35-37, Ex. 6. Plaintiff’s counsel’s
24 previous experience in litigating wage and hour class actions and the caliber of opposing counsel
25 also support the reasonableness of the fee request. HM, ¶¶ 39-40. The award of attorneys’ fees

26 _____
27 ⁴ The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a)) does not apply to
28 unpublished decisions from the lower federal courts. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn.
18 [“Citing unpublished federal opinions does not violate our rules.”].) Like published decisions of the lower federal
courts, unpublished decisions are not binding on us even on questions of federal law, but they are persuasive
authority. (*Western Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 989, fn. 6.)

sought is also justified by the contingency nature of the attorney-client relationship, the risks of non-payment and non-reimbursement, the delay in payment and cost reimbursement, and the great results Plaintiff's Counsel has achieved for the PAGA Members. HM, ¶ 40.

In addition, Plaintiff's Counsel incurred substantial costs, \$8,284.98 to date, including the costs of a mediator, to aid in the representation of the PAGA Members. HM, ¶ 38, Ex. 7. As the evidence submitted herewith shows, all of these costs are documented and reasonably incurred. *Id.* Accordingly, they warrant the Court's approval.

7. The Proposed Settlement Administration Costs Are Fair and Reasonable and Should Be Approved.

With regard to the settlement administration costs provision, it is reasonable. Before agreeing to ILYM Group, Inc., the Parties sought and reviewed bids from other reputable third-party administrators which provided higher bids. HM, ¶¶ 41-42, Exs. 8-10. *See generally* Declaration of Michael Sutherland. Thus, the settlement administration costs provision should be given approval.

V. CONCLUSION

For the reasons stated above, this Court should grant the Plaintiff's Motion in its entirety and adopt the proposed order submitted concurrently herewith.

Respectfully submitted,

MESSRELIAN LAW INC.

Dated: August 29, 2023

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