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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

ALEJANDRO RIVERA RAMIREZ, an
individual, on behalf of himself and others
similarly situated,

PLAINTIFF,

v.

S&E GOURMET CUTS, INC.; and DOES 1
thru 50, inclusive,

DEFENDANTS.

Case No. CIVSB2201247

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

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

*[Filed concurrently with Declarations of
Kelsey M. Szamet, Scott Wheeler, Jonathan
Paul of Xpand, Legal; [Proposed] Order, and
Judgment]*

Date: October 11, 2023

Time: 8:30 a.m.

Dept.: S-26

Complaint Filed: January 20, 2022

FAC Filed: June 1, 2022

Trial Date: None Set

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

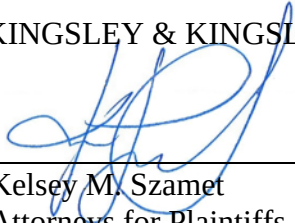
2 **PLEASE TAKE NOTICE** on October 11, 2023 at 8:30 a.m. in Department S-26 of the
3 above-entitled Court, Plaintiffs Alejandro Rivera Ramirez and Matilde Valencia will move the
4 Court for an Order Granting Approval of Representative Action Settlement.

5 The Motion will be made on the grounds that the proposed Settlement is fair, adequate,
6 reasonable, and in the best interest of Plaintiffs, all Allegedly Aggrieved Employees, and the
7 Parties.

8 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
9 and Authorities, the Declaration of Kelsey M. Szamet, the PAGA Settlement Agreement, which is
10 attached to the concurrently filed Szamet Declaration as Exhibit "1", all other papers and records
11 on file in this action, and on such oral and documentary evidence as may be presented at the hearing
12 on this Motion.

13
14 DATED: September 18, 2023

KINGSLEY & KINGSLEY, APC

15
16 By: 

17 Kelsey M. Szamet
18 Attorneys for Plaintiffs and all Allegedly Aggrieved
19 Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Alejandro Rivera Ramirez and Matilde Valencia (collectively, “Plaintiffs”) submit this Memorandum of Points and Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiffs and Defendant S&E Gourmet Cuts, Inc. (“Defendant”) (collectively, the “Parties”) have reached a proposed settlement documented in the PAGA Settlement Agreement (“Agreement”)¹ attached to the concurrently-filed declaration of Kelsey M. Szamet.

9 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699, et seq. (“PAGA”). The Gross Settlement Amount is \$275,000.00. After deduction of attorneys’ fees and litigation expenses and settlement administration costs as discussed in the Agreement, the remaining amount to be divided between the Labor and Workforce Development Agency (“LWDA”) and the Allegedly Aggrieved Employees (as defined in Section 1.4 of the Agreement and below) as required by Labor Code section 2699(i) is \$145,333.33, with \$109,000.00 (or 75%) going to the LWDA and \$36,333.33 (or 25%) distributed to the Allegedly Aggrieved Employees.²

17 Plaintiffs request that the Court “review and approve any settlement of any civil action filed pursuant to [PAGA].” (Lab. Code § 2699(l)(2).) If the Court deems the Settlement fair and acceptable, Plaintiffs request that the Court enter an order approving the Settlement and ordering the Parties to carry out the terms of the Agreement and enter a Final Judgment thereon.³

21 ///

22 ///

24 ¹ The Parties used the LASC Model PAGA Settlement Agreement.

25 ² Pursuant to PAGA, civil penalties recovered by Aggrieved Employees shall be distributed 75 percent to the Labor and Workforce Development Agency (“LWDA”) and 25 percent to the aggrieved employee(s). Lab. Code § 2699(i).

26 ³ Plaintiffs’ 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 Plaintiffs’ Motion for Approval of Representative Action Settlement, all related documents, and copy of the email from the LWDA confirming receipt is attached to the Declaration of Kelsey M. Szamet as Exhibit 8.

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Litigation Overview and Procedural History

On January 20, 2022, and in compliance with Labor Code § 2699.3(a)(1), Plaintiff Alejandro Rivera Ramirez provided written notice to Defendant and the Labor and Workforce Development Agency (“LWDA”) that we would seek civil penalties under PAGA for violation of Labor Code §§ 201-203, 226(a), 226.7, 246, 248.1, 248.2, 248.6, 510, 512, 558, 1194, 1197, 1198, and 2802. (Declaration of Kelsey M. Szamet (“Szamet Decl.”) ¶5.)

On July 20, 2022, Plaintiff Alejandro Rivera Ramirez commenced this Action by filing a Class Action Complaint alleging causes of action against Defendant for alleged violations of Labor Code §§ 201, 202, 203, 226(a), 226.7, 512, and 2802; Wage Order 1-2001; and California Code of Regulations, Title 8, Section 11010, and violation of Business & Professions Code § 17200. (Hereafter the “Action.”) (Szamet Decl. ¶6.) On June 1, 2022, Plaintiff Alejandro Rivera Ramirez filed a First Amended Class and Representative Action Complaint (“FAC”), adding an additional claim for penalties under PAGA. (Szamet Decl. ¶7.)

After being served with the Complaint, Defendant provided Plaintiff Alejandro Rivera Ramirez with a bilateral arbitration agreement between him and Defendant. (Szamet Decl. ¶8.) Plaintiff Alejandro Rivera Ramirez and Defendant met and conferred regarding the arbitration agreement and Plaintiff Alejandro Rivera Ramirez agreed that he was not able to pursue his claims on a class basis. (Szamet Decl. ¶9.) Thereafter, Plaintiff Alejandro Rivera Ramirez and Defendant agreed to an early mediation of the PAGA claims.

Thereafter, Plaintiff Alejandro Rivera Ramirez learned of another action with overlapping claims entitled *Matilde Valencia v. S&E Gourmet Cuts*, Case No. CIV SB 2219901, also pending in San Bernardino Superior Court. Ms. Valencia is represented by the Law Office of Scott Ernest Wheeler. Counsel for both Plaintiffs met and conferred and agreed to work together and jointly prosecute the Action. (Szamet Decl. ¶10.)⁴ The claims brought in that action were a single PAGA cause of action based on the following theories: (1) Failure to Provide Meal Breaks pursuant to

⁴ On August 30, 2023, the Parties have filed a Joint Stipulation to permit Plaintiff to file a Second Amended Complaint adding Plaintiff Valencia and removing any class allegations.

1 Labor Code §§ 226.7, 512, 558; (2) Failure to Provide Rest Periods pursuant to Labor Code §§
2 226.7, 512; (3) Failure to Pay Overtime Wages pursuant to Labor Code §§ 510, 1194, 1198; (4)
3 Failure to Pay Minimum Wages pursuant to Labor Code §§ 1194, 1197; (5) Failure to Pay Wages
4 to Discharged and Quitting Employees pursuant to Labor Code §§ 201-203; (6) Failure to Provide
5 Accurate Itemized Wage Statements Pursuant to Labor Code § 226(a); (7) Failure to Maintain
6 Required Records pursuant to Labor Code § 226(a); (8) Failure to Pay COVID-19 Supplemental
7 Sick Leave pursuant to Labor Code §§ 246, 248.1, 248.2, 248.6; and (9) Failure to Indemnify for
8 Necessary Expenditures pursuant to § 2802. On June 17, 2022, Ms. Valencia also gave written
9 notice by certified mail pursuant to Labor Code § 2699.3 to the LWDA and Defendants seeking
10 civil penalties under PAGA against Defendant.

11 Plaintiffs did not receive any response from the LWDA to their formal written notices. As
12 Plaintiffs waited more than sixty-five (65) days from the January 20, 2022 and June 17, 2022
13 postmark dates of their written notices before filing their actions, Plaintiffs have complied with all
14 of the requirements set forth in Labor Code § 2699.3 to commence a representative action under
15 PAGA. (Szamet Decl. ¶11.)

16 On September 15, 2023, Plaintiffs jointly filed a Second Representative Action Complaint
17 adding Matilde Valencia as a named Plaintiff and bringing only a single cause of action for
18 penalties⁵ pursuant to Labor Code §2699, *et seq.* for alleged violations of Labor Code §§ 201-203,
19 226(a), 226.7, 246, 248.1, 248.2, 248.6, 510, 512, 558, 1194, 1197, 1198, and 2802. (Szamet Decl.
20 ¶12.) The Valencia Action has been dismissed. Once filed, the Second Amended Complaint will
21 be the operative complaint in the Action (the “Operative Complaint”). (*Id.*)

22 B. The Discovery Process and Mediation

23 Prior to mediation, the Parties engaged in informal fact discovery and exchanged pertinent
24 information to understand the nature of the allegations and the scope of potential liability. (Szamet
25 Decl. ¶13.) Plaintiff requested relevant information such as a sampling of time and payroll data,
26 the number of pay periods and aggrieved employees at issue and any wage relevant policies.

27
28 ⁵ Both Plaintiffs executed mandatory arbitration agreements as discussed in the Joint Stipulation
discussed in Fn. 4.

1 (Szamet Decl. ¶14.)

2 Thereafter, the Parties engaged in the possibility of an early resolution before any formal
3 discovery or law and motion practice began. (Szamet Decl. ¶15.) The Parties agreed to attend
4 mediation and engaged in extensive informal pre-mediation discovery. (Szamet Decl. ¶16.) Prior
5 to mediation, Defendant produced Plaintiffs’ personnel records, time data, relevant policy
6 documents, and pay data, which includes the number of pay periods and Allegedly Aggrieved
7 Employees. (Szamet Decl. ¶17.) Based on Defendant’s records, the data reveals that the number
8 of Allegedly Aggrieved Employees is 202 (including Plaintiffs) and an estimated total of 5,500
9 Covered PAGA Pay Periods at issue. (Szamet Decl. ¶18.)

10 On May 30, 2023, the Parties participated in an all-day mediation with the Honorable Amy
11 D. Hogue (Ret.). (Szamet Decl. ¶19.) With the assistance of the mediator, the Parties reached a
12 settlement in principle. (Szamet Decl. ¶20.) Thereafter, the Parties formalized the Settlement
13 Agreement. (Szamet Decl. ¶21.)

14 The Parties assessed the risks and benefits of moving forward with litigation. Although
15 Defendant denies that they violated any pertinent law, Defendant recognizes the risks and costs of
16 continued litigation, even if the Court were to reduce the amount of penalties awarded.

17 Thus, the Parties were able to reach a tentative settlement subject to the finalization of a
18 formal Settlement Agreement and the approval of the Court. (Szamet Decl. ¶22.) The Parties
19 negotiated the terms and conditions of the Settlement and now present the agreed-upon Settlement
20 to the Court for Approval. (Szamet Decl. ¶23.)

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

22 **A. The PAGA Statutory Scheme**

23 PAGA creates a means of “deputizing” citizens as private attorneys general to enforce the
24 Labor Code on behalf of the LWDA. (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489,
25 501, *review den.* (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910.) A
26 Plaintiffs may not — and Plaintiffs here do not — bring a PAGA claim simply on his or her own
27 behalf as an individual claim, but “as the proxy or agent of the state’s labor law enforcement
28 agencies.” (*Id.* at p. 986; *see also Reyes v. Macy’s, Inc.* (2011) 202 Cal.App.4th 1119, 1123-1124;

1 *Iskanian v. CLS Transp. Los Angeles, LLC* (2014), 59 Cal. 4th 348, 380.)

2 When an aggrieved employee brings a PAGA claim, “the government is always the real
3 party in interest.” (*Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.* (2015) 234
4 Cal.App.4th 1109, 1119; *Montano v. The Wet Seal Retail, Inc.* (2015) 232 Cal.App.4th 1214, 1222
5 “[A] PAGA action is a dispute between an employer and the State agency.”.) Accordingly, a
6 Plaintiff that brings a PAGA claim represents “the same legal right and interest as state labor law
7 enforcement agencies,” in that the Plaintiff is seeking to recover those civil penalties that
8 otherwise would have been assessed and collected by the LWDA. (*Arias v. Superior Court* (2009)
9 46 Cal.4th 969, 986; Lab. Code § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at p. 1119;
10 *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 [“PAGA Plaintiffs do not
11 have property rights in their cases.”].) This is borne out by the fact that the LWDA receives 75
12 percent of any civil penalties recovered; thus, recoveries are principally for the state and only
13 secondarily for aggrieved employees. (Lab. Code § 2699(i).) Therefore, when a Plaintiff brings a
14 PAGA claim, he or she is properly conceived of as a private attorney general prosecuting
15 violations of California’s labor laws on behalf of the state.

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

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

21 (Lab. Code § 2699.3(a)(1).)

22 As explained above, Plaintiffs have complied with the notice requirements and have
23 properly pled a PAGA cause of action.

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

25 PAGA provides for penalties in the amount of one hundred dollars (\$100) for each
26 aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for
27 each aggrieved employee per pay period for each subsequent violation, except where another
28 penalty amount is provided. (Lab. Code § 2699(f)(2).) “PAGA penalties...are mandatory, not

discretionary” and must be awarded upon a showing that Defendant violated the Labor Code.⁶ (*Amaral v. Cintas Corp. No. 2* (2008), 163 Cal.App.4th 1157, 1213.) However, PAGA does provide the Court with discretion regarding the penalty amount. 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 conduct giving rise to liability, and 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, supra*, 46 Cal.4th 969, class action procedural rules do not apply in PAGA cases, including the two-step preliminary and final approval process. Rather, the approval process consists of one step where the court decides if the settlement should go into effect.

IV. THE SETTLEMENT

Under the Settlement Agreement, Defendant will pay the total sum of \$275,000.00 in full and final settlement of the PAGA claims. (Szamet Decl. ¶24, Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount: \$275,000.00

PAGA Counsel Fees Payment (1/3): \$91,666.67

⁶ 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

PAGA Counsel Litigation Expenses Payment: \$20,000.00⁷

Administrator Expenses Payment: \$8,000.00⁸

Litigation Enhancements to Plaintiffs: \$10,000.00⁹

PAGA Penalties: \$145,333.33

(\$109,000.00 to the LWDA; \$40,495.87 to Allegedly Aggrieved Employees)

(Szamet Decl. ¶25, Exhibit 1, ¶¶3.1-3.2.)

Each of the 202 Allegedly Aggrieved Employees shall receive a pro-rata portion of employees' share of PAGA penalties based on the number of PAGA Pay Periods worked by all Allegedly Aggrieved Employees for Defendant during the PAGA Period.¹⁰ (Szamet Decl. ¶26, Exhibit 1, ¶3.2.3.1.)

For settlement purposes, the Allegedly Aggrieved Employees are defined as "All persons who are employed or have been employed as a non-exempt employee by S&E Gourmet Cuts, Inc., in the State of California during the Covered Period." (Szamet Decl. ¶28., 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 explained in *Arias, supra*, 46 Cal.4th 969, 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

⁷ The settlement agreement provides for counsel to receive cost reimbursement of \$20,000.00. However, counsel's final costs come to \$18,365.65. (Szamet Decl., Ex. 2.) The extra \$1,634.35 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 \$36,333.33 contemplated in the settlement agreement. (See Szamet Decl., Ex. 1 ¶3.2.3.)

⁸ The settlement agreement provides for administration costs not to exceed \$8,000.00. However, the administrator's actual costs are \$5,471.82. (See Szamet Decl., Ex. 7 [Administrator's Bid].) The remaining amount will go towards the net settlement amount for distribution to the Aggrieved Employees.

⁹ Plaintiffs Matilde and Valencia will each receive a \$5,000 enhancement.

¹⁰ The PAGA Period or Covered Period means the period from January 20, 2021 to the earlier of date of approval of the settlement by the Court or the last day of the pay period on which the number of covered pay periods reaches 5,775 (representing the estimated 5,500 pay periods plus a 5% buffer of 275 pay periods). (Szamet Decl. ¶27., Exhibit 1, ¶1.19.)

1 through a motion for primary or final approval. Nonetheless, in order to comply with the
2 requirements of Labor Code §2699, the Parties submit the instant Motion and the Agreement
3 (Exhibit “1” to the Szamet Declaration) for Court approval.

4 B. The Risks of Moving Forward with Plaintiffs’ PAGA Claim

5 To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation
6 and discount taken follows. PAGA Counsel had to consider the arguments and defenses asserted
7 by Defense Counsel. (Szamet Decl. ¶29.) PAGA Counsel also had to assess the risks of moving
8 forward to trial and what this Court would do in awarding penalties were Plaintiffs to prevail at
9 trial. (Szamet Decl. ¶30.)

10 Through meet and confer, private mediation, as well as negotiation efforts, Defendant
11 vigorously contested liability. (Szamet Decl. ¶31.) As to the meal periods claim, Plaintiffs allege that
12 they and the aggrieved employees were not provided with on time, uninterrupted 30-minute meal
13 periods, nor were they free to leave the premises. (Szamet Decl. ¶32.) Defendant contends that it
14 maintains a compliant meal and rest period policy and practice, trains its supervisors and employees
15 to understand when meal periods should begin, provides employees with ability to take timely
16 uninterrupted meal periods of at least thirty minutes, that employees are and were not restricted from
17 leaving the premises during lunch and in fact did leave the premises, and that many employees signed
18 meal period waivers. (Szamet Decl. ¶33.) As to the wages/overtime claim, Plaintiffs alleged that they
19 and the aggrieved employees worked off the clock because they were required to arrive early to their
20 shifts to prepare and be available by cell phone during non-working hours. (Szamet Decl. ¶34.)
21 Defendant argues that it maintains a policy and practice to record all time worked, employees were
22 instructed to clock-in as soon as employees came into work, and employees were not required to be
23 available during non-working hours. (Szamet Decl. ¶35.) As to the Section 2802 claim, Defendant
24 contends that it provided all reimbursement for all reasonable and necessary business expenses
25 incurred, maintained a compliant policy and practice of reimbursing reasonable and necessary
26 business expenses, and if Plaintiff Ramirez chose not to seek reimbursement for business expenses
27 he alleges to have incurred, that was on his own volition. (Szamet Decl. ¶36.) The same risk analysis
28 would apply to the derivative claims. (Szamet Decl. ¶37.)

Furthermore, in accordance with the PAGA statute, 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). (Ex. 1 at ¶23(c).) PAGA Counsel anticipated that, at trial, Defendant could make potentially persuasive arguments that: (1) all Allegedly Aggrieved Employees were properly paid in accordance with Defendant’s lawful policies and practices, and that allegedly aggrieved employees were not required to work off the clock; (2) all Allegedly Aggrieved Employees were provided with meal and rest break areas in compliance with California law; (3) until this Lawsuit was filed, no Allegedly Aggrieved Employees had complained about any alleged failure to reimburse the cost of using any cell phones and vehicles; and (4) none of the Allegedly Aggrieved Employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiffs’ allegations. (Szamet Decl. ¶38.) All of which, Defendant would argue, should mitigate in favor of significantly reducing any PAGA penalties if not outright defeat the claims. (*Id.*) While Plaintiffs disagree that Defendant’s analysis is correct or persuasive, PAGA Counsel had to consider the foregoing facts and arguments and how they might impact any potential judgement ultimately awarded to the Allegedly Aggrieved Employees. (*Id.*)

In light of these factual disputes and the accompanying significant risks, and the fact that PAGA gives the Court broad discretion to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement Amount of \$275,000.00 was fair and reasonable. (Szamet Decl. ¶39., Exhibit 1, ¶3.1.)

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

Plaintiffs believe there is a strong risk that the Court will not award the \$200 civil penalty triggered for “subsequent” violations. (Lab. Code § 2699(f)(2).) If this case were to proceed to trial, Plaintiffs would argue that a “subsequent” violation simply means that Defendant violated sections 201-203, 226, 226.7, 246, 248.1, 248.2, 248.6, 510, 512, 558, 1194, 1197, 1198, and 2802,

1 more than once for a given employee. Plaintiffs are not aware of any case law that interprets
2 “subsequent” in the context of section 2699. However, Defendant is likely to rely on *Amaral*,
3 which rejected a purely temporal understanding of the term “subsequent” and interpreted its use
4 in Labor Code sections 210 and 225.5 to require that “the employer has been notified that it is
5 violating a Labor Code provision” before higher penalties are triggered. (*Amaral, supra*, 163
6 Cal.App.4th at 1209; *see also Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144.)

7 Moreover, it is Defendant’s position that the applicable penalty amount was \$50 per pay
8 period as described in Labor Code section 558(a)(1) and that the gap filler penalty set forth in
9 Section 2699(f)(2) would not apply. Defendant also took the position that the “subsequent”
10 penalty rates do not apply because it has not been notified that it violated a Wage Order because
11 the Labor Commissioner has not issued any citation nor has any court made a finding of a prior
12 violation.

13 D. A Court May Exercise Discretion to Reduce the Maximum Civil Penalty Awarded
14 for Technical Violations of the Labor Code

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

18 However, PAGA does provide the Court with discretion as to the amount it awards for
19 PAGA penalties. Labor Code section 2699(e)(2) states that “a court may award a lesser amount
20 than the maximum civil penalty amount specified by this part if, based on the facts and
21 circumstances of the particular case, to do otherwise would result in an award that is unjust,
22 arbitrary and oppressive, or confiscatory.” A court exercising its discretion to significantly reduce
23 the civil penalty awarded under PAGA is not a rare occurrence. (*See e.g., Carrington v. Starbucks*
24 *Corp.* (2018) 30 Cal.App.5th 504, 529 [awarding 10% of maximum civil penalty for meal break
25 claims in light of Starbuck’s “good faith attempts” to comply and because the violations were
26 minimal].)

27 Here, as explained above, Plaintiffs’ counsel anticipates that should the matter go to trial
28 and the Court find that violations occurred, Defendant would argue that the Court should exercise

1 its authority to reduce any civil penalties awarded.

2 ///

3 ///

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

6 For purposes of mediation, Plaintiffs retained an expert to analyze the time and pay data
7 produced by Defendant. (Szamet Decl. ¶40.) Plaintiffs' expert determined that Defendant's
8 maximum exposure for the PAGA claims for the aggrieved employees is \$3,566,400. (Szamet
9 Decl. ¶41.) Given that this Settlement is for \$275,000.00, Plaintiffs believe this is a very fair and
10 reasonable settlement.

11 **VI. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEES**

12 As detailed fully in the Settlement Agreement, the Settlement provides for Defendant to
13 create a Gross Settlement Amount of \$275,000.00. (Szamet Decl. ¶45; Ex. 1 at ¶3.1.) From that
14 fund, Plaintiffs requests an award of attorneys' fees for PAGA Counsel in the amount of
15 \$91,666.67, or 33.33% of the Gross Settlement Amount, and \$20,000.00 in reimbursement for
16 litigation costs. (*Id*; Ex. 1 at ¶3.2.1.)

17 A. Plaintiffs' Counsel are Entitled to a Fee from the Common Fund

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

23 We join the overwhelming majority of federal and state courts in
24 holding that when class action litigation establishes a monetary fund
25 for the benefit of the class members, and the trial court in its
26 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.

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

1 The recognized advantages of the percentage method—including relative ease of
2 calculation, alignment of incentives between counsel and the class, a better
3 approximation of market conditions in a contingency case, and the encouragement
4 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.

5 (*Id.* at 573.)

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

14 This doctrine rests on the understanding that attorneys should normally be paid by their
15 clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from
16 the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979)
17 23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent
18 this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees against
19 the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano*
20 *III*, 20 Cal.3d at p. 35.) “A court, in the exercise of its equitable discretion, may decree that those
21 receiving the benefit should contribute to the costs of its production.” (*Save El Toro Assn., supra*,
22 98 Cal.App.3d at 548.) As this approach “better approximates the workings of the marketplace
23 than the lodestar approach,” there is “a greater judicial willingness to evaluate a fee award as a
24 percentage of the recovery” in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82
25 Cal.App.4th 19, 31, 48.)

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

28 Courts historically award fees in the twenty-to-fifty percent range, depending on the

1 circumstances of the case. As stated in Newberg:

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

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

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

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

23 i. Requested Multiplier

24 The purpose of using the lodestar/multiplier method is to mirror the legal marketplace.
25 Counsel will not handle cases for straight hourly fees payable only if they win; therefore, an
26 enhancement is often awarded so that the fee received is commensurate with what attorneys could
27 expect to be compensated for services in similar circumstances. (See *Tulare Valley Audubon Soc.,*
28 *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

1 reflecting the court's calculations are required. (*Wershba, supra*, 91 Cal.App.4th at 254; *Rebney,*
2 *supra*, 232 Cal.App.3d at p. 1349.) "The record need only show that the attorney fees were awarded
3 according to the 'lodestar' or 'touchstone' approach." (*Ibid.*)

4 Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Szamet
5 Decl. ¶54.) The Kingsley Firm has an aggregate lodestar in the amount of \$56,710.25 which
6 represents 78.85 hours of attorney work on this litigation from its inception through the date of
7 this filing of Plaintiffs' instant Motion. (*Id.*) The Wheeler Firm has an aggregate lodestar in the
8 amount of \$39,900.00, which represents 45.60 hours of attorney work on this litigation. (Wheeler
9 Decl., ¶ 18.) PAGA Counsel also anticipates an additional ten hours of future time through the
10 hearing and the administration process. (Szamet Decl. ¶55.) As such, PAGA Counsel is asking
11 for a lodestar multiplier of 0.95. (Szamet Decl. ¶56.) Typically, the lodestar is merely the starting
12 point of the calculation of a reasonable fee, and courts often multiply the lodestar by a factor to
13 account for the risk of non-payment, delay in payment, the quality of work, and the novelty and
14 difficulty of the issues involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253; *Beasley v.*
15 *Wells Fargo Bank*, (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of*
16 *Supervisors*, (1997) 76 Cal.App.3d 24 1, 251.)

17 This case dealt with difficult legal and factual questions. (Szamet Decl. ¶78.)
18 Significantly, the risk attendant to the underlying claims in this matter was great considering
19 Defendant's defenses as discussed in detail above. (*Ibid.*) Were this case to proceed, Defendant
20 would have a strong incentive to litigate tenaciously. (*Ibid.*) There are genuine issues in dispute.
21 (*Ibid.*) Furthermore, PAGA Counsel was able to obtain close to the full value for this case.
22 (Szamet Decl. ¶79.)

23 As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades
24 of experience who diligently prepared and litigated this matter. (Szamet Decl. ¶80.) To achieve
25 the ultimate result in this case, my firm had to incur substantial risk and expense, and were
26 precluded from taking other fee generating employment for a total of 124.45 hours of attorney
27 time. (Szamet Decl. ¶81; Wheeler Decl., ¶¶13-21.) This matter had been handled purely on a
28 contingency fee basis and both firms have advanced many thousands of dollars in costs while

deferring all payment of fees, with no guarantee that any of the fees incurred or costs advanced would ever be recovered, and diverting significant firm resources to prosecution of this matter. (Szamet Decl. ¶82.) PAGA Counsel believe this is an exceptional result that has been well received by the Allegedly Aggrieved Employees. (Szamet Decl. ¶83.)

VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

In addition to their request for fees, PAGA Counsel further request reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this litigation, in the amount of \$18,365.65. (Szamet Decl. ¶84.) To date, Kingsley and Kingsley has incurred \$17,765.65 in costs. (Szamet Decl. ¶85.) The Wheeler Firm has incurred \$1,577.56 in costs. (Wheeler Decl., ¶22.) PAGA Counsel anticipates incurring an additional \$600.00 in costs to file and serve this motion. (Szamet Decl. ¶86.) As such, counsel is requesting a cost reimbursement of \$18,365.65. (Szamet Decl. ¶87.)

All of the requested costs are reasonable in amount and were necessarily incurred by PAGA Counsel in prosecuting this litigation. (Szamet Decl. ¶88; Exhibit 5 [Cost Report].) Expenses in this matter to date include costs for filing fees, research, mediation, expert analysis, and additional costs for the prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Kelsey M. Szamet. All of these costs have been incurred in the course of this litigation, and all costs advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of filing the present motion. (Szamet Decl. ¶89.)

Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court should approve the request for reimbursement in the amount of \$18,365.65. (Szamet Decl. ¶90.)

VIII. ENHANCEMENTS TO PLAINTIFFS RAMIREZ AND VALENCIA

The Settlement Agreement calls for enhancement payments of \$5,000.00 each to Plaintiff Ramirez and Plaintiff Valencia to be paid from the Maximum Settlement Amount. (Szamet Decl. ¶91; Ex. 1 at ¶3.3.3.) Incentive awards “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the

1 action, and sometimes, to recognize their willingness to act as a private attorney general.”
2 (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. “[I]t is established that
3 named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense
4 or risk they have incurred in conferring a benefit on other members of the class.” (*Munoz v. BCI*
5 *Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American*
6 *Residential Services LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th
7 Cir.2003) 327 F.3d 938, 977)).

8 Here, the enhancement takes into consideration the time, effort, and expense incurred by
9 Plaintiffs in coming forward to litigate this matter on behalf of all Aggrieved Employees. The
10 time spent by Alejandro Ramirez and Matilde Valencia include identifying competent counsel,
11 providing information to PAGA Counsel regarding all relevant employment experience, compiling
12 documents, conducting several meetings and conferences with PAGA Counsel to discuss the status
13 of the case and the theories of liability, and reviewing settlement documents. (Szamet Decl. ¶92.)
14 Plaintiffs have also agreed to a broader release than the Aggrieved Employees and expressly
15 waived the rights provided under California Civil Code section 1542. (*Id*; Ex. 1 at ¶3.4.)

16 PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶93.)
17 The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiff
18 in coming forward to litigate this matter on behalf of all Aggrieved Employees. (Szamet Decl.
19 ¶94.) Accordingly, Plaintiffs should be awarded the agreed-upon enhancement of \$5,000.00 each
20 for a total of \$10,000 from the Settlement Amount.

21 **IX. CONCLUSION**

22 Plaintiffs submit that the proposed Settlement as documented in the Agreement is fair,
23 adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiffs
24 respectfully request that the Court approve the Settlement and Order that the Settlement is carried
25 out according to the terms of the Agreement.

1 DATED: September 18, 2023

KINGSLEY & KINGSLEY, APC

2
3 By:

4 Kelsey M. Szamet
5 Attorneys for Plaintiffs and all Allegedly Aggrieved
6 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 September 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:

BUCHALTER

A Professional Corporation

Joshua Mizrahi

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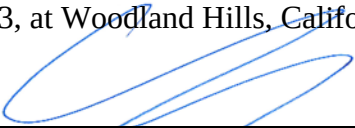
Claremont, California 91711

[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 September 18, 2023, at Woodland Hills, California.



Michelle Tanzer