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SUPERIOR COURT OF THE STATE OF CALIFORNIA

**FOR THE COUNTY OF MONTEREY
(UNLIMITED JURISDICTION)**

ARTURO VERA LOPEZ,

Plaintiff,

v.

GREEN VALLEY LANDSCAPE, INC.;
MITSUGU MORI; and DOES 1 to 25,
inclusive,

Defendant(s)

Case no.: 22CV003751

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

Action filed: December 2, 2022
Hearing Date: July 14, 2023
Hearing Time: 8:30 a.m.
Hearing Dept: 15, Hon. Thomas Wills

Submitted Herewith Under Separate Cover:

1. Memorandum of Point and Authorities;
2. Declaration of Harout Messrelian;
3. Declaration of Arturo Vera Lopez;
4. Declaration of Lisa Mullins; and
5. [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 July 14, 2023 at 8:30 a.m., or as soon thereafter as the
4 matter may be heard, in Department 15 of the Monterey County Superior Court, located at 1200
5 Aguajito Road, Monterey, California, Plaintiff Arturo Vera Lopez (“Plaintiff” or “Lopez”) will
6 and hereby does move this Court for an order approving the PAGA Settlement Agreement (the
7 “Agreement” or “PAGA Settlement”) and entering the [Proposed] Order and Judgment Approving
8 PAGA Settlement.

9 The PAGA Settlement is on behalf of Lopez and all nonexempt employees who are or
10 were employed by GREEN VALLEY LANDSCAPE, INC. and MITSUGU MORI
11 (“Defendants”) within the State of California from March 30, 2021 through March 31, 2023 (the
12 “Aggrieved Employees”). Plaintiff alleges that Defendants are liable to him and other Aggrieved
13 Employees for (1) failure to compensate for all hours worked, including minimum and overtime
14 wages; (2) failure to provide accurate, itemized wage statements; (3) failure to pay all wages owed
15 during and at the end of employment; (4) failure to maintain accurate records; (5) failure to give
16 rest breaks and meal breaks; and (6) failure to reimburse for business expenses.

17 The Motion is based on this Notice of Motion and Motion, the attached Memorandum of
18 Points and Authorities, the declarations of Harout Messrelian, Arturo Vera Lopez, and Lisa
19 Mullins, the PAGA Settlement, all papers and pleadings on file with the Court in this action, all
20 matters judicially noticeable, and on such oral and documentary evidence as may be presented in
21 connection with the hearing on the Motion.

22 Respectfully submitted,

23 MESSRELIAN LAW INC.

24 Dated: June 21, 2023

25 By: Maralle Messrelian
26 Harout Messrelian
27 Maralle Messrelian (Of Counsel)
28 Attorneys for Plaintiff, Arturo Vera Lopez

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**MEMORANDUM OF POINTS AND
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 Arturo Vera Lopez (“Plaintiff” or “Lopez”) submits this memorandum of points
4 and authorities in support of his motion for approval of the Private Attorneys General Act
5 Settlement Agreement and Release (the “Agreement” or “PAGA Settlement”)¹ for the civil
6 penalties claim he brought against Defendants Green Valley Landscape, Inc. and Mitsugu Mori
7 (“Defendants”) under the Labor Code Private Attorneys General Act of 2004, Labor Code §§
8 2698, *et seq.* (“PAGA”). Plaintiff brings this motion because Labor Code section 2699(l) of the
9 PAGA requires Court-approval of any civil penalties sought as part of a proposed settlement
10 agreement. Through this motion, Plaintiff respectfully requests for this Court to approve the
11 PAGA Settlement.

12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 Defendants own and operate Green Valley Landscape Inc. in Seaside, California. Plaintiff
14 first started working for Defendants as an assistant to the landscapers over a decade ago.
15 Plaintiff’s employment ended in or around December 2021. At all times during his employment
16 with Defendants, Plaintiff was considered an hourly, non-exempt employee. HM, ¶ 5.

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

18 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under the
19 Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). On
20 March 30, 2022, Plaintiff, on behalf of himself and Defendants’ other California non-exempt
21 hourly employees (hereafter collectively the “Aggrieved Employees”) gave written notice by
22 electronic service to the California Labor and Workforce Development Agency (“LWDA”) and
23 via certified mail to Defendants of the specific provisions of the California Labor Code alleged
24 to have been violated, including the facts and theories to support the alleged violations. HM, ¶ 6,
25 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 December 2, 2022, Plaintiff filed a lawsuit for his individual wage and hour violations,
3 disability discrimination, retaliation, wrongful termination, and the PAGA claim in Monterey
4 County Superior Court (the "Lawsuit"). HM, ¶ 7, Ex. 4. Regarding the PAGA claim (10th cause
5 of action), Plaintiff asserted on behalf of himself and the Aggrieved Employees that Defendants
6 (1) failed to pay for all hours worked, including but not limited to, minimum and overtime wages
7 (California Labor Code sections 510, 1194, 1197, 1197.1); (2) failed to provide all required timely
8 and duty-free meal and rest periods (California Labor Code sections 226.7 and 512); (3) failed to
9 pay wages owed every pay period (California Labor Code section 204); (4) failed to provide
10 accurate, itemized wage statements (California Labor Code section 226a); (5) failed to pay all
11 wages owed at the end of employment (California Labor section 203); (6) failed to maintain
12 accurate records (California Labor Code section 1174d); (7) failed to reimburse business expenses
13 (California Labor Code sections 2800 and 2802); and (8) failed to provide a safe and healthful
14 work environment (California Labor Code section 6400 *et seq.*). *Id.*

15 In response to Plaintiff's assertions, Defendants filed their General Denial to the
16 Complaint on January 31, 2023. HM, ¶ 8, Ex. 5. Defendants deny any liability or wrongdoing of
17 any kind whatsoever associated with the lawsuit. It is the desire of the parties to fully, finally, and
18 forever compromise, and discharge all claims known or unknown related to those alleged in
19 Plaintiff's lawsuit. HM, ¶ 9.

20 **C. Mediation With Eleanor Barr, Esq.**

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

24 On March 31, 2023, the parties attended a full day mediation session with Eleanor Barr,
25 Esq. At the mediation, the parties agreed to settle Plaintiff's PAGA Claim for violation of Labor
26 Code § 2698, *et seq.* Before agreeing to the terms of the Settlement, the Parties engaged in
27 informal discovery regarding Defendants' policies, practices, operations, time and payroll
28 information and other topics. In advance of mediation, Defendants produced Plaintiff's personnel

1 file, including time and payroll data through data sampling. Moreover, prior to the mediation,
2 Defense counsel provided Plaintiff's counsel with information and documents relating to other
3 Aggrieved Employees, including time and payroll data. Through extensive arm's length
4 negotiations at the mediation and only after discovery and investigation were performed, the
5 Parties agreed to settlement terms. Now that the parties have finalized the PAGA Settlement,
6 Plaintiff submits it to this Court for approval. HM, ¶ 10.

7 **III. OVERVIEW OF SETTLEMENT**

8 **A. "Aggrieved Employees" Definition**

9 The Aggrieved Employees are all nonexempt employees who are or were employed by
10 Defendants within the State of California during the PAGA Period. Agreement, page 2. The
11 PAGA Period means the period of time from March 30, 2021 through March 31, 2023.
12 Agreement, page 2.

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

14 Defendants have agreed to pay a total of \$230,000.00 ("Gross Settlement Amount" or
15 "GSA") to settle the PAGA lawsuit. In consideration for the release of all claims of Plaintiff and
16 the Aggrieved Employees against Defendants (described more fully below), Defendants agreed
17 to pay \$230,000.00 toward the GSA from which all settlement payments for the Net Settlement
18 Amount, Court approved attorneys' fees and costs, and Administration Costs shall be paid.
19 Agreement, ¶ 5. Each Aggrieved Employee will receive a portion of the civil penalties on a pro-
20 rata basis calculated based on the total number of pay periods each Aggrieved Employee worked
21 as a non-exempt hourly employee in California during the PAGA Period. Agreement, ¶ 7. The
22 GSA will be divided as follows:

- 23 1. PAGA Counsel's Fees amounting to \$80,500.00 (35% of the GSA),
24 and PAGA Counsel's Costs in the amount of \$9,010.18 (the Agreement
provides up to \$9,500);
- 25 2. Administration Costs of \$3,750.00 to ILYM Group, Inc.
26 ("ILYM" or "Settlement Administrator") to administer the Settlement;
- 27 3. Approximately \$136,739.82 ("Net Settlement Fund"), divided as follows:
28 a. \$102,554.87 to the LWDA (75%); and
b. \$34,184.95 to the Aggrieved Employees (25%)

Agreement, ¶ 5.

C. Funding and Distribution of the Settlement

Within fourteen (14) calendar days after the Effective Date², Defendants shall deposit the Gross Settlement Amount with the Settlement Administrator. Agreement, ¶ 11(a).

Within fourteen (14) calendar days after the Effective Date, Defendants shall also provide the Settlement Administrator with a list of all Aggrieved Employees with each listed employee's full name, last known mailing address, social security number, the actual number of pay periods worked by him or her during the PAGA Period. The Settlement Administrator shall run all the addresses of Aggrieved Employees through the United States Postal Service NCOA database to obtain current address information. Agreement, ¶ 11(a).

Within 28 calendar days from the date the Gross Settlement Amount has been deposited with the Settlement Administrator, the Settlement Administrator shall: (i) distribute a total of twenty-five percent (25%) of the PAGA Fund to the Aggrieved Employees; (ii) distribute a total of seventy-five percent (75%) of the PAGA Fund to the LWDA; (iii) distribute PAGA Counsel's Fees and PAGA Counsel's Costs; and (iv) pay itself the Administration Costs. Agreement, ¶ 11(b). The Settlement Administrator will issue each Aggrieved Employee a check for his or her share of the NSA along with the Notice of PAGA Settlement and Release of Claims (Exhibit 2 to HM Declaration) by U.S. First Class mail to the Aggrieved Employee's last known mailing address with directions to the Postmaster to forward the payment checks and return all undeliverable payment checks to the Settlement Administrator. Agreement, ¶ 11(b)(i).

D. Individual PAGA Payments and Uncashed Checks

The settlement checks issued to Aggrieved Employees will remain valid for one hundred eighty (180) days. Any settlement checks remaining uncashed for more than one hundred eighty (180) days after issuance will be distributed to the California State Controller's Office Unclaimed Property Fund in the name of the Aggrieved Employee. Agreement, ¶ 11(c). All settlement payments to Aggrieved Employees will be treated as miscellaneous income for which an IRS

² "Effective Date" means (a) the date of entry of the order of the court approving this settlement; or (b) if a timely appeal is made, ten (10) business days after the final resolution of that appeal if the appeal is rejected, the settlement is upheld, and the settlement approval order is no longer subject to further judicial review. Agreement, ¶1.

Form 1099 will be issued by the Settlement Administrator if required by law. Agreement, ¶ 9.

E. Release of Claims For Aggrieved Employees Limited To Those That Could Reasonably Arise From the Facts Alleged In The Action.

Upon the Effective Date of this Settlement, Plaintiff, the State of California (including, but not limited to, the LWDA), and the Aggrieved Employees will be deemed to have fully, finally, and forever released, settled, compromised, relinquished, and discharged the Released Claims with respect to Defendants and each of their past or present affiliates, d/b/a's, owners, officers, directors, shareholders, employees, agents, principals, heirs, representatives, accountants, auditors, consultants, insurers and reinsurers, and their respective . successors and predecessors in interest, subsidiaries, affiliates, parent companies and attorneys. The Released Claims include:

all claims, rights, demands, liabilities and causes of actions that are alleged, or reasonably could have been alleged based on the facts and claims asserted in the lawsuit and claims stated expressly or by implication in the notice filed with the LWDA, including any and all claims under the California Private Attorneys General Act of 2004, which include, but are not limited to: violations of California Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 232, 246, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1197, 1198, 2802, 6400, 6401, 6402, 6403, 6404 via 2698 and 2699, and the California Industrial Welfare Commission Wage Order, which may have arisen during the PAGA Period.

Agreement, ¶ 2.

IV. ARGUMENT

A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT

The Settlement of a PAGA claim requires court approval. Lab. Code §2699(l)(2). The Court necessarily has broad discretion in making the decision to approve or reject a settlement for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain circumstances, penalties should be assessed and, if so assessed, the appropriate amount of penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2). Although the PAGA does not set forth the particular standards against which a PAGA settlement should be evaluated, the LWDA has provided guidance for approval that mirrors the standards for evaluating class action settlements. HM, ¶ 12; *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 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

1 the PAGA are met and the terms of the settlement are fundamentally fair, reasonable, and
2 adequate). The established standards for evaluating whether class action settlements are fair,
3 reasonable, and adequate provide a familiar, useful framework for the Court to evaluate PAGA
4 settlements and have been adopted by several courts. *Id.*, See *Juarez v. Villafan*, 2017 U.S. Dist.
5 LEXIS 137205, *5 n.4 (E.D. Cal. 2017) (citing *Officers for Justice v. Civil Serv. Comm’n of City*
6 *& Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms,*
7 *LLC*, 2017 U.S. Dist. LEXIS 137272, *8-9 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*,
8 150 F.3d 1011, 1026 (9th Cir. 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7,
9 n.4 (E.D. Cal. 2017); *Smith v. H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal.
10 2018); *Rincon v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal.
11 2018).

12 In making the determination whether a settlement taken as a whole is fair, reasonable,
13 and adequate, the Court should be careful to still give “proper deference to the private consensual
14 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual
15 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
16 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
17 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at, 1027. The law favors
18 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
19 conserved by avoiding the time, expense, and rigors of formal litigation. See *Neary v. Regents*
20 *of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
21 1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

22 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**
23 **PAGA**

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

1 of the settlement so that it may be heard before the Court decides whether to grant approval. Cal.
2 Lab. Code § 2699(1)(2). Here, notice is being given to the LWDA concurrently with the filing of
3 this motion. HM, ¶¶ 13, 44, Ex. 11. As a result, Plaintiff has met all procedural statutory
4 requirements for settling a PAGA action.

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

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

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

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

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

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 Eleanor Barr, Esq. At
5 all times, the negotiations were adversarial and contentious, although still professional in nature.
6 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 Aggrieved Employees,
14 the 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 March 31, 2023 that enabled him to achieve the PAGA Settlement at issue. HM, ¶
21 15. 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 March of 2021. 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 and randomly chose 28 employee IDs out of 138 IDs provided by Defendants. This represents 20% of the total employees that Defendants employed during the PAGA Period based on data available at the time of mediation. Defendants provided the sampling of time and pay records.
- 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

Before mediation, Defendants disclosed that for the period of March 30, 2021 to October 13, 2022, there were approximately 138 potential Aggrieved Employees (later determined to be 144) and 1,980 pay periods. 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 \$1.5 million dollars 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	1980	\$198,000
Unpaid Overtime	510/558	\$50	1980	\$99,000
Inaccurate Wage Statements	226/226.3	\$250	1980	\$495,000

Inaccurate Pay Records	1174/1174.5	\$500	138 ees	\$69,000
Untimely Wages	201-204/210, 2699(f)(2)	\$100	1980	\$198,000
Unreimbursed Expenses	2802/2699(f)(2)	\$100	1980	\$198,000
Unprovided Meal Breaks	512/558	\$50	1968	\$98,400
Unprovided Rest Breaks	1198/2699(f)(2)	\$100	1968	\$196,800
MAXIMUM CIVIL PENALTIES				\$1,552,200

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 1,980 pay periods for all 138 potential Aggrieved Employees during the PAGA Period. Plaintiff's counsel is unaware of any California State court decision awarding a plaintiff and the other Aggrieved Employees 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 \$99,000.00 (1,980 pay periods x \$50 = \$99,000.00). HM, ¶ 16.

The PAGA action brought forth in this case by Plaintiff had two main substantive arguments: 1) unprovided meal and rest periods, 2) failure to reimburse business expenses for the purchase of work uniforms.³ Defendants had an auto-deduct system in place and meal punches were not tracked. As such, the timing and length of the meal periods cannot be determined based on the punch records. In *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th

³ Plaintiff estimated a maximum exposure of approximately **\$394,200** for civil penalties for Plaintiff's strongest disputed claims of failure to provide meal and rest periods and failure to reimburse for business expenses. As such, a GSA of \$230,000 is a great result. See HM, ¶ 17.

58, the California Supreme Court held that rounding time punches for meal periods is inconsistent with the purpose of the Labor Code provisions and the California Wage Orders governing meal periods. Here, Green Valley Landscape was rounding the employees' meal periods and not recording actual time for meal periods. The other arguments for PAGA penalties, including inaccurate paystubs, not paying all wages owed every pay period and at the end of employment, and not keeping accurate time records, are all derivative claims that have no value on their own, and especially when the substantive labor code violations, like business expense reimbursement is being used as a predicate. *See Naranjo v. Spectrum Security Services, Inc.*, 40 Cal App5th 444. HM, ¶ 17.

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

Defendants contend they provided their non-exempt employees with the opportunity to take rest periods in accordance with California law, and, accordingly, Plaintiff's rest break claim has no support. Additionally, there are other risks to Plaintiff's rest period claim. Employers are

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

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

10 Additionally, PAGA states a court has discretion to award a lesser amount than the
11 maximum penalty. See Lab. Code § 2699(e)(2) ("...a court may award a lesser amount than the
12 maximum civil penalty amount specified by this part if, based on the facts and circumstances of
13 the particular case, to do otherwise would result in an award that is unjust, arbitrary and
14 oppressive, or confiscatory."); see also *Thurman v. Bayshore Transit Management, Inc.* (2012)
15 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the Court
16 could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's evidence
17 of willful and intentional conduct. HM, ¶ 21. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504
18 ("*Carrington*") illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily
19 discounted award of only \$5 per violation because it was within the Court's discretion to
20 significantly reduce PAGA penalties even when there is a finding that a violation of the
21 California Labor Code occurred. The plaintiff in *Carrington* had requested penalties in excess of
22 \$70 million and was successful in proving the PAGA claim during a bench trial. However, the
23 trial court reduced the total award after trial to only \$150,000 (30,000 violations x \$5) and stated
24 that this reduction was warranted because imposing the maximum penalty would be "unjust,
25 arbitrary, and oppressive", based on Starbucks's "good faith attempts" to comply with meal break
26 obligations and because the Court found the violations were minimal. Applying the same formula
27 here and assuming there was one violation during each pay period, the award of civil penalties
28 could not exceed \$9,900.00 in PAGA penalties (1,980 violations x \$5). As such, this Settlement

1 is a great result based solely on the risk the Court chooses to apply the *Carrington* formula.
2 Defendants have also posed formidable defenses to the Labor Code claims underlying Plaintiff's
3 allegations. Thus, the chance of Plaintiff recovering a higher amount than the Gross Settlement
4 Amount is uncertain. HM, ¶ 21.

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

20 Furthermore, on September 9, 2021, the California Court of Appeal issued a significant
21 decision in *Wesson v. Staples the Office Superstore, LLC*, No. B302988, 2021 Cal. App. LEXIS
22 743 (Ct. App. Sep. 9, 2021) (“*Wesson*”), holding that courts have authority to ensure that PAGA
23 claims are manageable, and that courts may limit or strike unmanageable PAGA claims.⁴ HM,
24 ¶ 23.

25 The Parties further recognize that the issues presented in the representative PAGA claim
26 are likely only to be resolved with extensive and costly pretrial and trial proceedings, and that

27 ⁴ The *Wesson* decision marks the first time an appellate court has weighed in on whether PAGA claims
28 must be manageable.

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

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

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

25 As such, the settlement of PAGA penalties in the gross sum of \$230,000.00, of which
26 75% of the net amount after attorney's fees, litigation costs, and settlement administration costs
27 (\$102,554.87) will be paid to the LWDA and 25% (\$34,184.95) will be distributed to the
28 Aggrieved Employees, is reasonable and appropriate under the circumstances. HM, ¶ 27.

1 **4. Each Aggrieved Employee Will Be Paid Based on the Potential Extent of His or**
2 **Her Injury Compared to Other Aggrieved Employees**

3 Each Aggrieved Employee 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, ¶ 3.2.3.1. With a total of 144 Aggrieved Employees, the average estimated individual
6 PAGA payment for each Aggrieved Employee is approximately \$237.40 (\$34,184.95 (25% of
7 the estimated Net Settlement of \$136,739.82) / 144 Aggrieved Employees). This is a great result
8 given the uncertainties this lawsuit entails. HM, ¶ 28-29.

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,
13 Sharilyn Payne of NOLAND, HAMERLY, ETIENNE & HOSS has vast experience in handling
14 employment matters and wage and hour litigation. See HM, ¶¶ 2, 39-40, Ex. 7.

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

17 Of the \$230,000.00 allocated towards the GSA, Plaintiff's counsel requests \$80,500.00
18 (35% of the GSA) in attorney's fees and \$9,010.18 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

1 *California, Inc.* (2000) 82 Cal.App.4th 19, 26-30). HM, ¶ 34.

2 California courts have the discretion to employ (or decline to employ) a “lodestar cross-
3 check” on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)
4 1 Cal. 5th 480, 505 (“*Laffitte*”). However, the California Supreme Court in *Laffitte* has now made
5 clear that this cross-check is not required and approved one-third of the class action settlement
6 fund as reasonable attorney fees as “[t]he percentage of the fund method survives in California
7 class action cases....” *Id.* at 574. As other courts have acknowledged since *Laffitte*, “California
8 courts routinely award attorneys’ fees of one-third of the common fund.” *Lopez v. Mgmt. &*
9 *Training Corp.*, 2020 U.S. Dist. LEXIS 70029. The *Lopez* court explained that it need not “engage
10 in a full-blown lodestar analysis when the primary basis remains the percentage method...” The
11 lodestar calculation is merely a “useful perspective on the reasonableness of a given percentage
12 award.” *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638 (“Trial courts ‘also
13 retain the discretion to forgo a lodestar cross-check and use other means to evaluate the
14 reasonableness of a requested percentage fee.’”⁵ *Id.* (citing *Laffitte*)). HM, ¶ 35.

15 “[R]egardless whether the percentage method or the lodestar method is used, fee awards
16 in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008)
17 162 Cal.App.4th 43, 66, fn.11 (“*Chavez*”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d
18 373, 379 (“*Pacific*”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.*
19 (9th Cir. 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount).) This is
20 also consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA
21 settlements. HM, ¶ 36.

22 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding
23 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s
24 fee request of \$80,500.00 (35% of GSA) is fair and reasonable based on their lodestar as cross-
25 checked against the percentage of the recovery. HM, ¶ 37. Plaintiff’s counsel’s previous

26 _____
27 ⁵ 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.)

1 experience in litigating wage and hour class actions and the caliber of opposing counsel also
2 support the reasonableness of the fee request. HM, ¶¶ 39-40, Ex. 7. The award of attorneys' fees
3 sought is also justified by the contingency nature of the attorney-client relationship, the risks of
4 non-payment and non-reimbursement, the delay in payment and cost reimbursement, and the
5 great results Plaintiff's Counsel has achieved for the Aggrieved Employees. HM, ¶ 41.

6 In addition, Plaintiff's Counsel incurred substantial costs, \$9,010.18 to date, including the
7 costs of a mediator, to aid in the representation of the Aggrieved Employees. HM, ¶ 38, Ex. 6. As
8 the evidence submitted herewith shows, all of these costs are documented and reasonably
9 incurred. *Id.* Accordingly, they warrant the Court's approval.

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

12 With regard to the settlement administration costs provision, it is reasonable. Before
13 agreeing to ILYM Group, Inc., the Parties sought and reviewed bids from other reputable third-
14 party administrators which provided higher bids. HM, ¶¶ 42-43, Exs. 8-10. *See generally*
15 Declaration of Lisa Mullins. Thus, the settlement administration costs provision should be given
16 approval.

17 **V. CONCLUSION**

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

20
21 Respectfully submitted,

22 MESSRELIAN LAW INC.

23
24 Dated: June 21, 2023

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