

ERIC A. GROVER (SBN 136080)
eagrover@kellergrover.com
ROBERT W. SPENCER (SBN 238491)
rspencer@kellergrover.com
KELLER GROVER LLP
1965 Market Street
San Francisco, California 94103
Telephone: (415) 543-1305
Facsimile: (415) 543-7861

Attorneys for Plaintiffs
KAYLYN BUSH and MADELEINE GUEVARA

[Additional Counsel on Next Page]

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

KAYLYN BUSH and MADELEINE
GUEVARA, on behalf of themselves, and all
aggrieved employees,

Plaintiff,

v.

DUTCH BROS., LLC; and DOES 1 through
100, inclusive,

Defendants.

Case No: 22CV-01415

REPRESENTATIVE ACTION

*Assigned for all purposes to the
Hon. Brian McCabe, Dept. 8*

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR AN ORDER APPROVING
SETTLEMENT OF PAGA ACTION AND
DISMISSING ACTION WITH
PREJUDICE**

Date: December 13, 2023
Time: 8:15 a.m.
Dept. 8

Complaint filed: May 19, 2022
Trial Date: TBD

1 JOSEPH LAVI (SBN 209776)
2 jlavi@lelawfirm.com
3 VINCENT C. GRANBERRY (SBN 276483)
4 vgranberry@lelawfirm.com
5 COURTNEY M. MILLER (SBN 327850)
6 cmiller@lelawfirm.com
7 whits@lelawfirm.com
8 **LAVI & EBRAHIMIAN, LLP**
9 8889 W. Olympic Boulevard, Suite 200
10 Beverly Hills, California 90211
11 Telephone: (310) 432-0000
12 Facsimile: (310) 432-0001
13
14 Attorneys for Plaintiffs
15 KAYLYN BUSH and MADELEINE GUEVARA
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

		Page
1		
2		
3	I. INTRODUCTION	6
4	II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY	7
5	A. The Parties.....	7
6	B. Plaintiffs ‘exhaustion of administrative remedies and filing of the Complaint.....	8
7	C. The Proposed Settlement.....	10
8	1) The benefits to the LWDA and the PAGA Group.	10
9	2) The PAGA Release.	11
10	3) PAGA Notice.	12
11	4) Residual from uncashed checks.	13
12	5) The Settlement Agreement selects Simpluris, Inc. as the settlement administrator.	13
13	6) Settlement administration, attorneys’ fees and costs, and the Plaintiffs’ enhancement payment.	13
14	7) Notification to the LWDA of the Settlement.	13
15	III. LEGAL ARGUMENT	14
16	A. Standards for approval of a PAGA settlement.....	14
17	B. The settlement meets all of the criteria for approval.....	17
18	1) The factors giving rise to a presumption of fairness exist.	17
19	2) The risk, expense, and complexity of further litigation balances strongly in favor of approval of the Settlement.	17
20	3) The benefits conferred by the settlement balance in favor of approval.....	18
21	4) The scope of the release is narrowly tailored.....	19
22	5) The experience and views of Plaintiffs’ Counsel favor approval of the settlement.	20
23	6) The extent of discovery completed and the stage of the proceedings favor approval of the proposed settlement.	20
24	IV. CONCLUSION	21
25		
26		
27		
28		

TABLE OF AUTHORITIES

State Cases	Page(s)
<i>Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court</i> (2009) 46 Cal.4th 993	16
<i>Arias v. Superior Court</i> (2009) 46 Cal.4th 969	passim
<i>Carrington v Starbucks Corp.</i> (2018) 30 Cal.App.5th 504	18
<i>Cellphone Termination Fee Cases</i> (2009) 180 Cal.App.4th 1110	17
<i>Estrada v. Royalty Carpet Mills, Inc.</i> (2022) 76 Cal.App.5th 685	15
<i>In re Cellphone Fee Termination Cases</i> (2010) 186 Cal.App.4th 1380	14
<i>Kim v. Reins Int’l California, Inc.</i> (2020) 9 Cal.5th 73	15
<i>Moniz v. Adecco USA, Inc.</i> (2021) 72 Cal.App.5th 56	14, 15
<i>Nordstrom Com’n Cases</i> (2010) 186 Cal.App.4th 576	16, 17
<i>Thurman v. Bayshore Transit Mgmt., Inc.</i> (2012) 203 Cal.App.4th 1112	18
<i>Turrieta v. Lyft, Inc.</i> (2021) 69 Cal.App.5th 955	16
<i>Villacres v. ABM Industries Inc.</i> (2010) 189 Cal.App.4th 562	12
<i>Williams v. Superior Court</i> (2017) 3 Cal.5th 531	14, 16
<i>ZB, N.A. v. Superior Court</i> (2019) 8 Cal.5th 175	18
 Federal Cases	
<i>Baumann v. Chase Inv. Servs. Corp.</i> (9th Cir. 2014) 747 F.3d 1117	16
<i>Chamberlain v. Hughes</i> (July 29, 2020) 2020 U.S. Dist. LEXIS 134582	15
<i>Hanlon v. Chrysler Corp.</i> (9th Cir. 1998) 150 F.3d 1011	15

1	<i>In re TD Ameritrade Account Holder Litig.</i>	
2	(N.D. Cal. Sept. 12, 2011) 2011 U.S. Dist. LEXIS 103222	14, 16
3	<i>Linney v. Cellular Alaska P'ship</i>	
4	(9th Cir. 1998) 151 F.3d 1234	18, 20
5	<i>Magadia v Wal-Mart Assocs.</i>	
6	(N.D. Cal. 2019) 384 F. Supp. 3d 1058	18
7	<i>Officers for Justice v. Civil Service Com.</i>	
8	(9th Cir. 1982) 688 F.2d 615	14, 15, 18
9	<i>Petitt v. Exigency Healthcare Servs.</i>	
10	(E.D. Cal. Mar. 2, 2023) 2023 U.S. Dist. LEXIS 35869	14
11	<i>Ramirez v. Benito Valley Farms, LLC</i>	
12	(N.D. Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137272	15, 16
13	Rules	
14	California Rules of Court,	
15	Rule 3.769	16
16	Federal Rules of Civil Procedure,	
17	Rule 23	16
18	Statutes	
19	California Labor Code	
20	§ 201	8, 12
21	§ 202	8, 12
22	§ 203	8, 12
23	§ 204	8, 12
24	§ 226	8, 12
25	§ 226.3	8, 12
26	§ 226.7	8, 12, 18
27	§ 510	8, 12
28	§ 512	8, 12
	§ 1194	8, 12
	§ 1197	8, 12
	§ 1198	8, 12
	§ 1199	8, 12
	§ 2698	6, 12, 19
	§ 2699	<i>passim</i>
	§ 2699.3	8

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Kaylyn Bush and Madeleine Guevara (“Plaintiffs”) move this Court for an order granting approval of the proposed settlement of this representative Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.*, (“PAGA”) action against Dutch Bros., LLC (“Defendant”).¹ Plaintiffs’ PAGA action alleges that Defendant violated certain California Labor Code provisions resulting from its meal period, rest break, off-the-clock pay, wage statement, termination pay, and timely pay practices.² The proposed settlement will dispose of the PAGA claims asserted on behalf of Plaintiffs and all individuals within State of California who are or were employed by Defendant in the State of California as an hourly, non-exempt employee for at any time from March 14, 2021 through August 7, 2023, inclusive (the “PAGA Release Period”), (referred to as the “PAGA Group”).³

The proposed settlement embodies all of the features of a settlement that is fair, reasonable, and adequate. It is the product of (1) arms-length negotiations, (2) negotiated by attorneys experienced in wage-and-hour issues, (3) subsequent to undertaking sufficient investigation necessary to evaluate the relative strength and value of the PAGA claims, and (4) it reflects a reasoned compromise based directly on the relative strength and value of the PAGA claims, as well as the risks, expense, complexity, and likely duration of further litigation.

The settlement achieves a fair and reasonable benefit for the State of California’s Labor and Workforce Development Agency (“LWDA”) and the approximately 6,600 members of the PAGA Group.⁴ The Settlement Agreement allocates approximately \$1,244,925 to the settlement

¹ See Declaration of Eric A. Groer submitted in support of Plaintiffs’ Motion for Approval of PAGA Settlement (“Grover Decl.”), Ex. 1 (the Parties’ Labor Code Private Attorneys General Act Settlement Agreement (the “Settlement Agreement”)). All “Ex.” references are to Grover Declaration exhibits unless stated otherwise. Also, all capitalized terms shall have the same meaning as set forth in the Settlement Agreement unless noted otherwise.

² Ex. 3 (the operative First Amended Complaint (“FAC”)).

³ Ex. 1 at §§ I.K, L.

⁴ Grover Decl. at ¶¶ 18-28; see Ex. 1 at § I.K.

of the PAGA claims (referred to as the “Net Settlement Amount”).⁵ As required by the Labor Code, from the estimated \$1,244,925 Net Settlement Amount, 75% (\$933,694) will be distributed to the LWDA and 25% (\$311,231) will be paid to the PAGA Group (*i.e.*, the aggrieved employees).⁶ The \$311,231 to be paid to the PAGA Group members will be distributed according to the formula set forth in the Settlement Agreement.⁷

This is a reasonable recovery in light of the fact that Defendant has raised what it considers to be substantial defenses to Plaintiffs’ claims on the merits and the Court’s inherent authority to set the amount of PAGA penalties at less than the statutory maximum. Plaintiffs’ Counsel determined the risk to recovery to be significant and negotiated a settlement that they view as fair, reasonable and adequate for the LWDA, PAGA Group, and Plaintiffs under the circumstances.⁸

For these reasons, as set forth more fully herein, Plaintiffs request that this Court enter an order approving the PAGA settlement. In a separate motion being filed today, Plaintiffs seek an order awarding attorneys’ fees and costs, an enhancement award for each of the Plaintiffs, and the approval of Simpluris, Inc. as the Settlement Administrator and approval for payment of the settlement administration fees.

II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A. The Parties

Defendant is a Oregon limited liability company that operates retail coffee shops at locations throughout California.⁹ Plaintiff Bush worked as a non-exempt, hourly barista in Stockton, California from approximately July 9, 2021 through February 1, 2022.¹⁰ Plaintiff

⁵ Ex. 1 at § I.J; *see also*, §§ I.P, VI, X, XI. The remaining \$705,075 of the \$1,950,00 Settlement Amount is allocated to attorneys’ fees (\$650,000) and litigations costs (\$17,574.99), enhancement awards to Plaintiffs (\$20,000), and administration costs (estimated to be \$17,500). Grover Decl. at ¶ 21; Ex. 1 at §§ I.P, VI, X, XI.

⁶ Ex. 1 at §§ I.I, I.J. *See* Lab. Code § 2699(i).

⁷ Ex. 1 at § VIII.A.

⁸ Grover Decl. at ¶¶ 18-28.

⁹ Ex. 3 (FAC at ¶¶ 6, 10).

¹⁰ Ex. 3 (FAC at ¶¶ 4, 11).

1 Guevara worked as a non-exempt, hourly barista in Turlock, California from approximately June
2 10, 2021 through August 24, 2022.¹¹ The PAGA Group is defined as: All persons within the State
3 of California who are or were employed by Defendant in the State of California as an hourly,
4 non-exempt employee at any time within the PAGA Release Period.¹² The “PAGA Release
5 Period” is defined as the time period from and including March 14, 2021 through August 7,
6 2023.¹³

7 **B. Plaintiffs ‘exhaustion of administrative remedies and filing of the Complaint.**

8 On March 14, 2022, pursuant to Labor Code § 2699.3’s exhaustion requirements, Plaintiff
9 Bush gave written notice of her PAGA claims to the LWDA and Defendant.¹⁴ After satisfying
10 the administrative requirements of Labor Code § 2699.3(a), Plaintiff Bush filed her Complaint on
11 May 19, 2022, in Merced County Superior Court against Defendant for penalties pursuant to
12 Labor Code § 2699(f) for alleged violations and penalties under Labor Code §§ 201, 202, 203,
13 204, 226, 226.3, 226.7, 512, 1198, and 1199.

14 On March 7, 2023, Plaintiff Guevara gave written notice of her PAGA claims to the
15 LWDA and Defendant.¹⁵ On May 16, 2023, Plaintiff Guevara filed her Complaint in Stanislaus
16 County Superior Court (Case No. CV-23-002754) against Defendant for penalties pursuant to
17 Labor Code § 2699(f) for alleged violations and penalties under Labor Code §§ 201, 202, 203,
18 204, 226, 226.7, 510, 512, 1194, and 1197.

19 On October 9, 2023, Plaintiff Bush filed the operative FAC in Merced County Superior
20 Court, which adds Plaintiff Guevara as a plaintiff and adds claims for penalties pursuant to Labor
21 Code § 2699(f) for alleged violations and penalties under Labor Code §§ 512, 1194, and 1197.¹⁶

23 ¹¹ Ex. 3 (FAC at ¶¶ 5, 11).

24 ¹² Ex. 1 at § I.J.

25 ¹³ Ex. 1 at § I.K.

26 ¹⁴ Grover Decl. at ¶¶ 6, 11, Ex. 2 (PAGA exhaustion letter).

27 ¹⁵ Declaration of Vincent Granberry (“Granberry Decl.”) at ¶ 5, Ex. 1 (PAGA exhaustion letter);
28 *see also*, Grover Decl. at ¶ 11.

¹⁶ Grover Decl. at ¶ 12, Ex. 3 (FAC).

1 On October 9, 2023, Plaintiff Guevara dismissed her Stanislaus County Superior Court action
2 without prejudice.¹⁷

3 Defendant has denied all of the allegations in their entirety. To date, no court has made a
4 finding of any wrongdoing on the part of Defendant or that Defendant otherwise acted improperly
5 or in violation of any state law, rule or regulation, with respect to the issues presented in the
6 litigation.¹⁸

7 Following the filing of the *Bush* action, counsel for the Parties met and conferred with
8 respect to the potential settlement. Pursuant to these discussions, the Parties agreed to exchange
9 informal discovery and engage in private mediation. The Parties subsequently exchanged
10 informal discovery, including: timekeeping and payroll records; information and documentation
11 concerning the claims alleged in the actions; and information regarding the number of PAGA
12 Group members and the total workweeks and pay periods worked by the PAGA Group during the
13 PAGA Release Period.¹⁹ Defendant also provided information from its records supporting there
14 are no more than 6,600 individuals who meet the Settlement Agreement's definition of the PAGA
15 Group.²⁰

16 Armed with the information obtained from informal discovery, the Parties participated in
17 a formal mediation session with Tripper Ortman, Esq. on July 31, 2023. At the mediation, the
18 Parties were able to reach a tentative settlement and agreed to settle the entire action, subject to
19 approval by the Court.²¹ The detailed, formalized Settlement Agreement sets forth all terms of
20 the Parties' settlement.²² The settlement is the result of arm's-length negotiations between the
21 Parties' counsel.²³

23 ¹⁷ Granberry Decl. at ¶ 9; *see also*, Ex. 1 at § II.A.

24 ¹⁸ Ex. 1 at § IV.

25 ¹⁹ Grover Decl. at ¶¶ 9, 13.

26 ²⁰ Grover Decl. at ¶ 9; Ex. 1 at § I.K.

27 ²¹ Grover Decl. at ¶¶ 10, 14; Ex. 1 at §§ II.A, II.B.

28 ²² *Id.*

²³ Grover Decl. at ¶¶ 10, 15; Ex. 1 at § II.B.

C. The Proposed Settlement

1) The benefits to the LWDA and the PAGA Group.

The Settlement Agreement defines the PAGA Group as “All persons within the State of California who are or were employed by Defendant in the State of California as an hourly, non-exempt employee at any time within the PAGA Release Period.”²⁴ The “PAGA Release Period” is from March 14, 2021 through August 7, 2023, inclusive.²⁵ Defendant has identified approximately 6,600 PAGA Group members.²⁶

The Settlement Agreement provides that, to settle this matter, Defendant will pay \$1,950,000 (the “Settlement Amount”).²⁷ The Settlement Amount shall be all inclusive, encompassing (i) all payments to the LWDA and the PAGA Group, (ii) all costs of third-party administration of the settlement, (iii) Plaintiffs’ Counsel’s attorneys’ fees and costs of suit, and (iv) enhancement payments to the named Plaintiffs.²⁸

The total sum available for payment of PAGA penalties (*i.e.*, the Net Settlement Amount”) is calculated by deducting \$650,000 for the payment of Plaintiffs’ Counsel’s fees and \$17,574.99 for litigation costs, a \$10,000 enhancement payment to each Plaintiff, and estimated administration costs of \$17,500 from the Settlement Amount, leaving an estimated \$1,244,925.01 Net Settlement Amount to be distributed to the LWDA and the PAGA Group members.²⁹

As required by Labor Code § 2699(i), the Net Settlement Amount will be paid 75% (approximately \$933,694) to the LWDA and 25% (approximately \$311,231) to the PAGA Group members.³⁰ The \$933,694 that the LWDA will receive will be used for labor law enforcement

²⁴ Ex. 1 at § I.K.

²⁵ Ex. 1 at § I.L.

²⁶ Ex. 1 at § I.K; Grover Decl. at ¶ 19.

²⁷ Ex. 1 at §§ I.P, VIII.B.

²⁸ Ex. 1 at § I.P.

²⁹ Ex. 1 at § I.J, *see also*, §§ I.P, VI, X, XI; Grover Decl. at ¶¶ 21-23.

³⁰ Ex. 1 at § I.J, *see also*, §§ I.I, I.G, VIII.A; Grover Decl. at ¶ 21; *see also*, Lab. Code § 2699(c) (PAGA defines “aggrieved employee” as “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.”).

and education.³¹

The PAGA Group members will divide their portion based on the formula set forth in the Settlement Agreement, which, in summary, provides that the portion of the Net Settlement Amount to be distributed to the PAGA Group shall be divided by the total number of full pay periods, with partial pay periods rounded up to the next whole number, as determined by Defendant's records, for all times during the PAGA Release Period which the PAGA Group worked for Defendant. This amount shall be known as the "Pay Period Value." Each member of the PAGA Group shall be paid an amount equal to the number of individual pay periods he or she worked for Defendant during the PAGA Release Period multiplied by the Pay Period Value.³² On average, each PAGA Group member will receive approximately \$47.15.³³ PAGA Group members do not need to submit a claim to receive a settlement payment.³⁴

Simpluris will mail an Individual Settlement Payment check to each PAGA Group member no later than 60 calendar days of the Court's approval of the settlement.³⁵

2) The PAGA Release.

All PAGA claims alleged in the FAC are released as part of the settlement.³⁶ In exchange for the above-described settlement consideration, Defendant shall be entitled to the following release from Plaintiffs on behalf of the LWDA.³⁷

Upon approval of this settlement by the Court, Plaintiff, individually and as a representative acting as a proxy or agent of the LWDA, a State of California Executive Branch Agency, in this Litigation, agree to release Defendant and

³¹ Lab. Code § 2699(i).

³² Ex. 1 at §§ I.G, I.J, VIII.A.

³³ Grover Decl. at ¶ 23 (\$311,231/6,600 = \$47.15); *see also*, Ex. 1 at §§ I.G, I.J, VIII.A.

³⁴ Ex. 1 at § VIII.A; Grover Decl. at ¶ 23.

³⁵ Ex. 1 at § VII, *see also*, §§ I.G, I.J, VIII.A.

³⁶ Ex. 1 at § V, *see also*, § I.L.

³⁷ This comports with settled California Supreme Court authority. *See Arias v. Superior Court* (2009) 46 Cal.4th 969, 987 ("[W]ith respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act...."). The PAGA Group members do not individually release any claims as part of the settlement.

Defendant’s partners, parents, subsidiaries, affiliates, attorneys, and all agents thereof (collectively, the “Released Parties”), of and from any and all claims under the California Labor Code Private Attorneys General Act of 2004 (“PAGA”), Labor Code §§ 2698, *et seq.*, that were or could have been alleged based on the factual allegations and identified Labor Code sections in the operative pleading for the Litigation, including, but not limited to, California Labor Code sections §§ 201, 202, 203, 204, 226, 226.3, 226.7, 510, 512, 1194, 1197, 1198, and 1199, during the time period from and including March 14, 2021 through August 7, 2023 (the “Released Claims”). The Parties further agree to release any and all claims for costs, fees, and interest related to the Released Claims. The Parties further agree that this Agreement and judgment to be entered by the Court following approval of this settlement forever bars Plaintiffs and the LWDA, directly or through any other proxy or agent, from any future prosecution of any of the Released Claims against any of the Released Parties.³⁸

3) PAGA Notice.

Under the settlement, the Parties have agreed to provide a Notice of Settlement (“Notice”) notifying the PAGA Group members about the settlement terms.³⁹ The settlement requires Defendant to provide the Settlement Administrator with the following information for each PAGA Group member: name, last known home address, number of pay periods that the PAGA Group member worked during the PAGA Release Period, and social security number (collectively referred to as the “PAGA List”) no later than 30 calendar days after the Court approves the settlement.⁴⁰ After updating the PAGA List, the Settlement Administrator will mail the Notice and the Individual Settlement Payment check to each member of the PAGA Group no later than 60 calendar days after the Court approves the settlement.⁴¹

Under the settlement terms, for any Individual Settlement Payment check that is

³⁸ See Ex. 1 at § V.A. See *Arias, supra*, 46 Cal.4th at 987 (“[T]he nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties.”) This stands in contrast to the scope of release permitted in the class action context, where class members have a right to notice and the right to exclude themselves from the action. See *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 586 (“[A] court may release not only those claims alleged in the complaint and before the court, but also claims which ‘could have been alleged by reason of or in connection with any matter or fact set forth or referred to in’ the complaint.”).

³⁹ Ex. 1 at § VII, Exhibit A (the Notice).

⁴⁰ Ex. 1 at § VII.

⁴¹ Ex. 1 at § VII.

1 returned as undeliverable, the Settlement Administrator shall promptly attempt to locate the
2 PAGA Group member by performing an additional skip-trace and shall remail the Individual
3 Settlement Payment check no later than 10 calendar days following the receipt of the
4 undelivered Notice and check.⁴²

5 **4) Residual from uncashed checks.**

6 The Settlement Administrator shall void any settlement checks that remain uncashed
7 more than 180 days after issuance and the Settlement Administrator will remit the entire
8 amount of each PAGA Group member's uncashed Individual Settlement Payment to the
9 LWDA.⁴³

10 **5) The Settlement Agreement selects Simpluris, Inc. as the settlement**
11 **administrator.**

12 The Settlement Agreement provides that Simpluris, Inc. will administer the settlement.⁴⁴

13 **6) Settlement administration, attorneys' fees and costs, and the Plaintiffs'**
14 **enhancement payment.**

15 The Settlement Agreement also provides for the payment of settlement administration
16 fees, award of attorneys' fees and costs, and enhancement payments for the Plaintiffs.⁴⁵ Those
17 terms are discussed in the memorandum accompanying the Motion for Award of Attorneys' Fees
18 and Costs, Plaintiffs' Enhancement Awards and Settlement Administration Fees that is being filed
19 concurrently with this motion.

20 **7) Notification to the LWDA of the Settlement.**

21 As detailed in the Declaration of Robert Spencer, filed concurrently with the submission
22 of the Settlement Agreement to the Court, Plaintiffs are submitting the settlement to the LWDA
23 as required by Labor Code § 2699(1)(2).⁴⁶

24 _____
25 ⁴² Ex. 1 at § VII.

26 ⁴³ Ex. 1 at § VIII.B.

27 ⁴⁴ Ex. 1 at § VI.

28 ⁴⁵ Ex. 1 at §§ VI, X, XI; *see also*, §§ I.J, I.P.

⁴⁶ Spencer Decl. at ¶ 2.

III. LEGAL ARGUMENT

A. Standards for approval of a PAGA settlement.

The settlement of a PAGA claim requires court approval pursuant to the operative PAGA statute. Section 2699(l)(2) provides that the court must “review and approve any settlement of any civil action filed pursuant to [PAGA].” The California Supreme Court has noted that the trial court’s review and approval of PAGA settlements ensures “that any negotiated resolution is fair to those affected.”⁴⁷

As with any settlement, the court conducts its inquiry staying mindful that “[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in litigating further.”⁴⁸ Indeed, “the very essence of a settlement is ... ‘a yielding of absolutes and an abandoning of highest hopes,’”⁴⁹ as “it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.”⁵⁰ As such, “the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits” or “judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.”⁵¹

Although Section 2699(l) does not set forth the criteria on which a PAGA settlement is to be judged, controlling California case law has held that “a trial court should evaluate a PAGA settlement to determine whether it is fair, reasonable, and adequate in view of PAGA’s purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws.”⁵² PAGA is intended to incentivize private parties to recover civil penalties on behalf

⁴⁷ *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549, citing Lab. Code § 2699 (l)(2).

⁴⁸ *See In re TD Ameritrade Account Holder Litig.* (N.D. Cal. Sept. 12, 2011) No. C 07-2852 SBA and C 07-4903 SBA, 2011 U.S. Dist. LEXIS 103222, at *24.

⁴⁹ *Officers for Justice v. Civil Service Com.* (9th Cir. 1982) 688 F.2d 615, 624.

⁵⁰ *See id.* at 625.

⁵¹ *See id.*

⁵² *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77 (“*Moniz*”), citing *Williams, supra*, 3 Cal.5th at 546 (finding that PAGA seeks “to remediate present violations and deter future ones”) and *Arias, supra*, 46 Cal.4th at 980 (recognizing that PAGA’s declared purpose is to augment state enforcement efforts to achieve maximum compliance with labor laws.); *see also, e.g., Pettitt v. Exigency Healthcare Servs.* (E.D. Cal. Mar. 2, 2023) No. 21-cv-07639-VKD, 2023 U.S. Dist.

1 of the overburdened state enforcement agencies who otherwise would have assessed and collected
2 the civil penalties themselves.⁵³

3 When assessing a PAGA settlement, courts utilize some of the factors used to evaluate the
4 fairness of a class action settlement, which can include the strength of the plaintiff's case, the risk,
5 expense, complexity and likely duration of further litigation, and the experience and views of
6 counsel.⁵⁴ It, however, is important to underscore that the California Supreme Court has found
7 that, "[a]lthough representative in nature, a PAGA claim is not simply a collection of individual
8 claims for relief, and so is different from a class action."⁵⁵ A PAGA action "is fundamentally a
9 law enforcement action designed to protect the public and not to benefit private parties."⁵⁶ In a
10 PAGA action, the plaintiff employee serves as a proxy for the LWDA.⁵⁷ As a result, certain
11 factors relevant to a class action settlement do not apply when assessing the fairness of a PAGA
12 settlement.

13 In addition, other factors that are not relevant in the class action context are relevant in the
14

15 LEXIS 35869, at *9 (applying that standard when evaluating the PAGA portion of a settlement,
16 citing *Moniz* and other cases); *Chamberlain v. Hughes* (July 29, 2020) No. 1:19-cv-00831-DAD-
17 JLT, 2020 U.S. Dist. LEXIS 134582, at *15 (applying same standard when approving PAGA
18 settlement), cited with approval in *Moniz*. Plaintiffs cite federal authorities for guidance. *See In*
re Cellphone Fee Termination Cases (2010) 186 Cal.App.4th 1380, 1392 ("California courts may
look to federal authority for guidance on matters involving class action procedures.").

19 ⁵³ *See e.g., Kim v. Reins Int'l California, Inc.* (2020) 9 Cal.5th 73, 81; *Arias, supra*, 46 Cal.4th at
20 986; *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685, 710-11 (also finding that
21 "[t]he civil penalties recovered in a PAGA action are 'recovered on the state's behalf [and] are
intended to 'remediate present violations and deter future ones,' not to redress employees'
injuries,'" quoting *Kim, supra*, 9 Cal.5th at 86-87).

22 ⁵⁴ *Moniz, supra*, 72 Cal.App.5th at 77; *see also, e.g., Chamberlain, supra*, 2020 U.S. Dist. LEXIS
23 134582, at *12, n.5 (noting that the assessment of fairness, adequacy and reasonableness of a
24 PAGA settlement may involve balancing some of the factors used to assess class action
settlements), citing *Officers for Justice, supra*, 688 F.2d at 625; *Ramirez v. Benito Valley Farms,*
LLC (N.D. Cal. Aug. 25, 2017) No. 16-CV-04708-LHK, 2017 U.S. Dist. LEXIS 137272, at *8
(same), citing *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026).

25 ⁵⁵ *Kim, supra*, 9 Cal.5th at 86, citing *Arias, supra*, 46 Cal.4th at 986.

26 ⁵⁶ *Arias, supra*, 46 Cal.4th at 986.

27 ⁵⁷ *Id.*; *see also, e.g., Kim, supra*, 9 Cal.5th at 86, quoting *Arias, supra*, 46 Cal.4th at 986 ("[a]n
28 employee suing under PAGA 'does so as the proxy or agent of the state's labor law enforcement
agencies.'").

1 PAGA settlement context.⁵⁸ First, as noted, a court assesses a PAGA settlement’s adequacy
2 based on whether the total settlement achieves PAGA’s objective,⁵⁹ which is “to protect the
3 public” with “the potential impact on remedies other than civil penalties [being] ancillary to the
4 action’s primary objective.”⁶⁰ That said, a PAGA settlement – like any settlement – involves a
5 compromise that stops short of rendering findings of liability and damages.

6 Second, because they have no property interest in a PAGA claim,⁶¹ “PAGA has no notice
7 requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA
8 action.”⁶² The California Supreme Court has explained that “absent employees do not own a
9 personal claim for PAGA civil penalties and whatever personal claims the absent employees
10 might have for relief are not at stake.”⁶³ This renders the approval process of a PAGA settlement
11 distinct from a class action settlement, as there is no need for the Court to employ the “two-step
12 approval process” required under California Rule of Court 3.769 and FRCP Rule 23(e).⁶⁴

13 Finally, unlike in a class action settlement, the scope of release permitted in a PAGA
14 settlement is limited. While “judgment in [a PAGA] action is binding not only on the named
15 employee plaintiff but also on government agencies and any aggrieved employee not a party to

16 ⁵⁸ See *Ramirez, supra*, 2017 U.S. Dist. LEXIS 137272, at *8-9.

17 ⁵⁹ See *Nordstrom Com’n Cases* (2010) 186 Cal.App.4th 576, 589 (finding that the trial court
18 properly considered the overall circumstances of the settlement when determine whether the
19 PAGA settlement was appropriate).

20 ⁶⁰ *Arias, supra*, 46 Cal.4th at 987.

21 ⁶¹ See *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th
22 993, 1003 (PAGA “does not create property rights or any other substantive rights” as “[i]t is
23 simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor
24 Code violations—that otherwise would be sought by state labor law enforcement agencies.”).

25 ⁶² See *e.g., Turrieta v. Lyft, Inc.* (2021) 69 Cal.App.5th 955, 974 (“PAGA has no notice
26 requirements for unnamed aggrieved employees, nor may such employees opt out of a PAGA
27 action.”); *Baumann v. Chase Inv. Servs. Corp.* (9th Cir. 2014) 747 F.3d 1117, 1122 (same).

28 ⁶³ *Williams, supra*, 3 Cal.5th at 547, fn. 4, citing other California Supreme Court cases; *see also*,
Turrieta, supra, 69 Cal.App.5th at 973, quoting same.

⁶⁴ The Rule 23(e) two-step process facilitates “notice” to absent class members by requiring “(1)
preliminary approval of the settlement; and (2) final approval of the settlement at a fairness
hearing following notice to the class.” See, *e.g., In re TD Ameritrade, supra*, 2011 U.S. Dist.
LEXIS103222, at *10; *see* F.R.C.P. 23(e). Cal. Rule of Court 3.769 contains similar rules for
state court class actions.

1 the proceeding,”⁶⁵ “the nonparty employees, because they were not given notice of the action or
2 afforded any opportunity to be heard, would not be bound by the judgment as to remedies other
3 than civil penalties.”⁶⁶ Thus, the scope of a release in a PAGA settlement is necessarily limited to
4 PAGA claims.

5 **B. The settlement meets all of the criteria for approval.**

6 The proposed settlement embodies all of the key features of a settlement that is fair,
7 reasonable, adequate, and as such, meets all the criteria necessary for approval.

8 **1) The factors giving rise to a presumption of fairness exist.**

9 When reviewing a settlement, “a presumption of fairness exists where: (1) the settlement
10 is reached through arm’s-length bargaining; (2) investigation and discovery are sufficient to allow
11 counsel and the court to act intelligently; [and] (3) counsel is experienced in similar litigation.”⁶⁷
12 In this case, the proposed Settlement (1) is the product of arms-length negotiations,⁶⁸ (2)
13 occurred after Plaintiffs’ Counsel had conducted sufficient investigation to evaluate the strength
14 and potential value of the PAGA claims, as well as evaluating the risks of litigating these claims
15 through trial,⁶⁹ and (3) was negotiated by Plaintiffs’ Counsel with significant experience in
16 similar wage and hour litigation.⁷⁰ As a result, the proposed PAGA settlement warrants a
17 presumption of fairness.

18 **2) The risk, expense, and complexity of further litigation balances strongly in**
19 **favor of approval of the Settlement.**

20 The proposed settlement takes into consideration the risks that this action faces in
21 establishing Defendant’s liability. Defendant has raised what it considers to be substantial

22 _____
23 ⁶⁵ *Arias, supra*, 46 Cal.4th at 986.

24 ⁶⁶ *See id.* at 987.

25 ⁶⁷ *Nordstrom Com. Cases, supra*, 186 Cal.App.4th at 581 (internal quotations and alterations
26 omitted), citing *Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1117–1118
(also listing as a factor relevant only to class actions that percentage of objectors is small).

27 ⁶⁸ Grover Decl. at ¶¶ 10, 14.

28 ⁶⁹ Grover Decl. at ¶¶ 9-11, 13-14.

⁷⁰ Grover Decl. at ¶¶ 2-4, 32-35, 37, 40; Granberry Decl. at ¶¶ 10-14.

defenses to Plaintiffs' claims and continued litigation posed the risk of diminishing any possible recovery by increasing litigation expenses. Those combined risks, balanced with the fact that the settlement achieved a significant recovery, as demonstrated below, weigh strongly in favor of settlement approval.

3) The benefits conferred by the settlement balance in favor of approval.

The proposed settlement provides a significant monetary benefit for the LWDA and a reasonable monetary benefit for the PAGA Group. As the Ninth Circuit has held, a settlement may be fair and reasonable even where it only provides a fraction of what could have been obtained at trial:

The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators. Thus, the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes. ... The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.⁷¹

There are 6,600 PAGA Group members who worked approximately 152,000 pay periods during the PAGA Release Period.⁷² At \$100 per pay period, a PAGA award would amount to \$15,200,000.⁷³ However, Labor Code § 2699(e)(2) however allows a court to reduce the amount of a PAGA penalty at the court's discretion. And, as a number of reported cases demonstrate, many courts end up awarding substantially less than the full amount in PAGA penalties.⁷⁴

⁷¹ See *Linney v. Cellular Alaska P'ship* (9th Cir. 1998) 151 F.3d 1234, 1242 (internal quotations and citations omitted), citing *Officers for Justice, supra*, 688 F.2d at 625, among other cases).

⁷² Ex. 1 at § I.G; Grover Decl. at ¶¶ 9, 19.

⁷³ See Lab. Code § 2699(f)(2).

⁷⁴ See e.g., *Carrington v Starbucks Corp.* (2018) 30 Cal.App.5th 504, 517, 529 (affirming the trial court's \$150,000 PAGA penalty award out of \$75 million in penalties sought, based on 30,000 violations, which reduced the penalty rate to \$5 per violation); *Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1125, 1135-36 (affirming the trial court's award of \$358,588, a 30% reduction of the \$512,000 PAGA penalties requested), *disapproved on another ground* at *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 196; *Magadia v Wal-Mart Assocs.* (N.D. Cal. 2019) 384 F. Supp. 3d 1058, 1073, 1080, 1101, 1103-04, 1111 (awarding \$70,000 of requested \$821,400 PAGA penalties for Labor Code § 226.7 meal period violations, among other PAGA penalty reductions); see Grover Decl. at ¶ 28 (listing additional examples).

Under the Settlement Agreement, after all deductions are made for settlement administration, service payments to the Plaintiffs, and attorneys' fees and costs, approximately \$933,694 of the settlement funds will be paid out to the LWDA.⁷⁵ PAGA requires that the LWDA use the funds for education and enforcement purposes.⁷⁶ That is a substantial benefit to the State.

The remaining \$311,231 will be distributed to the PAGA Group based on the formula set forth in the Settlement Agreement.⁷⁷ The amount is reasonable and fair in light of the PAGA claims here and Defendant's asserted defenses.

4) The scope of the release is narrowly tailored.

The release bars Plaintiffs and the LWDA from prosecuting any claims covered by the Settlement Agreement through the PAGA Release Period.⁷⁸ Under *Arias*, that precludes any other member of the PAGA Group from asserting such claims on behalf of the LWDA in a future action but does not impact any other claims that any member of the PAGA Group may have.⁷⁹ The California Supreme Court has concluded that, in the context of PAGA, "the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties."⁸⁰ Thus, the scope of the release provided in exchange for the foregoing consideration is limited to the civil penalties asserted in this action under Labor Code §§ 2698 *et seq.*⁸¹ As such, this factor balances strongly in favor of approval of the proposed settlement.

⁷⁵ Ex. 1 at §§ I.L., I.J, I.P, VIII; Grover Decl. at ¶¶ 21-22.

⁷⁶ Lab. Code § 2699(i).

⁷⁷ Ex. 1 at § VIII.A; *see* Grover Decl. at 21, 23

⁷⁸ Ex. 1 at §§ I.L, V.A.

⁷⁹ *Arias, supra*, 46 Cal.4th at 986.

⁸⁰ *See id.* at 987.

⁸¹ Ex. 1 at § V.A.

5) The experience and views of Plaintiffs' Counsel favor approval of the settlement.

Plaintiffs' Counsel has significant experience in complex wage and hour litigation.⁸² In the view of Plaintiffs' Counsel, the benefit conferred by the proposed settlement is fair, reasonable, and adequate under the circumstances, as it reflects a reasoned compromise which takes into consideration the risks inherent in this case which have the potential to completely eliminate recovery.⁸³ As such, this factor weighs in favor of approval of the proposed settlement.

6) The extent of discovery completed and the stage of the proceedings favor approval of the proposed settlement.

In evaluating this element, the relevant consideration is whether "the parties have sufficient information to make an informed decision about settlement."⁸⁴ And as the Ninth Circuit has noted, "'formal discovery is not a necessary ticket to the bargaining table.'"⁸⁵

Here, the extent of informal discovery conducted was sufficient to enable Plaintiffs' Counsel to evaluate the strength and value of the claims for purposes of settlement.⁸⁶ Plaintiffs' Counsel's investigation and the discovery obtained from Defendant were sufficient to assess Defendant's meal period, rest break, off-the-clock pay, termination pay, other pay and wage statement practices and to tabulate the total number of pay periods at issue and identify the approximate total number of individuals falling within the definition of the PAGA Group during the PAGA Release Period.⁸⁷ The information obtained in this case in preparation for mediation enabled Plaintiffs' Counsel to make a realistic assessment of the strength of the PAGA claims.⁸⁸

Based on Plaintiffs' Counsel's experience litigating wage and hour claims, such investigation was sufficient to determine the potential value of the PAGA claims, and to evaluate

⁸² See Grover Decl. at ¶¶ 2-4, 32-35, 37, 40; Granberry Decl. at ¶¶ 10-14.

⁸³ Grover Decl. at ¶¶ 18-28.

⁸⁴ *Linney, supra*, 151 F.3d at 1239.

⁸⁵ *Id.*

⁸⁶ Grover Decl. at ¶¶ 9-11, 13-14.

⁸⁷ Grover Decl. at ¶¶ 9-11, 13-14.

⁸⁸ Grover Decl. at ¶¶ 9-11, 13-14, 18, 26-28.

1 the strength of these claims for purposes of settlement.⁸⁹

2 **IV. CONCLUSION**

3 As shown herein, the Settlement Agreement is fair, adequate and reasonable, as it
4 represents a reasoned compromise obtained through arm's-length negotiations. For all the
5 reasons set forth above, Plaintiffs respectfully request that this Court approve the settlement.

6
7 Dated: October 25, 2023

KELLER GROVER LLP

8
9 By: 

10 ERIC A. GROVER
11 ROBERT SPENCER
12 *Counsel for Plaintiffs*
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

28 ⁸⁹ Grover Decl. at ¶¶ 9-14, 18, 26-28; *see also*, ¶¶ 2-4, 32-35; Granberry Decl. at ¶¶ 10-14.

PROOF OF SERVICE

I, JOEY GONZALEZ, am employed in the County of San Francisco, State of California. I am over the age of eighteen and not a party to the within action. My business address is 1965 Market Street, San Francisco, California 94103. On October 27, 2023, in the case of *Bush, et al., v. Dutch Bros., LLC, et al.*, Merced Superior Court Case Number 22CV-01415, I served the foregoing document(s):

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR AN ORDER APPROVING SETTLEMENT OF PAGA ACTION AND DISMISSING ACTION WITH PREJUDICE

on the interested party(ies) below, using the following means:

Robert J. Wilger, Esq.
Benjamin A. Emmert, Esq.
Melinda Ward

Attorneys for Defendant
DUTCH BROS., LLC

LITTLER MENDELSON, P.C.
50 West San Fernando Street, 7th Floor
San Jose, California 95113
RWilger@littler.com
BEmmert@littler.com
MWard@littler.com

☒	(BY ELECTRONIC SERVICE) by electronically mailing a true and correct copy in PDF format through our electronic mail system to the email address(es) set forth above, or as stated on the attached service list per agreement between the parties.
☒	(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


JOEY GONZALEZ