

Adam M. Rose(210880)
adam@frontierlawcenter.com
 Theodore R. Tang (313294)
theodore@frontierlawcenter.com
 Manny M. Starr (319778)
manny@frontierlawcenter.com
 FRONTIER LAW CENTER
 23901 Calabasas Road, #2074
 Calabasas, CA 91302
 Telephone: (818) 914-3433
 Facsimile: (818) 914-3433

Attorneys for Plaintiff
 Gustavo Gomez

ELECTRONICALLY FILED
 Superior Court of California,
 County of Tulare
03/17/2023
 By: Nay Saelee,
 Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF TULARE

GUSTAVO GOMEZ, on behalf of himself and all aggrieved employees, Plaintiffs, v. R.N.V., INC. d/b/a R-N MARKET, and DOES 1 to 100, Defendants.	) Case No. VCU292268)) NOTICE OF MOTION AND MOTION) FOR APPROVAL OF PAGA) SETTLEMENT; MEMORANDUM OF) POINTS AND AUTHORITIES;) DECLARATION OF MANNY STARR;) [PROPOSED] ORDER)) Date: April 18, 2023) Time: 8:30 a.m.) Dept: 7)) Complaint Filed: June 27, 2022) Trial: July 28, 2023
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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on April 18, 2023 at 8:30 a.m. or as soon thereafter as may be heard in Department 7 of the Superior Court of California, County of Tulare, located at 221 South Mooney Blvd, Visalia, California 93291, Plaintiff Gustavo Gomez will and hereby does move this court for an order approving settlement of PAGA claims.

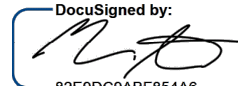
This motion is based on this notice, the memorandum of points and authorities, the declaration of Manny Starr, the declaration of Gustavo Gomez, the pleadings on file in this case, and any other evidence or argument as may be properly placed before the court at or before the

1 hearing.

2 Date: 03/14/23 | 3:26 PDT

FRONTIER LAW CENTER

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Manny Starr
Attorney for Plaintiff
Gustavo Gomez

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Private Attorneys General Act (“PAGA”) representative action relates to the Aggrieved Employees’ working for Defendant R.N.V., INC. d/b/a R-N MARKET (“RN” or “Defendant”) from April 23, 2021 through April 8, 2023. The Aggrieved Employees, as defined herein, were allegedly subject to violations of Labor Code sections 201, 202, 203, 226, 226.7, 512, and 2802.

Plaintiff Gustavo Gomez (“Gomez”) worked for RN in the meat department from approximately June to November of 2021. Declaration of Gustavo Gomez (“Gomez Decl.”) ¶2.

The parties attended mediation with experienced employment law mediator David Lowe on February 7, 2023. Through arm’s-length negotiations and after an extensive review of informal discovery and documentation, the parties reached a resolution at mediation. Declaration of Manny Starr (“Starr Decl.”) ¶5. The case settled for \$150,000. (Starr Decl. ¶ 6).

Under Labor Code section 2699(1)(2), “The superior court shall review and approve any settlement of any civil action filed pursuant to this part.” Plaintiff requests the Court to approve the settlement of the PAGA claims asserted in this action. Plaintiff expects this motion to be uncontested.

II. PROCEDURAL HISTORY

On April 12, 2022, Plaintiff filed a PAGA notice letter with the Labor and Workforce Development Agency (“LWDA”) and sent the same via certified mail to the Defendant (LWDA Case No. LWDA-CM-878787-22). In this letter, Plaintiff asserted that Defendant failed to comply with Labor Code sections 201, 202, 203, 226, 226.7, 512, and 2802. Specifically, the letter alleged: that RN failed to relieve the Aggrieved Employees of all duty during rest and meal periods; that although time spent on meal breaks was “on duty,” the Aggrieved Employees were not paid for this time and therefore not paid all wages due; that the wage statements given to Aggrieved Employees failed to disclose all hours worked and wages earned, including break premiums; that Gomez and the Aggrieved Employees had therefore not been paid all wages due and payable on the date of termination or within 72 hours thereafter; and that Defendant failed to reimburse the Aggrieved Employees for knives, chain safety gloves, knife sharpeners, and other necessary equipment (Starr

1 Decl. ¶2).

2 On June 27, 2022, Plaintiff filed this action. (Starr Decl. ¶ 3). The complaint had a single
3 cause of action seeking PAGA penalties for Defendant's alleged Labor Code violations. Plaintiff
4 propounded formal discovery shortly thereafter. Before the discovery became due, the parties agreed
5 that an early mediation would benefit all parties, and agreed to informal discovery to facilitated
6 mediation.

7 The parties mediated the case on February 7, 2023 with experienced employment law
8 mediator David Lowe. An agreement was reached at mediation, and on March 10, 2023 the parties
9 entered into a formal Representative Action Settlement and Release (the "Settlement").

10 The "PAGA Period" is from April 21, 2021 through April 8, 2023. For purposes of this
11 settlement only, "Aggrieved Employees" is defined as "All current and former nonexempt
12 employees of Defendant R.N.V., Inc. ("RNV") who performed work for Defendant in California at
13 any time from April 23, 2021, through the earlier of the date which the Court approves the Settlement
14 or April 8, 2023."

15 Through informal discovery, Defendant produced data relating to the number of Aggrieved
16 Employees and the number of pay periods those employees worked. Defendant also produced a
17 sample of timesheet and payroll information for the Aggrieved Employees, excerpts from its
18 employee handbook, and other company policy information.

19 **III. LEGAL ARGUMENT AND PAGA PENALTY CALCULATION**

20 PAGA permits an aggrieved employee to sue an employer for civil penalties associated with
21 the employer's alleged violation of various Labor Code provisions. Labor Code section 2699(a).
22 Pursuant to the statute, of the amount paid to settle a claim for PAGA penalties, twenty-five percent
23 (25%) is payable to the Aggrieved Employees and seventy-five percent (75%) is payable to the
24 LWDA. Labor Code section 2699(i). The penalties being sought as part of this settlement are derived
25 from the labor code violations referenced above. Each is discussed briefly in turn below.

26 The maximum penalty calculations below are based on 182 Aggrieved Employees (107
27 current, 75 former) having worked 5,071 aggregated pay periods. (Starr Decl. ¶ 9.)

28 ///

1 **a. Failure to Provide Complaint Rest Breaks**

2 Labor Code section 226.7 and the Wage Orders require an employer to provide a 10-minute
3 **off-duty** rest break for every 4 hours worked or major fraction thereof. Employers are required to
4 relinquish control over their employees during their 10-minute rest breaks. *Augustus v. ABM Sec.*
5 *Servs., Inc.*, 2 Cal. 5th 257, 269 (2016).

6 Plaintiff alleges that Defendant required employees to remain on the work premises and
7 ready to help if needed during their rest breaks, based in part on Plaintiff's experiences and in part
8 on a memo advising employees that they were to take breaks in the break room and not to stray far
9 from the building if using the designated smoking area.

10 Plaintiff alleges that all rest breaks were noncompliant due to the Aggrieved Employees
11 having to remain on the premises and generally on call during their rest breaks. The PAGA Penalty
12 applicable to meal break violations is found in Labor Code section 2699, which is \$100 for initial
13 violations and \$200 for subsequent violations. The maximum liability for meal break violations is
14 therefore (5,071 pay periods x \$100) **\$507,100¹**.

15 **b. Failure to Provide Compliant Meal Breaks**

16 Labor Code section 512 and the Wage Orders require an employer to provide a 30-
17 minute **off-duty** meal break for employees who work shifts longer than five hours. For the
18 meal breaks to be compliant, the employer must relieve its employees of all duty and
19 relinquish control over their activities. *Brinker Restaurant Corp. v. Superior Court*, 53
20 Cal.4th 1004, 1040 (2012).

21 Here, as with rest breaks, Plaintiff alleges that he and the Aggrieved Employees
22 were required to stay in the break room during meal breaks, and their meal breaks were
23 frequently interrupted. Unlike the written rest break policy, the written meal break policy
24 doesn't explicitly say that meal breaks must be taken in the break room. However, Plaintiff
25 states that the company practice and expectation was that employees were required to

26 _____
27 ¹ Plaintiff assumes in these calculations that all violations are "initial," even though some of the
28 pay periods involved arose after the PAGA notice was sent and could arguably be treated as
subsequent violations.

1 remain in the break room during meal breaks as well.

2 Plaintiff alleges that all meal breaks were noncompliant due to the Aggrieved Employees
3 having to remain on the premises and generally on call during their meal breaks. The PAGA
4 Penalty applicable to meal break violations is found in Labor Code section 558, which is \$50 for
5 initial violations and \$100 for subsequent violations. The liability for meal break violations is
6 therefore (5,071 pay periods x \$50) **\$253,550**.

7 **c. Failure to Pay for All Hours Worked**

8 As set forth above, Plaintiff and the Aggrieved Employees were not provided with
9 compliant, off-duty meal breaks. However, although they were required to remain generally on call
10 during their meal breaks, they were not paid for the time they spent while on their meal “breaks”.
11 The time the Aggrieved Employees spent while on these on-duty meal breaks wasn’t paid,
12 resulting in unpaid minimum and overtime wages. Additionally, Plaintiff alleges that the
13 Aggrieved Employees were frequently required to continue helping customers after clocking out,
14 further resulting in unpaid time.

15 As set forth above, Plaintiff alleges that all meal breaks were on-duty but unpaid, resulting
16 in a minimum wage violation. The PAGA Penalty applicable to minimum wage violations is found
17 in Labor Code section 1197.1, which is \$100 for initial violations and \$250 for subsequent violations.
18 The liability for the minimum wage violations is therefore (5,071 pay periods x \$100) **\$507,100**.

19 **d. Wage Statement and Waiting Time Penalties**

20 Derivative waiting time and wage statement penalties based on Labor Code section 226.7
21 for failure to pay all premium pay are permitted under *Naranjo v. Spectrum Sec. Servs., Inc.*, 13
22 Cal. 5th 93, 117, (2022). “In short, missed-break premium pay constitutes wages for purposes of
23 Labor Code section 203, and so waiting time penalties are available under that statute if the
24 premium pay is not timely paid.” *Id.* Thus, since Defendant failed to pay premium pay for missed
25 meal and rest breaks in violation of Labor Code section 226.7 as alleged above, Plaintiff may seek
26 PAGA Penalties relating to wage statement and waiting time penalties.

27 The PAGA Penalty applicable to waiting time penalties is found in Labor Code section 2699,
28 which is \$100 for initial violations and \$200 for subsequent violations. The liability relating to

waiting time penalties is therefore (75 former employees x \$100) **\$7,500**. The PAGA Penalty applicable to wage statement violations is found in Labor Code section 226.3, which is \$250 for initial violations and \$1,000 for subsequent violations. The liability for meal break violations is therefore (5,071 pay periods x \$250) **\$1,267,750**.

e. Failure to Reimburse Work-Related Expenses

Section 2802 requires employers to “indemnify [their] employees for all necessary expenditures... incurred... in direct consequence of the discharge of [their] duties...” Here, Plaintiff and the Aggrieved Employees were required to purchase several work-related items, such as a knife, chain gloves, knife sharpeners, safety glasses, rubber gloves, and pens and notepads. In sum, these items cost nearly \$500 but were not reimbursed by the Defendant.

The PAGA Penalty applicable to waiting time penalties is found in Labor Code section 2699, which is \$100 for initial violations and \$200 for subsequent violations. Assuming the Aggrieved Employees each had to purchase some or all of the above work-related tools at least once during the PAGA Period, the liability relating to the work expense violation is (182 employees x \$100) **\$18,200**.

f. Maximum Liability

In sum, Plaintiff estimates maximum exposure to be the following:

- Rest Break Violations: **\$507,100**
- Meal Break Violations: **\$253,550**
- Off the Clock Work: **\$507,100**
- Waiting Time Penalties: **\$7,500**
- Wage Statement Penalties: **\$1,267,750**
- Unreimbursed Word-Related Expenses: **\$18,200**
- **Total Maximum Liability: \$2,561,200**

This amount represents the maximum amount in civil penalties Plaintiff could reasonably expect to recover at trial on the merits of his claims, without any reduction for the inherent risks in litigation, the difficulty in trying the case, the specific defenses and evidence raised by the defendant, or reduction by the court pursuant to Labor Code section 2699 subdivision (e)(2).

///

IV. THE DESCRIPTION OF THE SETTLEMENT TERMS

The Settlement Agreement is attached to the Declaration of Manny Starr as **Exhibit 1**. The gross amount of the settlement is \$150,000. The settlement is broken down as follows:

- \$7,500 to Plaintiff as an enhancement and general release payment;
- \$52,500.00 to Frontier Law Center for attorney fees;
- \$12,000 to Frontier Law Center for costs of suit;
- \$3,000 to the Settlement Administrator, to administer the settlement, including providing notice, payment, accounting, and skip trace on returned mail;
- \$75,000 in PAGA Penalties, of which 75% (\$56,250) will go to the LWDA and 25% (\$18,750) will be distributed to the Aggrieved Employees on a pro rata basis.

(Settlement at section III.)

In exchange for this consideration, the Aggrieved Employees and the State of California will release all claims for civil penalties, recoverable by the LWDA or through a PAGA action, that were or could have been alleged in Plaintiff's April 12 PAGA letter. (Settlement section I. 17.) In addition to this release, Plaintiff Gustavo Gomez will also release all individual claims he would have against RN, whether based on facts alleged in the complaint and PAGA letter or not, arising from any time up to the effective date of the settlement.

V. SETTLEMENT IS FAIR AND REASONABLE

Labor Code section 2699(e)(2) states: "In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), 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." Indeed, as shown in the Court of Appeal's decision in *Carrington v. Starbucks Corp.*, 30 Cal.App.5th 504 (2018), while the plaintiff prevailed on his PAGA claim at trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing the employer's good faith attempt at complying with the law. *Id.* at 517. Upon review, the Court of Appeal found such reduction to be proper. *Id.* at 539.

1 While Plaintiff estimates Defendant's total potential exposure for the above-referenced
2 violations to be over approximately \$2.5 million, the facts and circumstances particular to this case
3 allow for a reduced settlement amount to avoid an award that is unjust, arbitrary, oppressive, or
4 confiscatory.

5 **a. Meal and Rest Break Claim Defenses**

6 If this case were to proceed, Defendant is prepared to argue that Plaintiff would not prevail
7 at all. First, Defendant points to its own corporate policies in its Employee Handbook. These
8 policies explicitly state that all non-exempt employees *are* free to leave the premises and do as they
9 wish while on their breaks. Further, the handbook explicitly states that it supersedes any previous
10 instructions and communications on policy, *as well as any communications or instructions that*
11 *directly contradict the handbook*. Thus, argues RN, employees were given explicit instructions
12 that, even if they were to receive a memo or other communication to the contrary, the handbook
13 instructs them to disregard those instructions and follow the handbook.

14 Second, Defendant contends that the conducted their own investigation into Plaintiff's
15 claims. During their investigations, they interviewed other employees, and each and every
16 employee they interviewed stated that they were aware that they could leave during breaks, and
17 either did so on occasion or chose not to for their own reasons. Further, not a single other employee
18 ever reported to RN (during the interview or otherwise) that they witnessed any individual being
19 instructed not to leave during a break, or being reprimanded for doing so. Timecards filled out by
20 employees, including Plaintiff, during the period in question indicated that breaks were in fact taken
21 without issue.

22 Third, RN had a policy for paying premium pay in the event that compliant breaks could
23 not be given for any reason. RN timesheet and payroll records revealed that it in fact paid such
24 premiums at least some of the time. Defendant contends that its employees were instructed in how
25 to report missed breaks, and when they were so reported the company paid the premium pay as
26 required by law.

27 **b. Overtime and Unpaid Wage Claim Defenses**

28 Plaintiff contends that he and the Aggrieved Employees were not paid all wages due on two

1 theories. First, Plaintiff contends that his meal breaks were not relieved of all duty. Second, he
2 contends that due to having to wait for customers to pick up their orders or other customer
3 interruptions, he would be required to work into his scheduled break or past the end of his scheduled
4 shift. Plaintiff alleges that RN was fully aware of this, yet expected he and the other employees to
5 just serve the customer and not complain about it.

6 Defendant in response again claims that the Employee Handbook clearly states that
7 employees should report the time actually worked, and should only perform work while “on the
8 clock.” In addition to this communicated policy, RN’s investigation found no witnesses that
9 corroborated any instances of this happening.

10 **c. Waiting Time Penalty and Wage Statement Defenses**

11 Defendant contends that, since Plaintiff’s waiting time and wage statement claims are purely
12 derivative of the other claims, they cannot survive if the underlying claim is also defeated. In
13 investigating the case, Plaintiff has not been made aware of any independent wage statement or
14 waiting time violations.

15 While Plaintiffs strongly contest these positions, the fact remains that there is a risk that the
16 Defendant could prevail on one or more of these issues. Furthermore, even if Plaintiffs prevailed
17 on all of the issues, the Court could reduce the penalties if Defendant could show a good faith
18 attempt to comply with the law.

19 **d. General PAGA Defenses**

20 Defendant contends that, in addition to the substantive issues with Plaintiff’s claims,
21 proceeding with an actual trial on the PAGA cause of action would be impossible. Defendant
22 contends that, since the written corporate policy is in compliance with California law, and there is
23 no evidence of an “unwritten policy” upon which the matter could be resolved on a class basis,
24 Plaintiff would be required to prove his cases using the testimony of each individual employee –
25 all 182 of them – in an overblown trial that has no practical chance of being conducted in an orderly
26 or manageable fashion. While PAGA actions do not have to meet the same requirements as class
27 actions, courts must still make sure a viable and manageable method of trying the case exists. *See*
28 *Wesson v. Staples Office Superstore, LLC*, 68 Cal.App.5th 746, 759 (2021).

1 Plaintiff contests all these defenses, and contends that, were the case to proceed through
2 litigation, sufficient uniform practice existed on which the case could be tried on a representative
3 basis. However, while Plaintiff is confident in his chances of success, he is all too aware that 1) a
4 reasonable trier of fact could disagree and 2) even were he to prevail on all his claims, the court
5 still has discretion to further reduce any award.

6 **VI. THE COURT SHOULD APPROVE THE PROPOSED PAGA SETTLEMENT**

7 The terms of the parties' settlement are reasonable under the circumstances and serve the
8 purpose of PAGA. (*O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal.
9 2016).) Although Defendant's total maximum liability could result in \$2.5 million in penalties, the
10 court has discretion to award a lesser amount than the maximum civil penalty allowed under PAGA.
11 Labor Code section 2699(e)(2). Here, the PAGA penalties being recovered are reasonable for the
12 reasons set forth above.

13 Given the number of employees involved, \$3,000 is a reasonable amount to set aside for
14 administration costs. Plaintiff's counsel received a bid from Phoenix Settlement Administrators for
15 \$3,000. The quote includes all necessary mailing, processing, and tax reporting, as well as 1 round
16 of remailing and skip-tracing for returned check and notice packets that come back without a
17 forwarding address (*Id.*)

18 PAGA allows a prevailing plaintiff to obtain attorneys' fees and costs. (Lab. Code, §
19 2699(g).) In class actions, California state and federal courts have recognized that an appropriate
20 method for determining an award of attorneys' fees is based on a percentage of the total value of
21 benefits to class members by the settlement. (*Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
22 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"); *Boeing Co. v. Van*
23 *Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air West, Inc.*, 557 F. 2d 759, 769 (9th Cir.
24 1997). One of the purposes of this equitable doctrine is to "spread litigation costs proportionally
25 among all the beneficiaries so that the active beneficiary does not bear the entire burden
26 alone." (*Vincent*, 557 F. 2d at 769.) Although this is not a class action, the same logic holds true
27 since a PAGA case is also a representative action.

28 The Common Fund doctrine is predicated on the principle of preventing unjust enrichment.

1 When a litigant's efforts create or preserve a fund from which others derive benefits, he may
2 require the passive beneficiaries to compensate those who created the fund. Both California state
3 and federal courts have embraced this doctrine. *Serrano III*, 20 Cal. 3d at 35; *Vincent*, 557 F.2d at
4 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995), the
5 California Supreme Court recognized that the common fund doctrine has been applied
6 "consistently in California when an action brought by one party creates a fund in which other
7 persons are entitled to share." The reasons for applying the common fund doctrine include:
8 "...fairness to the successful litigant, who might otherwise receive no benefit because his recovery
9 might be consumed by the expenses; correlative prevention of an unfair advantage to the others
10 who are entitled to share in the fund and who should bear their share of the burden of its recovery;
11 encouragement of the attorney for the successful litigant who will be more willing to undertake and
12 diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that
13 he will be properly and directly compensated should his efforts be successful." *Id.*

14 Indeed, the California Supreme Court has also held that the award of attorneys' fees in
15 common fund wage and hour class action settlements should start with the percentage method. *See*
16 *Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of
17 federal and state courts in holding that when class action litigation establishes a monetary fund for
18 the benefit of the class members, and the trial court in its equitable powers awards class counsel a
19 fee out of that fund, the court may determine the amount of a reasonable fee by choosing an
20 appropriate percentage of the fund created."). The California Supreme Court in *Laffitte* affirmed a
21 fee award representing 33 1/3 percent of the fund.

22 Here, Plaintiffs' counsel requested fees of \$52,500 is reasonable, as it represents 35 percent
23 of the fund. Furthermore, Plaintiffs' counsel has spent a significant amount of time litigating this
24 case, including time spent communicating with the clients, evaluating and analyzing the relevant
25 legal theories, drafting and filing PAGA letters, drafting and filing the complaint, engaging in
26 motion work including a demurrer and motion to consolidate, participating in informal discovery,
27 and attending mediation. (Starr Decl. ¶16).

28 Plaintiff's counsel have incurred \$9,989.76 in costs litigating this case. These costs include

1 filing fees, service costs, mediation costs, and various other litigation costs. (Starr Decl. ¶ 19).

2 Plaintiff anticipates further costs will be required to finalize the settlement and court approval.

3 Plaintiff participated in the discovery process, provided numerous documents to their counsel
4 for review, and spent several hours collectively on the phone answering questions about the case.
5 (Starr Decl. ¶20; Gomez Decl. ¶5). It is because of his willingness to participate in the litigation
6 process which ultimately resulted in this settlement. Furthermore, Plaintiff agreed to a general release
7 of claims as part of the settlement. (Starr Decl. ¶ 20.) Therefore, the amount attributed to him as an
8 enhancement payment is reasonable. *Id.*

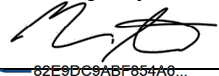
9 VII. CONCLUSION

10 Based on the above facts and arguments, Plaintiffs respectfully request the court to approve
11 this PAGA settlement and enter an order dismissing this action with prejudice.

12
13 Date: March 14, 2023

FRONTIER LAW CENTER

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15 DocuSigned by:

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Manny Starr

Attorney for Plaintiffs

Gustavo Gomez