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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

WALTER PORTILLO, an individual, on
behalf of the State of California, as a private
attorney general,

PLAINTIFF,

v.

FOX RENT A CAR, INC.; and DOES 1 thru
50, inclusive,

DEFENDANTS.

Case No. 22STCV19855

[Case Assigned for All Purposes to Hon. Judge
Wendy Chang in Dept. 36]

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

*[Filed concurrently with Declarations of
Kelsey M. Szamet, Jodey Lawrence of Phoenix
Class Action Administration Solutions, and
Plaintiff Walter Portillo in Support of
Plaintiff's Motion for Approval of
Representative Action Settlement; [Proposed]
Order, and Judgment]*

Date: March 21, 2024

Time: 8:30 a.m.

Dept.: 36

Complaint Filed: June 17, 2022

Trial Date: August 9, 2024

Reservation No. 359040195386

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

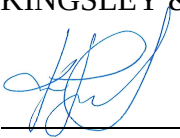
2 **PLEASE TAKE NOTICE** that on March 31, 2024 at 8:30 a.m. in Department 36 of the
3 above-entitled court, Plaintiff WALTER PORTILLO will move the Court for an Order Granting
4 Approval of Representative Action Settlement.

5 The Motion will be made on the grounds that the proposed Settlement is fair, adequate,
6 reasonable, and in the best interest of Plaintiff, all aggrieved employees, and the Parties.

7 The Motion will be based on this Notice of Motion; the attached Memorandum of Points
8 and Authorities; the Declarations of Kelsey M. Szamet, Phoenix Class Action Administration
9 Solutions and Plaintiff Portillo; the Private Attorneys General Act Settlement Agreement
10 (“PAGA”) (Exhibit “1” to the concurrently filed Szamet Declaration); all other papers and records
11 on file in this action; and on such oral and documentary evidence as may be presented at the hearing
12 on this Motion.

13
14 DATED: February 28, 2024

KINGSLEY & KINGSLEY, APC

15
16 By: 

Kelsey M. Szamet
Attorneys for Plaintiff WALTER PORTILLO and
all aggrieved employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Walter Portillo (“Plaintiff”) submits this Memorandum of Points and Authorities
4 in support of Motion for Approval of Representative Action Settlement. Plaintiff and Defendant
5 FOX RENT A CAR, INC. (“Defendant”) (collectively, the “Parties”) have reached a proposed
6 settlement documented in the Private Attorneys General Act Settlement Agreement (“Settlement”
7 or “Settlement Agreement”), attached to the concurrently-filed declaration of Kelsey M. Szamet.

8 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699,
9 et seq. (“PAGA”). The Gross Settlement Amount is \$299,000.00. After deduction of attorney’s
10 fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration
11 costs as discussed in the Settlement Agreement, the remaining amount to be divided between the
12 Labor and Workforce Development Agency (“LWDA”) and the aggrieved employees as required
13 by Labor Code section 2699(i) is \$169,981.87, with \$127,486.40 (or 75%) going to the LWDA
14 and \$42,495.47 (or 25%) distributed to the aggrieved employees.¹

15 Plaintiff requests that the Court “review and approve any settlement of any civil action
16 filed pursuant to this part” (See Lab. Code § 2699(1)(2).) If the Court deems the Settlement fair
17 and acceptable, Plaintiff requests that the Court: (1) enter an order approving the Settlement and
18 ordering the Parties to carry the terms of the Settlement Agreement; and (2) and enter a Final
19 Judgement thereon.²

20 **II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY**

21 **A. Litigation Overview and Procedural History**

22 On June 17, 2022, Plaintiff filed a Representative Action Complaint against Defendant in
23 Los Angeles County Superior Court, Case No. 22STCV19855, entitled WALTER PORTILLO, an
24 individual, on behalf of the State of California, as a private attorney general, PLAINTIFF v. FOX
25 RENT A CAR, INC.; and DOES 1 thru 50, inclusive, DEFENDANTS. (Declaration of Kelsey M.

26
27 ¹ Pursuant to PAGA, civil penalties recovered by aggrieved employees shall be distributed 75% to the Labor and
Workforce Development Agency (“LWDA”) and 25% to the aggrieved employee(s). Lab. Code § 2699(i).

28 ² Plaintiff’s Motion for Approval of Representative Action Settlement will be concurrently uploaded to the
LWDA’s website on the date this Motion is filed. Proof of submission of Plaintiff’s Motion for Approval of
Representative Action Settlement, all related documents, and copy of the email from the LWDA confirming
receipt can be provided to the Court upon request. (Szamet Decl. ¶129.)

1 Szamet ¶5.) (“Szamet Decl.”)

2 On January 8, 2024, Plaintiff filed a First Amended Representative Action Complaint to
3 add representative allegations under Labor Code § 2699 of Violations for Labor Code §§ 204, 246,
4 247, 510, 1194, 1197, and 1198 for failure to pay all wages during employment, failure to provide
5 sick leave, and failure to pay all minimum, regular, and overtime wages. (Hereafter, the “Action”).
6 (Szamet Decl. ¶6.) Plaintiff alleges a single cause of action under Labor Code § 2699, et seq., the
7 Private Attorneys General Act (“PAGA”) for penalties pursuant to Labor Code §§ 201, 202, 203,
8 204, 226(a), 226.7, 246, 247, 510, 512, 1194, 1197, 1198, and 2802. (Szamet Decl. ¶7.)

9 Plaintiff brings this Representative Action on behalf of a group of aggrieved employees as
10 defined in the Action as:

11 “All non-exempt employees who are employed or have been employed by FOX
12 RENT A CAR, INC., in the State of California at= any time since one (1) year prior
13 to the date of Plaintiff’s original PAGA letter sent on April 12, 2022 and October,
14 18, 2023. (“aggrieved employees”)

15 After the case was at issue, the Parties agreed to attend early, private mediation. (Szamet
16 Decl. ¶8.) On August 18, 2023, the Parties participated in a full-day mediation via Zoom
17 Videoconference. (Szamet Decl. ¶9.) The Parties reached a settlement at the mediation, after
18 several rounds of discussions and negotiation aided by experienced mediator Jeff Krivis, Esq.
19 (*Id.* at ¶9). Although Defendant denies that it violated any pertinent law, it recognized the risks and
20 attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to
21 finalization of a formal Private Attorneys General Act Settlement Agreement and the approval of
22 the Court. (Szamet Decl. ¶10.) The Parties negotiated the terms and conditions of the Settlement
23 Agreement and now presented to the Court for Approval. (Szamet Decl. ¶11.)

24 B. The Discovery Process

25 The Parties met and conferred and agreed to engage in fact discovery and informally exchange
26 pertinent information to understand the nature of the allegations and the scope of potential liability.
27 (Szamet Decl. ¶12.) Defendant produced relevant documents such as employment policies and
28 practices to allow Plaintiff to assess the risks as to the merits and the data necessary to assess the
potential exposure. (Szamet Decl. ¶13.) The time and pay data produced by Defendant contained
17,505 bi-weekly pay periods and 721 employees. (Szamet Decl. ¶14.) Plaintiff worked with an

expert to analyze the data for purposes of mediation to examine potential off the clock claims, meal and rest period violations, sick pay claims, and expense reimbursement. (Szamet Decl. ¶15.)

III. PAGA ACTIONS AND THE REQUIREMENTS

A. The PAGA Statutory Scheme

PAGA creates a means of “deputizing” citizens as private attorney generals to enforce the Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own behalf as an individual claim, but “as the proxy or agent of the state’s labor law enforcement agencies.” *Id.*, at 986; *see also Reyes v. Macy’s, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380).

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

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

“The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the

1 employer of the specific provisions of this code alleged to have been
2 violated, including the facts and theories to support the alleged violation.”

3 Lab. Code § 2699.3 (a)(1)

4 As explained above, Plaintiff has complied with the notice requirements and has properly
5 pled a PAGA cause of action. (Ex. 1, § F ¶ 40.)

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

7 PAGA provides for penalties in the amount of one hundred dollars (\$100) for each
8 aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for
9 each aggrieved employee per pay period for each subsequent violation. Lab. Code §2699(f)(2).
10 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that
11 Defendant violated the Labor Code.³ *Amaral v. Cintas Corp. No. 2* 163 Cal.App.4th 1157, 1213
12 (2008). However, PAGA provides the Court with discretion when it awards these penalties. Labor
13 Code §2699(e)(2) states that “a court *may* award a lesser amount than the maximum civil penalty
14 amount specified by this part if, based on the facts and circumstances of the particular case, to do
15 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”
16 (emphasis added). Here, as Defendant denies that it violated any law or that it engaged in any
17 knowing or intentional conduct giving rise to liability and expressly deny that any employees
18 suffered harm, it would certainly argue that if the Court were to find that any liability existed, the
19 Court should exercise its discretion to significantly reduce any civil penalty.

20 In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, the
21 Court exercised its discretion to reduce the PAGA penalty amount. There, the plaintiff brought a
22 PAGA claim for violations of section 226(a) based on the following issues: (a) the statements did
23 not show either an employee identification number or the last four digits of the social security
24 number of the employee; (b) the statements did not show the beginning date of the pay period for
25 which the employee was paid; (c) the statements identified Covidien as the employee’s employer.
26 (*Id.* At *2). There were approximately 28,000 wage statements at issue. (*Id.* at *3). The *Fleming*
27 court calculated the maximum potential civil penalty exposure at \$2.8 million (\$100 per wage

28 ³ See also *Willner v. Manpower Inc.*, *supra*. 35 F. Supp. 3d at 1136; *McKenzie v. Federal Exp. Corp.*, *supra*, 765
F.Supp.2d at 1232.

statement). (*Ibid*; see also Labor Code § 2699(f)(2)). After a bench trial, the Court elected to exercise its discretion to reduce the civil penalty per wage statement to \$18 per wage statements, reflecting 18% of the potential exposure. (*Id.* at *4). The Court reasoned:

Here, the aggrieved employees suffered no injury due to the erroneous wage statements, and made no complaint of the errors or omissions contained therein prior to filing suit. Also, Defendants were not aware that the wage statements violated the law and took prompt steps to correct all violations once notified. Given these circumstances, the Court finds a \$2.8 million penalty unjust according to § 2699(e)(2). Accordingly, in its discretion, the Court reduces the penalty to \$500,000.

Id. at *4. A court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence. See *e.g.*, *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbucks’ “good faith attempts” to comply and because the violations were minimal).

Here, as explained above, Plaintiff’s counsel anticipated that, at trial, Counsel for Defendant would argue that: (1) the PAGA Members were properly paid and reimbursed in accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate the PAGA Members was the result of inadvertence and clerical error; (2) the PAGA Members were provided with the opportunity to take meal and rest breaks in compliance with California law; and (3) until this Action was filed, no employees had complained about any of the alleged Labor Code violations. All of which, Counsel for Defendant would argue, should mitigate in favor of significantly reducing any civil penalty.

After engaging in pertinent informal discovery in this Action, Plaintiff’s counsel determined that a settlement of \$299000.00 is reasonable given the above risks.

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

Plaintiff believes there is a strong risk that the Court will not award the \$200 civil penalty triggered for “subsequent” violations. Labor Code section 2699(f)(2). If this case were to proceed to trial, Plaintiff would argue that a “subsequent” violation simply means that Defendant violated section 226(a) more than once for a given employee. Plaintiff is not aware of any case law that

interprets “subsequent” in the context of section 2699. However, Defendant is likely to rely on *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157 (2008) because it rejected a purely temporal understanding of the term “subsequent” and interpreted its use in Labor Code sections 210 and 225.5 to require that “the employer has been notified that it is violated a Labor Code provision” before higher penalties are triggered. *Id.* at 1209. Defendant presumably will take the position that it has not been notified that it actually violated any provisions of the Labor Code until the Labor Commissioner has issued a formal citation or this Court made a finding that a violation existed.

D. Standards for Settlement Approval

When approving a settlement of a PAGA action, the statute simply requires the Court to “review and approve any settlement of any civil action filed pursuant to this part.” (Lab. Code § 2699(l)(2).) PAGA does not set forth standards for evaluating such settlements, and the California appellate courts have not weighed in on the issue. However, trial courts have approved PAGA settlements where the penalties are “genuine and meaningful” and “consistent with the underlying purpose” of the statute. (See *O’Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1113.) Additionally, as explained in *Arias v. Superior Court* (2009) 46 Cal.4th 969, class action procedural rules do not apply in PAGA cases, including the two-step preliminary and final approval process. Rather, the approval process consists of one step where the court decides if the settlement should go into effect.

IV. THE SETTLEMENT

Defendant will pay the total sum of \$299,000.00 in full and final settlement of the PAGA claims alleged. (Szamet Decl. ¶16, Exhibit 1, §B, ¶7.) Per the Settlement Agreement, the amount is allocated as follows:

Gross Settlement Amount:	\$299,000.00	
PAGA Counsel Fees Payment:	\$99,666.67	
PAGA Counsel Litigation Expenses Payment:	\$16,000.00 ⁴	
Administrator Expenses Payment:	\$6,750.00	

⁴ The Settlement Agreement provided for counsel to receive cost reimbursement up to \$16,000.00. However, counsel seeks cost reimbursement of \$15,101.46. (Szamet Decl. ¶17, Ex. 1, § B, ¶9.) The extra money will remain in the net settlement fund, causing the net amount for distribution to the LWDA and Aggrieved Employees to be slightly higher than contemplated in the settlement agreement. (Szamet Decl. ¶17, Ex. 1, § B, ¶9.)

1	Named Plaintiff Enhancement:	\$7,500.00	
2	PAGA Penalties:	\$169,981.87	
3		<i>(\$127,486.40 to the LWDA; \$42,495.47 to remain in the Net Settlement Amount)</i>	

4 (Szamet Decl. ¶17., Exhibit 1, § B.)

5 For settlement purposes, the aggrieved employees are defined as: all persons who are
6 employed or were employed by Defendant in the State of California as a non-exempt employee at
7 any time during the PAGA Period. (“PAGA Member”). (Szamet Decl. ¶19., Exhibit § A, ¶6.)

8 Each aggrieved employee shall receive a pro-rata portion of the Aggrieved Employee
9 Settlement Fund allocated to each PAGA Member. Individual Settlement Payments will be calculated
10 proportionately for each PAGA Member based on the number of the pay periods worked during the
11 PAGA Period in relation to other PAGA Members. (Szamet Decl. ¶18., Exhibit 1, § B, ¶17.)

12 Based on the time and pay data produced by Defendant, there are 17,505 pay periods at
13 issue and 721 aggrieved employees. (Szamet Decl. ¶20.) The Settlement Agreement contains an
14 escalator clause; if the data transmitted to the Settlement Administrator contains more than 18,500
15 pay periods, Defendant can elect to increase the dollar amount of the Settlement or shorten the
16 release period so that the escalator clause is not triggered. (Szamet Decl. ¶21., Exhibit § F, ¶57.)

17 **V. ARGUMENT**

18 **A. The Court Should Approve the Settlement Agreement**

19 The Parties recognize that in accordance with Labor Code §2699(l), Court approval is
20 required in the event of a settlement of a PAGA action on a representative basis. However, as
21 explained in *Arias v. Sup. Crt.*, 46 Cal.4th 969 (2009), the Parties are not obligated to follow the
22 class action procedural rules in PAGA cases and therefore need not obtain approval of the PAGA
23 settlement through a motion for primary or final approval. Nonetheless, in order to comply with
24 the requirements of Labor Code §2699, the Parties submit the instant Motion and the Settlement
25 Agreement (Exhibit “1” to the Szamet Declaration) for Court approval.

26 **B. The Risks of Moving Forward with Plaintiff’s PAGA Claim**

27 To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation
28 and discount taken follows. (Szamet Decl. ¶22.) Plaintiff believed that Defendant may persuasively

1 argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether
2 waive any penalties under PAGA. (Szamet Decl. ¶23.) Pursuant to Labor Code §226.3, the Labor
3 Commissioner has the discretion to “decide not to penalize an employer for a first violation when
4 that violation was due to a clerical error or inadvertent mistake.” (Szamet Decl. ¶24.) And, the
5 court in a PAGA action has the same discretion “to assess a civil penalty” that the Labor
6 Commissioner would have, as well as complete discretion to “award a lesser amount than the
7 maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances of
8 the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive,
9 or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)). (Szamet Decl. ¶25.)

10 PAGA Counsel anticipated that, at trial, Counsel for Defendant could make a potentially
11 persuasive argument that Defendant: (1) the PAGA Members were properly paid and/or reimbursed
12 in accordance with Defendant’s lawful policies and practices, and that any alleged failure to
13 compensate the PAGA Members was the result of inadvertence and clerical error; (2) the PAGA
14 Members were provided with the opportunity to take meal and rest breaks in compliance with
15 California law and reimbursed for any necessary business expenses; (3) until this Action was filed,
16 no employees had compliance about any alleged failure provide meal and/or rest breaks, reimburse
17 expenses, issue accurate itemized wage statements; and (4) none of Defendant’s employees suffered
18 any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff’s
19 allegations. (Szamet Decl. ¶26.) All of which, Counsel for Defendant would argue, should mitigate
20 in factor of significantly reducing or waiving any PAGA penalties. (*Id.*) While Plaintiff disagrees
21 that this analysis is legally correct or persuasive, PAGA Counsel had to consider the foregoing facts
22 and arguments and how they might impact any judgment ultimately awarded to PAGA Members if
23 the Court were persuaded by them. (Szamet Decl. ¶27.)

24 **1. The Risks Associated with Wages/Overtime Wages**

25 “California employees are entitled to compensation for all hours worked, which means “the
26 time during which an employee is subject to the control of an employer, and includes all the time
27 the employee is suffered or permitted to work, whether or not required to do so.” (Title 8 Cal. Code
28 of Regs., § 11080(2)(G); *See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified

1 on denial of reh'g (Aug. 29, 2018).) Time is compensable if an employee is “*subject to the control*
2 *of an employer*” even if not working, or if an employee “*is suffered or permitted to work*” even if
3 not “under the employer’s control, provided the employer has or should have knowledge of the
4 employee’s work.” (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh'g denied (May 13,
5 2020) (citations omitted.) An employer controls an employee if the employer directs an employee
6 and the employee is unable to use their time how they wish. (*Id.* at p. 1047.) Other factors courts
7 may consider include whether the activity is required, “the location of the activity, the degree of
8 the employer’s control, whether the activity primarily benefits the employee or employer, and
9 whether the activity is enforced through disciplinary measures.” (*Id.* at p. 1056; *Cf. Gibbs v. TWC*
10 *Administration, LLC* (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768, at *9
11 (denying Defendant’s motion for summary judgment when plaintiff-employees conducted off-the-
12 clock pre-shift activity in preparation to start work right when they clocked in).)

13 Additionally, California workers are statutorily entitled to overtime compensation, unless
14 they are properly classified as falling within one of the narrow exemption categories. Under
15 California law, “[a]ny work in excess of eight hours in one workday and any work in excess of 40
16 hours in any one workweek...shall be compensated at the rate of no less than one and one-half
17 times the regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).) Furthermore, “[a]ny
18 work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the
19 regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).) Labor Code §§ 510, 1194 and
20 1199 require an employer to compensate its employees at the rate of no less than one and one-half
21 times the regular rate of pay for any work in excess of eight hours in one workday and any work
22 in excess of 40 hours in any one workweek. Plaintiff alleged that all aggrieved employees were
23 forced to work on a regular and consistent basis without receiving compensation for all hours
24 worked at the proper rate. (Szamet Decl. ¶28.) Specifically, Plaintiff alleged that he and the
25 aggrieved employees would routinely work “off the clock” and performed compensable activities
26 before and after working each shift for which no pay was provided. (*Id.*)

27 First, Defendant vehemently denied this claim and argued that its labor policies prohibit off-the-
28 clock work. (Szamet Decl. ¶29.) Second, Defendant argued that Plaintiff’s theory of liability would be

extremely difficult to prove on a representative basis. (Szamet Decl. ¶30.) Defendant argued that this case would devolve into a series of mini-trials wherein each Class Member would have to testify as to whether he or she actually worked off the clock on any given day and why. (Szamet Decl. ¶31.) Plaintiff acknowledges that this can be a highly difficult type of claim to prove because there are no time records to substantiate or evaluate the claim. (Szamet Decl. ¶32.) This type of inquiry, Defendants would argue, makes its very difficult to establish liability based on common or representative proof. (Szamet Decl. ¶33.) Based on this acute risk, Plaintiff believed it was appropriate to discount this claim for settlement purposes. (Szamet Decl. ¶34.)

2. The Risks Associated with the Meal Period Claim

Under California Labor Code section 512 and IWC Wage Order No. 5, no employer shall employ any person for a work period of more than five hours without providing a meal period of not less than thirty minutes. The first meal period must be permitted to commence no later than after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be permitted to commence no later than after ten hours of work, or the start of the eleventh hour of work (10.0 hours on the clock). (*Ibid.*) The California Supreme Court succinctly described Section 512's mandate: "Employers must afford employees uninterrupted half-hour periods in which they are relieved of any duty or employer control and are free to come and go as they please." (*Brinker, supra*, 53 Cal.4th at 1037.)

Here, Plaintiff alleged that Defendant failed to apprise Plaintiff and the aggrieved employees of their rights associated with meal periods and failed to provide compliant meal periods. (Szamet Decl. ¶35.) Defendant countered that it has a written policy that complied with the law and that it regularly reminded employees to punch out for lunch before the end of the fifth hour of work. (Szamet Decl. ¶36.) Nonetheless, Plaintiff contends meal breaks were strictly at a supervisor's discretion, and he was regularly interrupted by supervisors and coworkers to discuss sales, performance, and the like. (Szamet Decl. ¶37.) Further he contends that numerous times would not be permitted to take lunch until after the start of the sixth hour of work. (*Id.*) When this occurred, Plaintiff alleged that Defendant would adjust Plaintiff's timecards to show a lunch prior

1 to the end of the fifth hour to avoid paying a meal premium to Plaintiff. (*Id.*) Additionally, Plaintiff
2 alleged that he would not be given a second meal break when he worked long shifts over 10 hours.
3 (*Id.*) Thus, Plaintiff contends that Defendant has had a consistent policy and practice of: (1) failing
4 to provide Plaintiff and the aggrieved employees with compliant meal periods in violation of Labor
5 Code §§ 226.7 and 512; and (2) failing to pay such employees one (1) hour of pay at the employees’
6 regular rate of compensation for each workday that the complaint meal period was not provided.
7 As such, Plaintiff argued that Defendant owes a meal premium for each and every unlawful meal
8 period paid out at the employee’s regular rate, not at an employee’s base hourly wage. (Szamet
9 Decl. ¶38.)

10 In response, first and foremost, Defendant argued that aggrieved employees were provided
11 with legally compliant meal periods. (Szamet Decl. ¶39.) As with the wage claim, Defendant
12 argued that Plaintiff’s theory of liability would be extremely difficult to prove on a representative
13 basis because the time records will show compliant meal periods so Defendant would argue that it
14 would be entitled to inquire of each aggrieved employee, on each day whether or not they were
15 provided with compliant meal periods. (Szamet Decl. ¶40.) Defendant would also have argued
16 that it has no obligation to “guarantee” or “ensure” that meal periods are taken by all employees
17 at all times. *Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040 (2012) (employers are “not
18 obligated to police meal breaks and ensure no work thereafter is performed”). Rather, an employer
19 satisfies (as Defendant would argue) its obligation to provide meal periods if “it relieves its
20 employees of all duty, relinquishes control over their activities and permits them a reasonable
21 opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them
22 from doing so.” (*Id.*)

23 Plaintiff was confident that Defendant would attempt to gather testimonial evidence from
24 aggrieved employees indicating that the records were accurate and either they took compliant meal
25 breaks as reflected in the records or were paid a meal period premium in lieu thereof. (Szamet
26 Decl. ¶41.) Though Plaintiff does not believe this was the case, Plaintiff must acknowledge it
27 poses risks at trial. (Szamet Decl. ¶42.) There is risk as to both sides as to what declarations and
28 depositions of aggrieved employees might reveal. (Szamet Decl. ¶43.) Indeed, Plaintiff had to

1 consider that Defendant could secure several declarations from aggrieved employees that all
2 complaint breaks were “provided”, but that they chose to take late breaks or forego breaks on
3 occasion. (Szamet Decl. ¶44.)

4 Taken together, Plaintiff acknowledged there was significant risk as to establishing liability
5 on the meal period claim. (Szamet Decl. ¶45.) Considering this risk, Plaintiff believes it is fair
6 and reasonable to discount the meal period claim for settlement purposes. (Szamet Decl. ¶46.)

7 **3. The Risks Associated with the Rest Period Claim**

8 Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour
9 of compensation for each workday the employer fails to provide a rest period according to law.
10 Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or
11 major fraction thereof. (Cal. Code Regs., tit. 8, § 11070, subd. 12(A).)

12 Plaintiff’s rest period claims arises from an allegedly common course of conduct wherein
13 Defendant failed to provide employees with the opportunity to take 10-minute rest breaks in
14 compliance with California law. The California Supreme Court has held: “Employees are entitled
15 to 10 minutes’ rest for shifts from three and one-half to six hours in length, 20 minutes for shifts
16 of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours
17 and so on.” (*Brinker Rest. Corp v. Superior Court*, supra, 53 Cal.4th at 1029.) In an eight-hour
18 work day, being denied the two paid rest breaks in a day is “essentially perform[ing] 20 minutes
19 of ‘free’ work.” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104).
20 Employers must authorize and permit a net ten-minute paid rest period for every four hours, or
21 major fraction thereof, of work for its employees. If an employer does not, then the employer must
22 pay the employee one hour of pay at the employee’s regular rate of pay for each workday that the
23 rest period is not provided. (Cal. Code Regs., tit. 8, § 11050, subd. 12(B).)

24 Here, Plaintiff contends that Defendant failed to provide Plaintiff and the aggrieved
25 employees with rest breaks of not less than ten (10) minutes per four (4) hour work period, or
26 major fraction thereof. Plaintiff alleges that his workload was so heavy that he was consistently
27 and regularly denied rest breaks. (Szamet Decl. ¶47.) If the sales floor was busy, Plaintiff contends
28 that Defendant required him to miss rest breaks to help with the workload. (*Id.*).

1 In its defense, Defendant argued that Plaintiff's rest period claim cannot readily be proven
2 as to all aggrieved employees because California law does not require employees to record rest
3 periods. (Szamet Decl. ¶48.) Absent a shift-by-shift, break-by-break, employee-by-employee
4 inquiry, Defendant would have argued that there was simply no way to know (1) whether a break
5 was taken on any given day; and (2) if not, why not. (Szamet Decl. ¶49.) For each instance where
6 an employee contends that she did not take a 10-minute rest period by the end of the fourth hour
7 of work, the trier of fact would still have to determine why that particular employee had less than
8 their full allotment of rest time. (Szamet Decl. ¶50.) Defendant accordingly would have argued
9 that rest break claims are inherently individualized in nature because employers only need to
10 "authorize and permit" breaks; they need not ensure that rest breaks are taken. (*Id.*) *Brinker*, 53
11 Cal. 4th at 1004. To succeed, "[a]n employee must show that the employer prevented the employee
12 from taking breaks; mere proof of knowledge that the employee was forgoing breaks is
13 insufficient." As such, Plaintiff had to acknowledge that it could potentially be easy for Defendant
14 to defeat this claim if it was able to gather testimonial evidence from aggrieved employees
15 indicating that they were provided the opportunity to take all required rest breaks each day.
16 (Szamet Decl. ¶51.) Though Plaintiff does not believe this was the case, Plaintiff must
17 acknowledge it poses serious risks as to establishing liability. (Szamet Decl. ¶52.) Just as with
18 meal periods, there is risk as to both sides as to what declarations and depositions of aggrieved
19 employees might reveal. (Szamet Decl. ¶53.)

20 Thus, Plaintiff believes discounting this claim for Settlement purposes was appropriate
21 periods. (Szamet Decl. ¶54.)

22 **4. The Risks Associated with the Reimbursement Claim**

23 Labor Code section 2802 provides that an employer must "indemnify his or her employee
24 for all necessary expenditures or losses incurred by the employee in direct consequence of the
25 discharge of his or her duties" (Lab. Code, § 2802, subd. (a).)

26 Plaintiff alleges that he and all aggrieved employees were required to incur substantial
27 expenses in direct consequence of the discharge of their duties for Defendant without
28 reimbursement. (Szamet Decl. ¶55.) Specifically, Plaintiff contends that Defendant has failed to

1 reimburse Plaintiff and the aggrieved employees the cost of using their personal cell phones for
2 business related purposes arguing that he was regularly required to communicate with his
3 supervisors and coworkers using his personal cell phone as well as use his cell phone to take photos
4 of the vehicles' license plates to enter into the system. Because these cell phones were not provided
5 by Defendant and Defendant did not reimburse for business expenses, Plaintiff contends that
6 Defendant has violated the law and owes penalties under PAGA.

7 The main risk here is the factual dispute at hand. (Szamet Decl. ¶56.) Defendant contends
8 that it does not require aggrieved employees to use personal cellphones; it provides work phones
9 that are readily available and computers for email usage. (Szamet Decl. ¶57.) If Defendant were
10 able to establish such, there could be no recovery at all for this claim. (Szamet Decl. ¶58.)

11 **5. The Risks Associated with the Wage Statement Claims**

12 California Labor Code §226(a) requires Defendant to provide its employees with an
13 accurate, itemized written wage statement that shows, in relevant part, total hours worked by the
14 employee, their name and address of the legal entity that is the employer, and all applicable hourly
15 rates and the corresponding number of hours worked. Labor Code §226(a) specifically requires
16 employers to furnish accurate itemized wage statements in writing that show total hours worked
17 by the employee and all applicable hourly rates in effect during the pay period and the
18 corresponding number of hours worked at each hourly rate by the employee.

19 Here, Plaintiff alleged that Defendant provides aggrieved employees itemized wage
20 statements that do not accurately show total hours worked or all applicable hourly rates in effect
21 during the pay period and the corresponding number of hours worked at each hourly rate in
22 violation of the Labor Code. (Szamet Decl. ¶59.) Further, Plaintiff alleged that he and the
23 aggrieved employees are furnished wage statements that do not include meal and rest period
24 premiums as a result of the claims alleged above. (Szamet Decl. ¶60.)

25 The main risk taken into account is that wage statement claims are vulnerable to an
26 argument that aggrieved employees did not suffer any harm. Defendants commonly argue that,
27 without more, wage statement claims are nothing but technical violations for which a court should
28 award a dramatically reduced civil penalty, if anything at all. (Szamet Decl. ¶61.)

1 **6. The Risks Associated with Sick Leave Claim**

2 Labor Code §§ 246 and 247 provide that “[a]n employer shall provide an employee
3 with written notice that sets forth the amount of paid sick leave available, or paid time off leave
4 an employer provides in lieu of sick leave, for use on either the employee’s itemized wage
5 statement described in Section 226 or in separate writing provided on the designated pay date with
6 the employee’s payment of wages.” Plaintiff alleged Defendant has failed to set forth the
7 amount of sick leave available, or paid time off leave an employer provides in lieu of sick
8 leave, on the itemized wage statements described in Labor Code § 226 that it issues to Plaintiff
9 and all aggrieved employees. (Szamet Decl. ¶62.)

10 In response, Defendant argued that it did itemize the sick pay correctly. (Szamet Decl.
11 ¶63.) A review of the itemized wage statements suggests defendant is correct and the likelihood
12 of success of the merits was not strong. (Szamet Decl. ¶64.) Accordingly, Plaintiff believes it was
13 reasonable to dramatically discount this claim for settlement purposes. (Szamet Decl. ¶65.)

14 **7. The Risks Associated with Failing to Pay Timely Wages**

15 Labor Code § 204(d) requires that employees paid on a weekly, biweekly, or semimonthly
16 basis be paid no later than seven (7) calendar days after the payroll period ends. Plaintiff alleges
17 that Defendant failed to pay Plaintiff and the aggrieved employees all wages for a biweekly payroll
18 period within seven (7) calendar days following the close of the payroll period. (Szamet Decl.
19 ¶66.)

20 The main risk here is that Defendant argued that payroll was completed within seven (7)
21 calendar days following the close of the payroll period. (Szamet Decl. ¶67.) Because the face of
22 the paystubs do show this, Plaintiff felt this was not a strong claim and therefore assigned little to
23 no value to it for settlement purposes. (Szamet Decl. ¶68.)

24 **8. The Risks Associated with the Waiting Time Penalties Claim**

25 Under Labor Code section 203, if an employer fails to provide wages at the time of an
26 employee’s termination or within seventy-two (72) hours of resignation, then the employee’s
27 wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203
28 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g.,

1 *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68
2 Cal.App.4th 487, 492.)

3 Here, Plaintiff and numerous aggrieved employees are no longer employed by Defendant.
4 Plaintiff contends that Defendant failed to properly pay overtime for any work in excess of eight
5 (8) hours per day and/or any work in excess of forty (40) hours per week. (Szamet Decl. ¶69.)
6 The risk analysis for the section 203 claim flows from the risk analysis for the underlying wage
7 claim discussed above as derivative waiting-time penalties are only as strong as the underlying
8 predicate claims and are subject to good faith defenses. (Szamet Decl. ¶70.) If Defendant could
9 prove, as it contends, that class members were properly paid for all hours worked, there would be
10 no recovery of wages and no waiting time penalties that flow therefrom. (Szamet Decl. ¶71.)⁵

11 The bigger risk that Plaintiff analyzed, however, is that to establish liability for waiting
12 time penalties, Plaintiff would have to establish not only that the underlying violations occurred,
13 but also that Defendant's conduct was "willful." (Labor Code § 203; Szamet Decl. ¶72.) If
14 Defendant could establish that any alleged failure to blend was the result of mistake or oversight
15 and not "willful", then it is possible that Plaintiff would not be able to recover penalties for this
16 claim. (Szamet Decl. ¶73.) Because of this risk, Plaintiff determined that accepting a discount for
17 settlement purposes was appropriate. (Szamet Decl. ¶74.)

18 C. Based on the Risks Above and the Analysis of the Maximum Penalties Available,
19 Plaintiff Believes this Settlement is Fair and Reasonable

20 Based on the data, the maximum potential exposure for the PAGA claims for the PAGA
21 Members is \$1,750,500 (17,505 pay periods at issue multiplied by \$100 a pay period). (Szamet
22 Decl. ¶75.) While there is no authority available on this issue, a court could conceivably "stack"
23 per pay periods violations, and the full potential value could balloon up to over \$14,000,00.00
24 (\$1,750,500 x 8 distinct claims alleged), but in light of the immense discretion available, Plaintiff
25 believes the Settlement is reasonable. (Szamet Decl. ¶76.) Indeed, if this Court were to ultimately
26 award \$18 per pay period as the trial court did in *Fleming v. Covidien Inc., supra*, the present
27 Settlement is well within that range at \$17 per pay period (for comparison the \$18/pay period in
28

⁵ Plaintiff also alleged that Defendant owes waiting time penalties by not paying former alleged employees all wages owed and all premium payments for non-compliant meal or rest periods, Labor Code § 226.7

Fleming would be \$315,090 here as 17,505 pay periods x \$18 = \$315,090). Were the Court to award 10% of maximum civil penalty as occurred in *Carrington, supra*, 30 Cal. App. 5th 504, the result here would be \$175,050. (Szamet Decl. ¶77.)

Given that this Settlement is well within the range of awards in other trial courts, Plaintiff believes this settlement of \$299,000 is a very fair and reasonable settlement. (Szamet Decl. ¶78.)

VI. THE REQUEST FOR ATTORNEYS' FEES AND COSTS

As detailed fully in the Settlement, the settlement provides for Defendant to create a Gross Settlement Amount of \$299,000.00. (Szamet Decl. ¶83; Ex. 1 at § B, ¶ 7.) From that fund, Plaintiff requests an award of attorneys' fees for PAGA Counsel in the amount of \$99,666.67, or 33.33% of the Gross Settlement Amount, and \$16,000.00 in reimbursement for litigation costs. (*Id.* Ex. 1 at § B, ¶ 9.)⁶

A. Plaintiff's Counsel are Entitled to a Fee from the Common Fund

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

We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards Class Counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.

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

The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation [citations]—convince us the percentage method is a valuable tool that should not be denied our trial courts.

⁶ PAGA Counsel has decades of experience prosecuting class and representative action litigation. (Szamet Decl. ¶79-82)

1 (Id. at 573.)

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

10 This doctrine rests on the understanding that attorneys should normally be paid by their
11 clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from
12 the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979)
13 23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent
14 this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees against
15 the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano*
16 *III*, 20 Cal.3d at p. 35.) “A court, in the exercise of its equitable discretion, may decree that those
17 receiving the benefit should contribute to the costs of its production.” (*Save El Toro Assn., supra*,
18 98 Cal.App.3d at 548.) As this approach “better approximates the workings of the marketplace
19 than the lodestar approach,” there is “a greater judicial willingness to evaluate a fee award as a
20 percentage of the recovery” in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82
21 Cal.App.4th 19, 31, 48.)

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

24 Courts historically award fees in the twenty-to-fifty percent range, depending on the
25 circumstances of the case. As stated in Newberg:

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

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

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

Courts may “cross-check” the results of the common fund method against the lodestar method. (See *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.) The lodestar is calculated by multiplying the reasonable hours expended by a reasonable hourly rate. (*Serrano v. Priest*, 20 Cal.3d 25, 48-49 (1977) (“*Serrano III*”).) Those rates reflect “the general local hourly rate for a fee-bearing case” and do “not include any compensation for contingent risk, extraordinary skill, or any other factors.” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138.) The court may then enhance the lodestar with a multiplier. (*Wershba, supra*, 91 Cal.App.4th at 254; *Serrano III, supra*, 20 Cal.3d at 49.)⁷

i. **Requested Multiplier**

The purpose of using the lodestar/multiplier method is to mirror the legal marketplace. Counsel will not handle cases for straight hourly fees payable only if they win; therefore, an enhancement is often awarded so that the fee received is commensurate with what attorneys could expect to be compensated for services in similar circumstances. (See *Tulare Valley Audubon Soc., Inc. v. County of Tulare* (1984) 155 Cal.App.3d 738, 755 [an award must be large enough “to entice competent counsel to undertake difficult public interest cases”].) No specific findings reflecting the court’s calculations are required. (*Wershba, supra*, 91 Cal.App.4th at 254; *Rebney, supra*, 232 Cal.App.3d at p. 1349.) “The record need only show that the attorney fees were awarded according to the ‘lodestar’ or ‘touchstone’ approach.” (*Ibid.*)

Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Szamet

⁷ The rates charged by the attorneys of my firm are commensurate with the market and reflect the risk borne in contingency fee matters. (Szamet Decl. ¶¶84-91.)

Decl. ¶92.) PAGA Counsel have an aggregate lodestar in the amount of \$77,717.50 which represents 93.60 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiff's instant Motion. (*Id.*) As such, PAGA Counsel is asking for a modest lodestar multiplier of 1.28. (Szamet Decl. ¶92-93, 107-119.) Typically, the lodestar is merely the starting point of the calculation of a reasonable fee, and courts often multiply the lodestar by a factor to account for the risk of non-payment, delay in payment, the quality of work, and the novelty and difficulty of the issues involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253; *Beasley v. Wells Fargo Bank*, (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of Supervisors*, (1997) 76 Cal.App.3d 241, 251.)

This case dealt with difficult legal and factual questions. (Szamet Decl. ¶94.) Significantly, the risk attendant to the underlying claims in this matter was great considering Defendant's defenses as discussed in detail above. (*Ibid.*) Were this case to proceed, Defendant would have a strong incentive to litigate tenaciously. (*Ibid.*) There are genuine issues in dispute. (*Ibid.*) Furthermore, PAGA Counsel was able to obtain a Settlement within the range of other trial court awards in similar matters. (Szamet Decl. ¶95.)

As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades of experience who diligently prepared and litigated this matter. (Szamet Decl. ¶79-81, 103-111.) To achieve the ultimate result in this case, my firm had to incur substantial risk and expense, and were precluded from taking other fee generating employment for approximately 94 hours of attorney time. (Szamet Decl. ¶117.) This matter had been handled purely on a contingency fee basis and my firm has advanced many thousands of dollars in costs while deferring all payment of fees, with no guarantee that any of the fees incurred or costs advanced would ever be recovered and diverting significant firm resources to prosecution of this matter. (Szamet Decl. ¶84, 98.) PAGA Counsel believe this is an exceptional result that has been well received by the PAGA Members. (Szamet Decl. ¶99.)

VII. THE COURT SHOULD APPROVE THE COST REIMBURSEMENT REQUEST

In addition to their request for fees, PAGA Counsel further request reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this

litigation, in the amount of \$15,101.46. (Szamet Decl. ¶123.) To date, PAGA Counsel has incurred \$14,501.46 in costs and PAGA Counsel anticipates incurring an additional \$600.00 in costs to file and serve this motion. (Szamet Decl. ¶124.) Though the Settlement provides for a reimbursement of litigation costs of up to \$16,000.00, Counsel is only requesting a cost reimbursement of \$15,101.46. (Szamet Decl. ¶125.)

All of the requested costs are reasonable in amount and were necessarily incurred by PAGA Counsel in prosecuting this litigation. (Szamet Decl. ¶126.); Exhibit 2 [Cost Report].) Expenses in this matter to date include costs for filing fees, research, mediation, and additional costs for the prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Kelsey M. Szamet. All of these costs have been incurred in the course of this litigation, and all costs advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of filing the present motion. (Szamet Decl. ¶127.) Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court should approve the request for reimbursement in the amount of \$15,101.46. (Szamet Decl. ¶128.)

VIII. ENHANCEMENT TO PLAINTIFF

The Settlement calls for an enhancement payment of \$7,500.00 to the named Plaintiff, to be paid from the Gross Settlement Amount. (Szamet Decl. ¶129; Ex. 1 at §B, ¶10.) Incentive awards “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. “[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

Here, the enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of the PAGA Members. The time spent

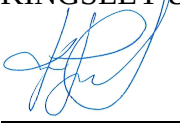
1 by Walter Portillo includes identifying competent counsel, providing information to PAGA
2 Counsel regarding Plaintiff's relevant employment experiences, compiling documents, meeting
3 with PAGA Counsel frequently to discuss the status of the case and the theories of liability,
4 reviewing settlement documents, and making himself available for a full day of mediation. (Szamet
5 Decl. ¶130.) PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl.
6 ¶131.) The enhancement takes into consideration the time, effort, risks, and expense incurred by
7 Plaintiff in coming forward to litigate this matter on behalf of the PAGA Members. (Szamet Decl.
8 ¶132.) Accordingly, Plaintiff should be awarded the agreed-upon enhancement of \$7,500.00.

9 **IX. CONCLUSION**

10 Plaintiff and Plaintiff's Counsel submit that the proposed Settlement as documented in the
11 Settlement Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the
12 State of California. Plaintiff respectfully requests that the Court approve the Settlement and Order
13 that the Settlement is carried out according to the terms of the Settlement Agreement.

14
15 DATED: February 28, 2024

KINGSLEY & KINGSLEY, APC

16
17 By: 

Kelsey M. Szamet
Attorneys for Plaintiff WALTER PORTILLO and
all aggrieved employees

(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On February 28, 2024, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

LITTLER MENDELSON, P.C.

Timothy Wojcik
TWojcik@littler.com
Tracy R. Leidner
TLeidner@littler.com
Fermin Llaguno
FLlaguno@littler.com
Karla Garcia
KGarcia@littler.com
Jessica Zepeda
JZepeda@littler.com
18565 Jamboree Road, Suite 800
Irvine, California 92612

[XX] BY ELECTRONIC SERVICE: I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] (BY ELECTRONIC MAIL TRANSMISSION): I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 28, 2024, at Woodland Hills, California.



Michelle Tanzer