Justin F. Marquez (SBN 262417)
justin@wilshirelawfirm.com
Benjamin H. Haber (SBN 315664)
benjamin@wilshirelawfirm.com
Arrash T. Fattahi (SBN 333676)
afattahi@wilshirelawfirm.com
WILSHIRE LAW FIRM
3055 Wilshire Blvd., 12th Floor
Los Angeles, California 90010
Telephone: (213) 381-9988
Facsimile: (213) 381-9989

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

JORGE DAGOBERTO RIVERA CAMACHO, on behalf of the State of California and other aggrieved persons,

Plaintiff,

v.

BRAGA FRESH FOODS, LLC, a California Limited Liability Company; and DOES 1 through 10, inclusive,

Defendants.

Case No.: 22CV002573

PAGA REPRESENTATIVE ACTION

[*Assigned for all purposes to*: Hon. Thomas W. Wills, Dept. 15]

PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE PAGA SETTLEMENT

[*Filed concurrently with*: Declaration of Justin F. Marquez; Declaration of Plaintiff Jorge Dagoberto Rivera Camacho; and [Proposed] Order]

APPROVAL HEARING:
Date: March 22, 2024
Time: 8:30 a.m.
Dept.: 15

Complaint Filed: August 29, 2022
Trial date: Not Set

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 22, 2024 at 8:30 a.m. in Department 15 of the Monterey County Superior Court, Monterey Courthouse, located at 1200 Aguajito Road, Monterey, CA 93940, the Honorable Thomas W. Wills presiding, Plaintiff Jorge Dagoberto Rivera Camacho ("Plaintiff") will, and hereby does, move for an order under Labor Code section 2699(l)(2) approving the Private Attorneys General Act ("PAGA") Settlement Agreement ("Settlement") entered into by Plaintiff and Defendant Braga Fresh Foods, LLC ("Defendant").

Pursuant to Labor Code § 2699(l)(2), the settlement of Plaintiff's PAGA claims requires the Court's approval. The basis for this motion is that Plaintiff and Defendant reached and fully executed a Settlement of the above-entitled case, Case No. 22CV002573, that disposes of the matter entirely and is fair, reasonable, and serves the purposes of the PAGA statute. The Settlement includes all persons who were engaged by Defendant as hourly-paid or non-exempt employees in California at any time from May 7, 2021 through December 15, 2023. The Settlement is fair, adequate, and reasonable, and it provides for civil penalties to be distributed to Plaintiff, other aggrieved employees, and the California Labor & Workforce Development Agency.

This motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declaration of Justin F. Marquez (along with the attached exhibits), the Declaration of Plaintiff Jorge Dagoberto Rivera Camacho, as well as the records on file in this action and any argument the Court is presented with at the time of the hearing.

Respectfully submitted,

Dated: February 29, 2024

WILSHIRE LAW FIRM

By: ______________________________
Justin F. Marquez
Benjamin H. Haber
Arnash T. Fattahi

Attorneys for Plaintiff

TABLE OF CONTENTS

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

TABLE OF AUTHORITIES

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

CASES

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

STATUTES

RULES

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

On August 29, 2022, Plaintiff Jorge Dagoberto Rivera Camacho ("Plaintiff") filed a Private Attorneys General Act of 2004 ("PAGA") (Cal. Lab. Code §§ 2698, *et seq*.) representative action against Defendant Braga Fresh Foods, LLC ("Defendant," and collectively with Plaintiff, the "Parties"). Plaintiff and Defendant then engaged in vigorous, arms-length negotiations regarding the resolution of this matter. After an all-day mediation presided over by Honorable Amy D. Hogue (Ret.), the Parties ultimately agreed to settle Plaintiff's PAGA claim for $465,000.00, which will provide significant civil penalties to the aggrieved employees and California Labor & Workforce Development Agency ("LWDA").

Labor Code § 2699(l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the [LWDA] at the same time that it is submitted to the court." Plaintiff submitted the proposed Settlement to the LWDA on February 26, 2024, pursuant to Labor Code § 2699(l)(2). (Declaration of Justin F. Marquez ["Marquez Decl."], ¶ 8, Ex. 2.) The Parties now seek Court approval of the Settlement. For the reasons discussed in detail below, the Court should issue an order approving the Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND.

Defendant sells organic and conventional fresh vegetables and salads to retail markets. (*Id.* at ¶ 3.) Plaintiff worked for Defendant in Monterey, California as an hourly-paid, non-exempt employee from approximately 2019 to approximately October 2021. (*Id.*)

Plaintiff's PAGA claim stems from Defendant's failure to pay for all hours worked (minimum, straight time, and overtime wages), failure to provide meal periods, failure to authorize and permit rest periods, failure to pay all earned wages twice per month, failure to maintain accurate records of hours worked and meal periods, failure to timely pay final wages, failure to furnish accurate wage statements, and failure to indemnify for necessary expenditures. (*Id.* at ¶ 4.)

On May 27, 2022, Plaintiff provided notice to the LWDA and Defendant of the violations

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

described above, as required by Labor Code § 2699.3(a)(1). (*Id.* at ¶ 5, Ex. 1.) Pursuant to Labor Code § 2699.3(a)(2)(A), the LWDA had 65 calendar days to notify Plaintiff and Defendant whether it intended to investigate the alleged violations. (*Id.*) However, the LWDA did not do so. (*Id.*)

After Plaintiff filed his complaint, the Parties engaged in extensive settlement discussions. (*Id.* at ¶ 6.) To facilitate settlement, Defendant provided Plaintiff with timekeeping and payroll data for a sampling of the aggrieved employees, and the applicable policies in effect during the relevant time period. (*Id.*) Thereafter, the Parties engaged in extensive discussions about the factual and legal strengths (and weaknesses) of the claims and defenses. (*Id.*)

On August 18, 2023, the Parties and their counsel participated in private mediation with Honorable Amy D. Hogue (Ret.). (*Id.* at ¶ 7.) The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. The Parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their own position through trial and appeal if a settlement had not been reached. (*Id.*) Ultimately, after an all-day mediation, the Parties agreed to settle the PAGA claim for $465,000.00, which includes all persons who were engaged by Defendant as hourly-paid or non-exempt employees in California at any time from May 7, 2021 to December 15, 2023. (*Id.* at ¶ 8.) There are approximately 1,559 aggrieved employees covered by the settlement. (*Id.*) Plaintiff submitted the Settlement to the LWDA on February 26, 2024, pursuant to Labor Code § 2699(l)(2). (Marquez Decl., ¶ 8, Ex. 2.) A true and correct copy of the Settlement executed by the Parties, along with the confirmation that the Settlement was submitted to the LWDA is attached to the Declaration of Justin F. Marquez as **<u>Exhibit 2</u>**. (Marquez Decl., ¶ 8.) Additionally, attached as **<u>Exhibit 3</u>** to the Declaration of Justin F. Marquez is the Settlement Notice that will be sent to the aggrieved employees with payment after the Court enters a Judgment on its Order Approving the PAGA Settlement.

III. <u>ARGUMENT.</u>

PAGA permits an aggrieved employee to sue an employer for civil penalties associated with the employer's alleged violations of the Labor Code. (Cal. Lab. Code § 2699(a).) Under

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

the statute, of the amount paid to settle a claim for PAGA penalties, twenty-five percent (25%) is payable to the aggrieved employees and seventy-five percent (75%) is payable to the LWDA. (Cal. Lab. Code § 2699(i).)

A. **The Terms of the PAGA Settlement.**

The Settlement provides for a Gross Settlement Amount of $465,000.00 to be distributed to all aggrieved employees. (Settlement, ¶ 3.1). Aggrieved employee means a person employed by Defendant in California and classified as an hourly-paid or non-exempt employee who worked for Defendant during the PAGA Period, May 7, 2021 to December 15, 2023. (Settlement, ¶¶ 1.4, 1.19). Of that amount, $155,000.00 is allocated to Attorneys' Fees, up to $25,000.00 is allocated to litigation costs, up to $18,000.00 is allocated to Settlement Administrator Costs, and $10,000.00 is allocated as a PAGA Representative Award to Plaintiff. (Settlement, ¶ 3.) The remaining $257,000.00 will be allocated as PAGA penalties, with 75% ($192,750.00) allocated to the LWDA PAGA Payment and 25% ($64,250.00) allocated to the Individual PAGA Payments. (Settlement, ¶ 3.3.1).

Settlement Administration. Defendant shall fully fund the Gross Settlement Amount by transmitting the funds to a Qualified Settlement Fund ("QSF") account established by the Administrator no later than 20 days after the Effective Date. The Administrator is to provide Defendant advanced notice within seven (7) calendar days after the Effective Date regarding the total monies Defendant must deposit. (Settlement, ¶ 4.3). Within 14 days after Defendant funds the Gross Settlement Amount, the Administrator will mail checks for all Individual PAGA Payments, the LWDA PAGA Payment, the PAGA Representative Award, the Administration Expenses Payment, and the PAGA Counsel Expenses Payment. Disbursement of the PAGA Counsel Litigation Expenses Payment shall not proceed disbursements of Individual PAGA Payments. (Settlement, ¶ 4.4.)

The Administrator will issue checks for the Individual PAGA Payments and send them to the aggrieved employees via First Class Mail, postage prepaid. The face of each check shall prominently state the date (not less than 180 days after the date of mailing) when the check will be voided. The Administrator will cancel all checks not cashed by the void date. Before mailing

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

any checks, the Settlement Administrator must update the recipients' mailing addresses using the National Change of Address Database. (Settlement, ¶ 4.4.1.) The Administrator must conduct an Aggrieved Employee Address Search for all aggrieved employees whose checks are returned as undelivered without USPS forwarding address. Within 7 days of receiving a returned check, the Administrator must re-mail checks to the USPS forwarding address provided or to an address ascertained through the Aggrieved Employee Address Search. (Settlement, ¶ 4.4.2.) For any aggrieved employee whose Individual PAGA Payment check is uncashed and uncancelled after the void date, the Administrator shall transmit the funds represented by such checks to the California Controller's Unclaimed Property Fund in the name of the aggrieved employee. (Settlement, ¶ 4.4.3.)

B. **The Terms of the PAGA Settlement Are Fair and Should Be Approved.**

The settlement of a PAGA claim requires court approval pursuant to the operative PAGA statute, which states that the "court shall review and approve any penalties sought as part of a proposed settlement agreement pursuant to this part." (*See* Cal. Lab. Code § 2699(l).)

As with any settlement, the Court must be mindful in conducting its inquiry that "[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in litigating further." (*See In re TD Ameritrade Account Holder Litig.* (N.D. Cal. Sept. 13, 2011) 2011 WL 4079226, *9.) Indeed, "the very essence of a settlement is … 'a yielding of absolutes and an abandoning of highest hopes,'" as "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." (*See Officers for Justice v. Civil Service Com*. (9th Cir. 1982) 688 F.2d 615, 624-25.) 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." (*Id*.)

Although the operative PAGA statute does not set forth the criteria by which a PAGA settlement is to be judged, it is presumed that a reviewing court may utilize some of the factors for review of a class action settlement. However, "a PAGA claim asserted on a non-class representative basis…is not considered a class action but a law enforcement action, and

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

therefore does not have to meet the requirements of [a class action]." (*See Casida v. Sears Holdings Corp.* (E.D. Cal. Jan. 26, 2012) 2012 WL 253217, *3; *Thomas v. Aetna Health of Cal., Inc.* (E.D. Cal. June 2, 2011) 2011 WL 2173715, *13 ; *Mendez v. Tween Brands, Inc.* (E.D. Cal. July 1, 2010) 2010 WL 2650571, *4.) Based thereon, a court's review of a PAGA settlement necessarily implicates the following unique features that render the approval process distinct from approval of a class action settlement under Code of Civil Procedure § 382 and California Rules of Court (Cal. Rule), Rule 3.769.

First, in evaluating the adequacy of the settlement amount, the Court's focus is not concerned with the amount(s) that "aggrieved employees" are to receive, but rather, must focus on the total settlement amount in achieving PAGA's objective. Indeed, "[t]he remedy sought in a PAGA suit consists of civil penalties, not individual or class damages." (*Mendez, supra*, 2010 WL 2650571 at *4.) "Unlike class actions, these civil penalties are not meant to compensate unnamed employees because the action is fundamentally a law enforcement action." (*Ochoa-Hernandez v. Cjaders Foods, Inc.* (N.D. Cal. Apr. 2, 2010) 2010 WL 1340777, *4. Moreover, while a PAGA action "is … designed to protect the public and penalize the employer for past illegal conduct," a reviewing Court must take into account the fact that settlement of a PAGA claim – like any settlement – involves a "compromise" that stops short of rendering findings of liability and damages. (*Mendez*, 2010 WL 2650571 at p. *4) As such, the Court must not lose sight of the fact that "[u]nlike a class action seeking damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies." (*See Ochoa-Hernandez,* 2010 WL 1340777 at p. *4.)

Second, consistent with the fact that unnamed employees have no property interest in a PAGA claim,[1] "[u]nnamed employees need not be given notice of the PAGA claim, nor do they

[1] As held by the California Supreme Court, "[t]he Labor Code Private Attorneys General Act of 2004 does not create property rights or any other substantive rights" as "[i]t is simply a procedural statute allowing an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise would be sought by state labor law enforcement agencies." (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Super. Ct.* (2009) 46 Cal.4th 993, 1003.)

have the ability to opt-out of the representative PAGA claim." (*See Ochoa-Hernandez, supra,* 2010 WL 1340777 at p. *4.) This renders the approval process of a PAGA settlement distinct from a class action settlement, as there is no need for the Court to employ the "two-step approval process" required under Federal Rules of Civil Procedure ("FRCP"), Rule 23(e) and Cal. Rule 3.769.[2]

Finally, unlike a class action settlement under FRCP 23(e) and Cal. Rule 3.769, the scope of release permitted in a PAGA settlement is limited. While "judgment in [a PAGA] action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding…the non-party 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." (*See Arias v. Super. Ct.* (2009) 46 Cal.4th 969, 986-87.) Thus, with the exception of the named Plaintiff, the scope of a release in a PAGA settlement is necessarily strictly confined to the PAGA penalties alleged in the complaint, and claims that were or could have been alleged pursuant to PAGA based on the factual allegations in the complaint. In the case at hand, as the only claims at issue are PAGA claims, those will be the only claims extinguished as a result of this Settlement, with the exception of Plaintiff's much broader, general release against Defendant.

California courts have a strong policy in favor of settlement. (*See, e.g., Stambaugh v. Super. Ct.* (1976) 62 Cal.App.3d 231, 236.) Unlike individual settlements, class action settlements (and representative PAGA settlements) involve a court approval process that exists to prevent fraud, collusion, and unfairness to absent individuals. (*Malibu Outrigger Bd. of Governors v. Super. Ct.* (1980) 103 Cal.App.3d 573, 578-79.) In the class action context, there is a presumption of fairness of a class action settlement when: (1) the settlement is reached as a result of arm's length negotiations; (2) there has been sufficient investigation and discovery; (3)

[2] Significantly, the "two-step" approval process of FRCP Rule 23(e) is required to facilitate "notice" to absent class members, as FRCP 23(e) expressly requires notice and an opportunity for absent class members to exclude themselves or object. (*See* FRCP 23(e) ["The following procedures apply to a proposed settlement … (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal…. (4) … the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members…. (5) Any class member may object to the proposal if it requires court approval under this subdivision"].) Cal. Rule 3.769 contains similar rules for state court class actions.

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

counsel is experienced in similar litigation; and (4) the percentage of objectors is small. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1802.) Before approving a class action settlement, a trial court must develop an understanding "of the amount that is in controversy and the realistic range of outcomes of the litigation." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 120.).

The proposed settlement meets all of these factors.

1. The Settlement Was Reached Through Arms-Length Bargaining.

The Parties reached the Settlement after an all-day mediation presided over by Honorable Amy D. Hogue (Ret.). (Marquez Decl., ¶¶ 7, 8.) The settlement negotiations were at arm's length and, although conducted in a professional manner, were adversarial. (*Id.* at ¶ 7.) The Parties went into the mediation willing to explore the potential for a settlement of the dispute, but each side was also prepared to litigate their or its position through trial and appeal if a settlement had not been reached. (*Id.*)

2. The Settlement Is Based on Sufficient Investigation and Discovery.

Before the Settlement, Plaintiff's counsel conducted an investigation into the claims alleged by Plaintiff, conducted legal research, and engaged in informal discovery. Based upon the information obtained through informal discovery, Plaintiff's counsel was able to act intelligently and effectively in negotiating the proposed Settlement. (*Id.* at ¶ 9.)

3. Plaintiff's Counsel Have Extensive Experience in PAGA Actions.

Highly capable and experienced counsel conducted the settlement negotiations. Plaintiff's counsel are respected members of the bar with a strong record of vigorous and effective advocacy for their clients, and they are experienced in handling complex wage and hour class action litigation and PAGA actions. (*Id*. at ¶¶ 27-37.) Although Plaintiff and counsel were prepared to litigate the claims in this action, they support the proposed Settlement as being in the best interests of the State of California and the aggrieved employees. (*Id*. at ¶ 7.)

4. Assessing the Amount in Controversy and the Risks of Trial.

Plaintiff and his counsel remain confident of the merits of Plaintiff's claims. (*Id.* at ¶ 10.) However, Plaintiff does acknowledge that his position includes risk and uncertainty, as

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

described in more detail below. For instance, Plaintiff's allegation that Defendant failed to pay Plaintiff and the aggrieved employees all of their owed wages is based on Defendant's failure to pay employees for work performed "off-the-clock." (*Id.*) With respect to the meal period allegation, Plaintiff alleges that Defendant lacked compliant policies providing meal periods during the PAGA Period. (*Id.*) Although Plaintiff contends that this allegation is meritorious, there is risk with this underlying claim, particularly because Defendant issued meal period premiums to its employees and implemented meal period waivers throughout the covered period. (*Id.*) With respect to the rest period allegation, Plaintiff contends that employees, including himself, were not provided with California-compliant rest periods. (*Id.*) Again, despite Plaintiff's contention that this allegation is credible, proving rest period allegations is particularly difficult because rest periods do not have to be recorded and Defendant can argue that the aggrieved employees chose to voluntarily forego their rest periods. (*Id.*) With respect to the unreimbursed business expenses allegation, Plaintiff alleges that Defendant required him and the other aggrieved employees to purchase work-related attire (e.g., steel toed boots) and use their personal vehicles to travel to different job sites throughout the workday, without reimbursement from Defendant. (*Id.*) Defendant disputes this claim. (*Id.*) Lastly, with regard to Plaintiff's wage statement claim, Defendant argues that the wage statements issued to employees meet the requirement of Labor Code § 226(a). (*Id.*)

Additionally, Plaintiff faced a significant risk that even if the Court did award PAGA penalties, the Court could drastically reduce the penalties based on the discretionary factors contained in Labor Code § 2699(e)(2) ("In action by an aggrieved employee…, 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."). Plaintiff believed there was a legitimate risk of the Court significantly reducing penalties given the technical nature of the alleged violations. (Marquez Decl., ¶ 11.)

Without this settlement, the Parties face preparation for trial, as well as extensive formal discovery efforts and depositions. (*Id.*) As a result, the Parties would incur considerably more

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

attorneys' fees and costs through trial. (*Id.*) This settlement avoids those risks and the accompanying expense. Thus, this factor favors settlement approval. (*Id.*)

As described above, the proposed Settlement provides a fair and reasonable monetary recovery for the aggrieved employees and the LWDA in the face of the contested claims. Plaintiff estimated Defendant's realistic exposure for the PAGA penalties as follows:

<u>PAGA Penalties for Unpaid Wages, Meal Period Violations, Rest Period Violations, and Unreimbursed Business Expenses</u>: **$653,780.00**

Plaintiff's expert determined that there were 65,378 pay periods during the relevant time period which presented issues with regard to unpaid wages, meal period violations, rest period violations, and unreimbursed business expenses. (Marquez Decl., ¶ 12.) Plaintiff acknowledges that when evaluating Defendant's potential exposure, it is likely that the Court would impose only the initial $100 violation for all PAGA violations. (*See Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1207 [finding that the "initial" violation rate applies until the employer has been notified that it is violating a Labor Code provision].) Applying the $100 "initial violation" penalty for each of these pay periods, Defendant's potential PAGA exposure is $6,537,800.00 (based on 65,378 pay periods). (Marquez Decl., ¶ 12.) However, Plaintiff discounted this figure by 90% to account for Defendant's contention that the underlying allegations lacked merit, Defendant's largely compliant policies, Defendant's issuance of meal period premiums to the aggrieved employees, Defendant's implementation of meal period waivers throughout the liability period, the risk of not prevailing on the merits, and the Court's discretion in reducing penalties, for a total of $653,780.00. (*Id.*)

<u>PAGA Penalties for Wage Statement Violations:</u> **$322,992.50**

Plaintiff's expert determined that there were 65,378 pay periods at issue with regard to the wage statement violations claim. (*Id.* at ¶ 13.) Because Plaintiff's wage statement theory of liability is predicated on Defendant's issuance of facially deficient wage statements – each of the wage statements issued would carry a potential PAGA penalty. (*Id.*) As Labor Code § 226(e) specifies what penalties are recoverable for violations of § 226(a) ($50 penalty per initial violation and a $100 penalty per subsequent violation, up to an aggregate penalty of $4,000 per

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

employee), the PAGA penalties recoverable through this section mirror the penalties available through § 226(e). (*See* Cal. Lab. Code § 2699(a).) Accordingly, Defendant's maximum exposure for its wage statement violations is $6,459,850.00 ([1,559 "initial" violations x $50 per violation] + [63,819 "subsequent" violations x $100 per violation]). (Marquez Decl., ¶ 13.)

However, based on Defendant's counterarguments (as explained more thoroughly above) and because the Court maintains discretion to reduce these penalties, Plaintiff discounted that figure by 95% for a risk of not prevailing on the merits and to account for the Court's discretion to reduce the penalties (given the highly technical nature of the alleged violations). (*Id.*; *see also Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No. (OPX)) 2011 WL 7563047, at *4 [reducing PAGA penalties from $2.8 million to $500,000]; *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1136 [affirming trial court's finding that awarding maximum PAGA penalties would be unjust].)

Using these estimated figures, Plaintiff predicted that the realistic total potential recovery for the aggrieved employees and the LWDA would be approximately $976,772.50. (Marquez Decl., ¶ 14.) The proposed Settlement of $465,000.00 therefore represents approximately 48% of Plaintiff's reasonably forecasted total recovery. (*Id.*) "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." (*Linney v. Cellular Alaska Partnership* (9th Cir. 1998) 151 F.3d 1234, 1242 [internal quotations omitted].) In this case, continued litigation would delay payment to the LWDA and the aggrieved employees as they await trial and, most likely, appellate proceedings. (Marquez Decl., ¶ 14.) Furthermore, while Plaintiff is confident in the merits of the case, a legitimate controversy exists as to each of the predicate Labor Code violations. (*Id.*) The possibility that the Court finds no liability at the PAGA bench trial is also a risk. (*Id.*) In sum, when the risks of litigation, the burdens of proof necessary to establish liability, and the probability of appeal of a favorable judgment are balanced against the merits of Plaintiff's claims, it is clear that the Settlement amount is fair. (*Id.*) Further, because of the proposed Settlement, the aggrieved employees will receive timely, guaranteed relief and will avoid the risk of an unfavorable

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

judgment. (*Id.*) Plaintiff also recognizes that proving the amount of wages due to each employee would be an expensive, time-consuming, and uncertain proposition. (*Id.*)

If the Court approves the terms of the Settlement, each aggrieved employee's payment will be approximately $41.21 and approximately $192,750.00 will go to the LWDA. (*Id.* at ¶ 15.) In reality, some employees will likely receive more, and others may receive less depending on the length of their employment with Defendant. (*Id.*)

C. **The PAGA Representative Service Payment Is Reasonable.**

Plaintiffs in class action lawsuits are eligible for reasonable incentive payments as compensation "for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Company of Los Angeles* (2010) 186 Cal.App.4th 399, 412.) Courts routinely grant approval of class action settlement agreements containing additional awards for the class representatives, which 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." (*Cellphone Fee Termination Cases* (2010) 186 Cal.App.4th 1380, 1393-94 [citations omitted].)

The Settlement provides for a Service Payment to Plaintiff in an amount not to exceed $10,000.00. (Settlement, ¶ 3.2.3.) The requested service award is intended to recognize: (1) the substantial time and effort that Plaintiff has expended on behalf of the State and aggrieved employees; (2) the risks faced by Plaintiff as a result of bringing this action; (3) the fact that Plaintiff put the interests of the State of California and other aggrieved employees ahead of his own; and (4) the substantial benefit conferred upon the State and the aggrieved employees as a result of Plaintiff's actions. (Marquez Decl., ¶ 16.) Plaintiff has spent numerous hours performing tasks for this case, including, but not limited to, the following: consulting with counsel over the telephone; searching for and producing relevant documents; reviewing documents produced by Defendant and settlement documents; keeping informed of the developments in the case; and participating in decisions concerning the case, including settlement. (*Id*. at ¶ 17; Declaration of Plaintiff Jorge Dagoberto Rivera Camacho ["Camacho

Decl.'], ¶¶ 6-9.) As a result of his efforts, the LWDA and about 1,559 aggrieved employees will receive compensation for civil penalties for underpaid wages and other wage and hour violations. (Marquez Decl., ¶ 17.)

Plaintiff put himself at significant risk in pursuing this action on behalf of the State, as serving as a Plaintiff in a representative action could affect his prospects for future employment. (*Id*. at ¶ 18.) Plaintiff also placed himself at substantial risk because, if Defendant was to prevail in this action, Plaintiff could be liable for Defendant's costs and attorneys' fees. (*Id*.; Camacho Decl., ¶ 12.)

In short, this action would not have been possible without the aid of Plaintiff, who put his own time and effort into this litigation, sacrificed the value of his individual claims by entering into a general release of all known and unknown claims, and placed himself at risk for the sake of the State and the aggrieved employees. (*Id*. at ¶ 19.) Accordingly, the requested Service Payment is reasonable and should be approved by the Court.

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

D. The Requested Attorneys' Fees and Costs Are Reasonable.

A prevailing party in a PAGA action is entitled to recover his attorneys' fees and costs for his claims. (Cal. Lab. Code § 2699(g) ["Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs."].) A fee award is justified where the legal action has produced its benefits by way of a voluntary settlement. (*See, e.g., Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1290-91; *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 352-53.)

Fee awards of roughly one-third of the settlement fund are routinely awarded in California state and federal courts in class and representative PAGA actions. "[F]ee awards in class actions average around one-third of the recovery." (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn. 11 ; *see also In re Pacific Enterprises Securities Litig.* (9th Cir. 1995) 47 F.3d 373, 379 [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 [holding that class counsel's fee award should have been calculated as one-third of the gross settlement fund]; *Chavez v. Saticoy Lemon Ass'n* (Cal. Super. Ct. Ventura Cty. Aug. 10, 2015) Case No. 56-2015-00468600-CU-OE-VTA, 2015 WL

5561118 [approving attorneys' fees of one-third of settlement fund in representative PAGA settlement]; *Clavel v. Lupe's Thousand Oaks Mexican Restaurant, Inc.* (Cal. Super. Ct. Ventura Cty. Mar. 25, 2016) Case No. 56-2015-00467353-CU-OE-VTA, 2016 WL 1601221 [same].)

The fee award requested here ($155,000.00, representing 1/3 of the $465,000.00 Gross Settlement Amount) is justified because Plaintiff's counsel achieved a significant monetary recovery for the aggrieved employees and the LWDA in an uncertain and risky case while bearing the substantial burdens of representation on a contingency basis, and the fees requested are in line with the market rates described above. Plaintiff's counsel expended significant time and resources in litigating this case, which resulted in a favorable result for the LWDA, Plaintiff, and the aggrieved employees. Plaintiff's counsel elected to bear the contingency risk of this litigation for the benefit of the aggrieved employees, as well as for the State of California (who elected not to take the case after receiving the PAGA notice). (Marquez Decl., ¶¶ 39-42.)

Critically, this settlement exceeds other PAGA awards approved by courts. (*See, e.g., Aguirre v. DSW, Inc.* (C.D. Cal. Nov. 29, 2012) 2012 WL 11875296, *3 [approving $10,000 PAGA payment]; *Garcia v. Gordon Trucking, Inc.* (E.D. Cal. Oct. 31, 2012) 2012 WL 5364575, *7 ["GTI agrees to allocate $10,000 to Plaintiffs' PAGA claims, and will pay $7,500 to the LWDA, and $2,500 to participating Class Members on a pro-rata basis. This comports with settlement approval of PAGA awards in other cases. [Citations.] Therefore, the Court will approve the allocation of the Settlement to Plaintiffs' PAGA claim."]; *Boyd v. Bank of America Corp.* (C.D. Cal. Nov. 18, 2014) 2014 WL 6473804, *8 [approving $18,750 PAGA payment]; *Franco v. Ruiz Food Prods.* (E.D. Cal. Nov. 27, 2012) 2012 WL 5941801, *14 [approving $10,000 PAGA payment]; *Chu v. Wells Fargo Investments, LLC* (N.D. Cal. Feb. 16, 2011) 2011 WL 672645, *1 [approving $10,000 PAGA payment]; *cf. Nordstrom Comm'n Cases* (2010) 186 Cal.App.4th 576, 589 [holding that trial court did abuse its discretion in approving wage and hour class action settlement that involved PAGA claims even though no settlement money was allocated to the PAGA claims and paid to the LWDA].) The fact that Plaintiff's counsel achieved these results without engaging in a protracted legal battle, in the face of serious defense challenges and an uncertain legal landscape, confirms the strength of the results achieved.

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

As discussed above, this case carried substantial risk as to the merits as well as the potential of the Court drastically reducing penalties in the context of a contested trial or summary judgment proceeding. Accordingly, it is fair and reasonable to account for these risks in compensating Plaintiff's counsel. Since undertaking this representation, Plaintiff's counsel has dedicated substantial resources to this litigation, including approximately $19,038.39 in costs, without receiving any compensation to date. (Marquez Decl., ¶¶ 20, 26.) Plaintiff's counsel conducted extensive legal research regarding the merits of Plaintiff's claims, his ability to recover penalties under the PAGA, and Defendant's potential defenses. (*Id.* at ¶ 9.) Plaintiff's counsel expended significant additional effort in preparing formal settlement documents and this Motion to Approve PAGA Settlement. (*Id*. at ¶ 17.) Given the considerable potential for adverse outcomes in this case, including, but not limited to, Defendant defeating Plaintiff's claims on the merits, and/or facing a drastic reduction to potential PAGA penalties, the contingent risk borne by Plaintiff's counsel was great. The quality of Plaintiff's counsel's work, and the efficiency and dedication with which it was performed, should be compensated.

Plaintiff's counsel's previous experience in litigating similar class and representative actions also supports the reasonableness of the fee request. Plaintiff's counsel brings extensive plaintiff-side wage and hour class, collective, and representative action experience. (*Id*. at ¶¶ 27-37.) They have been found to be adequate counsel in numerous cases alleging wage and hour claims. (*Id.* at ¶ 37.) Practice in the narrow field of wage and hour litigation requires skill and knowledge concerning the rapidly evolving substantive state and federal law, as well as the procedural law of class and representative action litigation. Because it is reasonable to compensate Plaintiff's counsel commensurate with its skill, reputation, and experience, a fee award of 1/3 of the Gross Settlement Amount is reasonable.

Plaintiff's request for reimbursement of actual litigation costs of $25,000.00 is also fair and reasonable. As the evidence submitted herewith shows, all of Plaintiff's litigation costs are documented and reasonably incurred. (*See* Marquez Decl., Ex. 4. [Expense Summary].)

E. <u>Settlement Administrator Costs Are Reasonable.</u>

The Settlement Administrator Costs in the amount of $18,000.00 are reasonable, given

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

the tasks to be performed by the Settlement Administrator, including, but not limited to, the following duties: mailing and re-mailing (if necessary) checks to approximately 1,559 aggrieved employees and the LWDA; establishing a QSF; preparing and submitting to aggrieved employees and government entities all appropriate tax filings and forms; distributing the PAGA Representative Service Payment and attorneys' fees and costs; keeping the Parties timely apprised of the performance of all obligations under the Settlement; and voiding uncashed or undeliverable checks to issue those funds to the California Controller's Unclaimed Property Fund. (Settlement, ¶ 4.4.3.) Plaintiff respectfully requests that the Court approve the requested costs.

IV. CONCLUSION.

For the reasons set forth above, Plaintiff requests that the Court grant this Motion and approve the Parties' PAGA Settlement.

Respectfully submitted,

Dated: February 29, 2024

WILSHIRE LAW FIRM

By: ______________________

Justin F. Marquez
Benjamin H. Haber
Arrash T. Fattahi

Attorneys for Plaintiff

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137

PROOF OF SERVICE

Camacho, et al. v. Braga Fresh Foods, LLC
22CV002573

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, Zeyra Ceballos, state that I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 3055 Wilshire Blvd., 12th Floor, Los Angeles, California 90010. My electronic service address is zceballos@wilshirelawfirm.com.

On **February 29, 2024**, I served the foregoing **PLAINTIFF'S NOTICE OF MOTION AND MOTION TO APPROVE PAGA SETTLEMENT**, on the interested parties by placing a true copy thereof, enclosed in a sealed envelope by following one of the methods of service as follows:

Alden J. Parker (SBN 196808)
aparker@fisherphillips.com
Rebecca Hause-Schultz (SBN 292252)
rhause-schultz@fisherphillips.com
Christopher J. Truxler (SBN 282354)
ctruxler@fisherphillips.com
Christina M. Anton (SBN 340329)
canton@fisherphillips.com
Alexandra H. Mills (SBN 345837)
amills@fisherphillips.com
Vicki Rathke
vrathke@fisherphillips.com
Alicia Malerbi
amalerbi@fisherphillips.com
Nancy Galeno
ngaleno@fisherphillips.com
Desiree Herrera
dherrera@fisherphillips.com
FISHER & PHILLIPS LLP
621 Capitol Mall, Suite 1400
Sacramento, California 95814
Telephone: (916) 210-0400
Facsimile: (916) 210-0401

Attorneys for Defendant

///

///

(X) **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known email address or e-mail of record in this action.

I declare under the penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on **February 29, 2024** at Los Angeles, California.

Zeyra Ceballos

WILSHIRE LAW FIRM, PLC
3055 Wilshire Blvd, 12th Floor
Los Angeles, CA 90010-1137