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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 SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO APPROVE PAGA SETTLEMENT** [*Filed concurrently with*: Supplemental Declaration of Justin F. Marquez; Supplemental Declaration of Plaintiff Jorge Dagoberto Rivera Camacho; and [Proposed] Order] APPROVAL HEARING: Date: May 3, 2024 Time: 8:30 a.m. Dept: 15

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Plaintiff Jorge Dagoberto Rivera Camacho ("Plaintiff") submits this supplemental memorandum of points and authorities in support of his unopposed Motion to Approve PAGA Settlement (the "Motion"). The PAGA Settlement Agreement ("Settlement Agreement" or "Settlement") is attached as Exhibit 2 to the Declaration of Justin F. Marquez in Support Plaintiff's Motion ("Marquez Decl."), which was filed concurrently with the Motion on February 29, 2024. The Settlement provides for a settlement amount of $465,000 for 1,559 individuals in compromise of the Private Attorneys General Act ("PAGA") claims raised by Plaintiff, on behalf of himself, the State of California, and all persons who were hourly-paid or non-exempt employees of Defendant Braga Fresh Foods, LLC ("Defendant," and together with Plaintiff, the "Parties") in California at any time between May 7, 2021 to December 15, 2023.

On February 29, 2024, Plaintiff filed his Motion. (Supplemental Declaration of Justin F. Marquez ["Supp. Marquez Decl."], ¶ 11.) On March 22, 2024, counsel for the Parties appeared for the hearing on the Motion. (*Id.*) At the March 22, 2024 hearing, the Court stated that additional information was needed regarding the claims and Settlement prior to proceeding towards approval of the Settlement. (*Id.*) This Supplemental Memorandum, along with the Supplemental Declarations of Justin F. Marquez and Plaintiff ("Supp. Camacho Decl."), is now being submitted to the Court to address the concerns the Court raised at the March 22, 2024 hearing on the Motion.

II. THE PAGA REPRESENTATIVE AWARD TO PLAINTIFF SHOULD BE APPROVED BECAUSE IT IS FAIR, ADEQUATE, AND REASONABLE.

Courts routinely approve enhancement payments to compensate plaintiffs for the services they provide and the risks they incur during class/PAGA action litigation, often in much higher amounts than sought here. (*See, e.g.*, *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 726 [upholding "service payments" to plaintiffs for their efforts in bringing the case]; *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F.Supp. 294 [approving a $50,000 enhancement award for the named class representative].) The PAGA Representative

Award sought in this case is reasonable and rewards the Plaintiff for the time and effort he has spent on the case. (Theodore Eisenberg and Geoffrey P. Miller, "Incentive Awards to Class Action Plaintiffs: An Empirical Study," 53 UCLA L. Rev. 1303, 1316 (2006) ["From a doctrinal perspective, incentive awards have been justified as a form of restitution for a benefit conferred on others."] [*citing In re Cont'l Ill. Sec. Litig.* (7th Cir. 1992) 962 F.2d 566, 571].)

1. <u>The PAGA Representative Award is a Small Percent of the Settlement Amount.</u>

Here, the Settlement provides for a PAGA Representative Award of $10,000 for the Plaintiff. (Supp. Marquez Decl., ¶ 12.) Plaintiff's PAGA Representative Award of $10,000 amounts to **<u>2 percent</u>** of the Settlement Amount ($10,000 / $465,000 = 2%). (*Id.*) This is a relatively small percentage considering the time Plaintiff has spent on this matter. (*See, generally,* Supp. Camacho Decl.) Additionally, Plaintiff is not receiving any additional consideration as part of the Settlement. (*Id.* at ¶ 5; Declaration of Plaintiff Jorge Dagoberto Rivera Camacho ["Camacho Decl."], ¶ 13.) As such, awarding Plaintiff $10,000 as a PAGA Representative Award is fair and reasonable in these circumstances.

2. <u>The Time and Effort Plaintiff Expended on This Litigation Justifies the PAGA Representative Award.</u>

Plaintiff has spent a considerable amount of time on this matter, which ultimately led to the settlement of Plaintiff's PAGA claims. As part of Plaintiff's initial declaration, filed concurrently with the Motion, Plaintiff estimated that he spent approximately 40 hours on this case. (Camacho Decl., ¶ 6.) Plaintiff's declaration outlined Plaintiff's efforts in this case undertaken on behalf of the absent aggrieved employees. (*Id.* at ¶¶ 7-9.) These efforts include, *inter alia*: Plaintiff speaking on the phone with his attorneys to get updates about the case and providing his attorneys with information regarding the matter; looking for documents relevant to the case to send to his attorneys; reviewing legal documents, including the retainer and Settlement Agreement, in detail; being available on the day of mediation and being in continuous contact with his attorneys regarding questions or issues that arose at mediation. (*Id.*) At the March 22, 2024 hearing on the Motion, the Court requested that Plaintiff provide additional factual specifics regarding Plaintiff's efforts in furtherance of this matter. In addition to the work outlined in Plaintiff's initial declaration, Plaintiff's additional efforts in this case include, *inter alia*: participating in a comprehensive "intake process" (in November 2021) where Plaintiff's potential claims were thoroughly discussed with a Wilshire Law Firm representative; communicating with Wilshire Law Firm regarding the retainer agreement and next steps regarding the matter, which included over a dozen phone calls, emails, and text messages; reviewing his personnel file (which spans over 100 pages) with his attorneys; discussing the potential claims in further detail with his attorneys; reviewing the arbitration agreement with his attorneys and discussing the impact of such on the matter; participating in multiple "pre-mediation" calls with his attorneys regarding the August 2023 mediation; and communicating with his attorneys after the mediation regarding the Settlement and approval process. (Supp. Camacho Decl., ¶ 5.) Notably, Plaintiff decided to forego pursuit of his individual claims in favor of a PAGA resolution and to ensure a fair result for the aggrieved employees as a whole and the State of California.

3. <u>The Risks That Plaintiff Undertook Justifies the PAGA Representative Award.</u>

In prosecuting the action as outlined above, Plaintiff has exposed himself to significant risks, including the risk that he could have been ordered to pay Defendant's attorneys' fees and costs if this action had been unsuccessful (*see* California Labor Code §§ 218.5-218.6), as well as the risk that he could, in the future, face a potentially hostile work environment and worsened career prospects for suing a prior employer for wage and hour violations and serving as a Plaintiff in a PAGA lawsuit. (Supp. Marquez Decl., ¶ 13.) Further, Plaintiff, as the PAGA representative, ran the risk of having to potentially pay outrageous fee and/or cost awards if the claims were unsuccessful. (*Id.*) Such cost awards could be higher than the net of the Settlement Amount. (*Id.*) It is unfair in the view of the substantial risk of an adverse fee or cost award of several thousand dollars that Plaintiff receive less as a reward for taking such a risk. Moreover, Plaintiff is not high wage earner. Plaintiff, for example, was earning approximately $16.00 per hour before his employment ended. (Supp. Camacho Decl., ¶ 3.) Even the lowest of the cost awards would have devastating consequences for Plaintiff in view of his modest earnings. (Supp. Marquez Decl., ¶ 13.)

4. The Public Policy Behind Collective Actions Justifies the PAGA Representative Award.

The public policy behind class and PAGA actions that seek an aggregate recovery of otherwise small amounts of money is equally important and has been recognized by the courts. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (*Amchem Products, Inc. v. Windsor* (1997) 521 U.S. 591, 617 [*quoting Mace v. Van Ru Credit Corp.* (1997) 109 F.3d 338, 344].) "Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers are often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct." (*Vasquez v. Super. Ct.* (1971) 4 Cal.3d 800, 808.) "A current employee who individually sues his or her employer is at greater risk of retaliation. We have recognized that retaining one's employment while bringing formal legal action against one's employer is not a viable option for many employees." (*Gentry v. Super. Ct.* (2007) 42 Cal.4th 443, 459 [*quoting Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 821].) If would-be class or PAGA action plaintiffs are not adequately incentivized to assume the risk of a substantial cost award, it is unlikely that they will bring such lawsuits in the first place.

5. The Risk of Impairment to Plaintiff's Job Prospects Justifies the PAGA Representative Award.

Plaintiff faces worsened career prospects for suing a former employer for wage and hour violations and serving as a plaintiff in a PAGA lawsuit. (Supp. Marquez Decl., ¶ 14; Camacho

Decl., ¶ 11.) Because this lawsuit was filed in the California Superior Court, a public record now exists that Plaintiff sued his employer for Labor Code violations – a fact that won't be lost on prospective employers considering him for a job. Common sense dictates that an employer will think twice about hiring someone who sued his or her last employer. California even has laws to address this risk: Labor Code § 1102.5 prohibits retaliation against employees who speak up about Labor Code violations and Labor Code § 98.6 prohibits discrimination against employees who bring Labor Code violations to the attention of the Labor Commissioner. Thus, the risk to Plaintiff's future employment shows that the PAGA Representative Award sought is fair, adequate, and reasonable, and warrants approval of the Court. (Supp. Marquez Decl., ¶ 15.)

6. <u>Plaintiff Has Achieved a Result the PAGA Group Can Be Proud Of.</u>

In view of the risks, Plaintiff achieved a result the aggrieved employees can be proud of. There were significant risks (as outlined in Plaintiff's Motion and this Supplemental Memorandum) to any award on behalf of the aggrieved employees and Plaintiff still achieved a settlement of $465,000. This outstanding result calls for a significant award to Plaintiff for making the result possible.

III. ADDITIONAL FACTUAL INFORMATION REQUESTED BY COURT AT MARCH 22, 2024 HEARING.

As briefly described above, the Court requested that Plaintiff provide additional information regarding the facts of the case, claims at issue, and Settlement prior to proceeding towards approval of the Settlement. (Supp. Marquez Decl., ¶ 11.)

On May 27, 2022, Plaintiff filed a *class action* matter against Defendant alleging that Defendant: (1) failed to pay minimum and straight time wages; (2) failed to pay overtime wages; (3) failed to provide meal periods; (4) failed to authorize and permit rest periods; (5) failed to timely pay final wages at termination; (6) failed to provide accurate itemized wage statements; (7) failed to indemnify employees for expenditures; and (8) engaged in unfair business practices (Monterey County Superior Court, Case No. 22CV001470). (Supp. Marquez Decl., ¶ 2.) On August 3, 2023, Defendant filed a Motion to Compel Arbitration and to Dismiss and/or Stay

Proceedings (the "Motion to Compel Arbitration") in the class action matter. (*Id.* at ¶ 3.) Following the filing of the Motion to Compel Arbitration, the Parties engaged in additional meet and confer efforts regarding the Motion to Compel Arbitration and Plaintiff agreed to dismiss his class claims, without prejudice, and arbitrate his individual claims. (*Id.*) On December 1, 2022, Plaintiff's class action claims were dismissed, without prejudice, and his individual claims were sent to arbitration. (*Id.*)

On August 29, 2022, Plaintiff filed the present PAGA representative action against Defendant stemming 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. (Marquez Decl., ¶ 4.) In or around April 2023, Plaintiff's individual PAGA claim against Defendant was sent to arbitration and his representative PAGA claims were stayed. (Supp. Marquez Decl., ¶ 4.)

In lieu of engaging in arbitration, the Parties agreed to pursue private mediation in August 2023 in an effort to resolve all of Plaintiff's remaining claims (i.e., individual wage and hour claims, individual PAGA claim, and representative PAGA claims). (*Id.* at ¶ 5.) The Parties did not engage in formal discovery prior to agreeing to private mediation. (*Id.*) Instead, the Parties opted to participate in an informal discovery exchange prior to the August 2023 mediation. (*Id.*) As part of Defendant's informal discovery production, Defendant produced all of its relevant policy documents that were in effect during the liability period and an approximately 5% randomized sampling of timekeeping and payroll records for the aggrieved employees, which included over 17,000 shifts for Plaintiff's counsel to review. (*Id.* at ¶ 6.) When entered into a sample size calculator, the number of shifts in the sampling indicated a margin of error of less than 1% on a 99% confidence interval. (*Id.*)

Based on information from Plaintiff and Defendant, Plaintiff's counsel and expert were able to analyze the allegations underlying Plaintiff's PAGA claim to determine Defendant's maximum exposure. (*Id.* at ¶ 7.) With regard to Defendant's failure to pay for all hours worked, Plaintiff's counsel found that Plaintiff and the other aggrieved employees regularly performed work for Defendant during unpaid meal periods and after clocking out for the workday. (*Id.* at ¶ 8.) However, given that off-the-clock claims are difficult to prove as they tend to be based on anecdotal evidence, this allegation was significantly discounted by Plaintiff's counsel headed into mediation. (*Id.*) Regarding the meal period allegation, Plaintiff's expert found a meal period violation rate of less than 2% given that Defendant utilized meal period waiver agreements throughout the liability period and issued meal period premiums to the aggrieved employees for most of non-waivable meal period violations. (*Id.*) With respect to the rest period allegation, Plaintiff alleged that Defendant required him and similarly situated class members to work in lieu of taking rest periods, or their rest periods were missed or interrupted. (*Id.*) However, similar to the off-the-clock claim above, this claim was heavily discounted by Plaintiff's counsel going into mediation given that Defendant maintained a compliant rest period policy, rest periods do not need to be recorded (meaning that anecdotal evidence is required to prove such), and there is a strong possibility that the aggrieved employees voluntarily chose to forego their rest periods. (*Id.*) Lastly, Plaintiff's allegation that Defendant failed to reimburse employees for necessary business-related expenses was based on Plaintiff's position that Defendant required its employees to purchase work-related attire and use their personal vehicles for work-related purposes. (*Id.*) Although Plaintiff maintained the position that Defendant failed to reimburse employees for the aforementioned expenses, Plaintiff's counsel acknowledged the difficulty associated with proving this allegation, particularly in light of the fact that Defendant held the position that its policies and practices in this regard were compliant with California law. (*Id.*)

Ultimately, as highlighted in Plaintiff's Motion, Plaintiff's expert found 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.) However, it would be unlikely for the Court to assess a $100 penalty for each of these pay periods in light of Defendant's contention that the underlying allegations lacked merit, Defendant's largely compliant policies, the meal period violation rate of 2%, 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, the risk of arbitration potentially eviscerating Plaintiff's PAGA claims, and the Court's discretion in reducing penalties (particularly in light of Defendant's corrective measures). (Supp. Marquez Decl., ¶ 9.) As such, the maximum exposure of $6,537,800.00 was discounted by 90% to account for the aforementioned factors, yielding a realistic damages estimate of $653,780.00. (Marquez Decl., ¶ 12.) With respect to the wage statement violations, although Plaintiff's expert determined that there were 65,378 pay periods during the relevant time period that had potential wage statement violations, Plaintiff discounted the maximum exposure of $6,459,850.00 ([1,559 "initial" violations x $50 per violation] + [63,819 "subsequent" violations x $100 per violation]) by 95% in light of the fact that the wage statement violations were <u>isolated occurrences</u> (as opposed to a systematic issue) given that Defendant largely maintained compliant wage statements in accordance with Labor Code § 226 throughout the liability period, Defendant issued meal period premiums for nearly all of the facially non-compliant meal periods seen in the records, and it would be difficult to assess a wage statement penalty for the other underlying allegations (for off-the-clock work and rest period violations) given their anecdotal nature. (*Id.* at ¶ 12; Supp. Marquez Decl., ¶ 10.)

Using these estimated figures, Plaintiff predicted that the realistic total potential recovery for the aggrieved employees and the Labor Workforce & Development Agency ("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].) This is an excellent result given the uncertainty associated with proceeding forward with this action, particularly in light of the arbitration agreement at issue.

IV. JUSTIN F. MARQUEZ'S SUPPLEMENTAL DECLARATION PROVIDES AN UPDATED COSTS SHEET & CONTEMPORANEOUS ATTORNEY BILLING RECORDS.

At the March 22, 2024 hearing on the Motion, the Court stated that Plaintiff's costs sheet needs to provide more detail and timesheets need to be provided for the attorneys that have worked on this matter. Such has been provided as part of Justin F. Marquez's Supplemental Declaration for the Court's review. (Supp. Marquez Decl., ¶¶ 16-17; Exs. A & B.)

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 in Plaintiff's Motion. 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.)

Additionally, Plaintiff's request for reimbursement of actual litigation costs of up to $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. (Supp. Marquez Decl., ¶ 17; Ex. B.)

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V. CONCLUSION.

For the reasons stated above and in Plaintiff's Motion, this Court should grant Plaintiff's Motion to Approve PAGA Settlement in its entirety.

Dated: April 26, 2024

WILSHIRE LAW FIRM

By: ______________________________

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

Attorneys for Plaintiff

PROOF OF SERVICE

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

22CV002573

STATE OF CALIFORNIA)
) ss
COUNTY OF IRVINE)

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 15707 Rockfield Blvd., Suite 250, Irvine, California 92618. My electronic service address is zceballos@wilshirelawfirm.com.

On **April 26, 2024**, I served the foregoing, **PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 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:

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(X) **BY E-MAIL:** I hereby certify that this document was served from Irvine, 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.

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

Executed on **April 26, 2024** at Irvine, California.

Zeyra Ceballos