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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 FOR THE COUNTY OF RIVERSIDE

13  
14 DONNA HOLLEY, and PAUL WILLIAMS, as  
aggrieved employees pursuant to the Private  
15 Attorneys General Act ("PAGA"),

16 Plaintiff,

17 v.

18 24 HOUR FITNESS USA, INC., a California  
19 corporation; and DOES 1 through 10, inclusive,

20 Defendants.  
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Case No.: RIC1602246

CLASS ACTION

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION  
TO APPROVE SETTLEMENT PURSUANT  
TO PRIVATE ATTORNEYS GENERAL ACT  
OF 2004**

Date: July 11, 2018  
Time: 8:30 a.m.  
Judge: Hon. Craig G. Riemer  
Dept.: Department 5

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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Plaintiffs Donna Holley and Paul Williams seek approval of an \$11 million non-reversionary Settlement for civil penalties against Defendant 24 Hour Fitness USA, Inc. (“Defendant” or “24 Hour”) under the California Labor Code Private Attorneys General Act of 2004 (“PAGA”; Labor Code §§ 2698, *et seq.*). The Settlement resolves the present action as well as the following two additional PAGA actions for alleged violations of the Labor Code at 24 Hour’s health club facilities in California: *Madrigal v. 24 Hour Fitness USA, Inc.* (Orange County Superior Court, Case No. 30-2014-00235568) (“*Madrigal*”) and *Vorise v. 24 Hour Fitness USA, Inc.* (Contra Costa County Superior Court, Case No. CIV-MS15-02051) (“*Vorise*”). Each action has been separately, intensely litigated for more than two years—up to almost four years for *Madrigal*—and each action has overcome several challenges to the pleadings and contentious discovery battles. Defendant filed petitions for appeal up to the California Supreme Court in *Madrigal* and *Vorise*, which were denied. Defendant has denied, and continues to deny, the allegations that it has violated the Labor Code with respect to employees in California.

In early 2018, the Parties began to explore the possibility of a global resolution that would resolve all of the pending PAGA actions. On February 27, 2018, the Parties mediated the cases with Jeff Ross, a respected mediator of employment actions. The mediation was productive, and through serious, arms-length negotiations thereafter, the Parties ultimately reached an \$11,000,000.00 global Settlement that resolves all of the claims in these actions. The Parties have memorialized their agreement in the Private Attorneys General Act Settlement Agreement and Release (the “Settlement”) that is the subject of this Motion.<sup>1</sup>

The basic terms of the Settlement are as follows: (1) the Maximum Settlement Amount is \$11,000,000.00; (2) no portion of the Maximum Settlement Amount will revert to Defendant; (3) a Net Settlement Amount of approximately \$7,103,333.00 will be available for distribution to the State of California and the “aggrieved employees” (the “PAGA Settlement Employees”); (4) the Net Settlement Amount will be allocated between a General PAGA Penalties Fund (63.5% of the Net Settlement Amount) and a 558 Civil Penalties Fund for PAGA penalties under Labor Code § 558 (36.5% of the Net Settlement Amount); (5) 75% of the General PAGA Penalties Fund will be paid to the State of

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<sup>1</sup> A true and correct copy of the Settlement is attached as **Exhibit 1** to the Declaration of Raul Perez in Support of Motion to Approve Settlement Pursuant to Private Attorneys General Act of 2004 (“Perez Decl.”). Proof of service of the Settlement to the LWDA is attached as Exhibit 2 to the Perez Decl.

California, and 25% will be paid to the PAGA Settlement Employees; (6) 100% of the 558 Civil Penalties Fund will be paid to the PAGA Settlement Employees; (7) General Release Payments of \$15,000.00, each, will be paid to the four Named Plaintiffs in these actions for their release of all claims against Defendant; (8) the actual costs and expenses of the Settlement Administrator, CPT Group, Inc. (“CPT Group”), currently estimated to be \$70,000.00, will be paid from the Maximum Settlement Amount; (7) 33 1/3% (thirty-three and one-third percent) of the Maximum Settlement Amount for attorneys’ fees will be split among Plaintiffs’ respective counsel in the three actions; and (8) actual costs will be reimbursed to Plaintiffs’ counsel in an amount not to exceed \$100,000.00.

Plaintiffs now seek this Court’s approval of this PAGA-only Settlement. The Settlement merits full approval because it fulfills the purpose of PAGA (i.e., to deter potential violations of the Labor Code and to provide relief that is genuine, meaningful, and consistent with California’s goal of benefitting the public through enforcement of labor laws). Delivering an excellent result for the State and the alleged “aggrieved employees”, this Settlement makes more than \$3,700,000.00 available to the PAGA Settlement employees and requires Defendant to pay more than \$3,300,000.00 in PAGA penalties to the State of California. These sizeable payments of civil penalties vindicate the purpose and goals of PAGA.

Because this is a PAGA-only settlement, the process for approval is straightforward: “The superior court shall review and approve any settlement of any civil action filed pursuant to this part.” Labor Code § 2699(l)(2). Based on the California Supreme Court’s holdings in *Arias v. Superior Court*, 46 Cal. 4th 969 (2009) and *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), there is no requirement under PAGA for Plaintiffs to establish the requirements of class certification (i.e. numerosity, typicality, commonality and adequacy), nor is there the two-step preliminary and final approval process applicable to class actions. Rather, this Settlement simply requires a one-step review and approval process.

For these reasons and those discussed below, Plaintiffs respectfully request that the Court approve the Settlement.

## **II. FACTS AND PROCEDURE**

### **A. Madrigal Action**

Plaintiff Alyssa Madrigal filed the first of these actions on July 22, 2014 in Orange County Superior Court, alleging a PAGA-only suit for Defendant’s failure to provide Kids Club Attendants (“KCAs”) with compliant rest breaks. Plaintiff Madrigal was a non-exempt, former KCA who worked at six different 24 Hour locations in Irvine, Costa Mesa, and Huntington Beach; she seeks penalties for alleged Labor Code violations on behalf of herself and all other KCAs. KCAs are employed to supervise

1 members' children while they exercise. Her complaint alleges that Defendant failed to provide KCAs in  
2 California with rest periods, and as a result, failed to provide itemized and accurate wage statements and  
3 failed to maintain accurate payroll records in compliance with California law. In January 2015, Plaintiff  
4 Madrigal filed a First Amended Complaint adding allegations that Defendant failed to pay overtime to  
5 the KCAs in compliance with California law. Declaration of Aashish Desai in Support of Motion to  
6 Approve Settlement Pursuant to Private Attorneys General Act of 2004 ("Desai Decl."), ¶ 12.

7 Plaintiff Madrigal propounded discovery seeking the names, contact information, and time-  
8 keeping records for KCAs within the relevant time period. Defendant objected to this discovery and so  
9 Plaintiff Madrigal filed a motion to compel. After the Court denied the motion and stayed all discovery,  
10 Plaintiff Madrigal filed a writ petition to appeal this ruling as conflicting with the holding in *Arias v.*  
11 *Superior Court*, 46 Cal.4th 969, 975-987 (2009), that PAGA cases are not required to meet class action  
12 requirements. Soon after this writ was denied on June 29, 2015, Plaintiff Madrigal moved the Court to  
13 re-consider its ruling in light of review being accepted by the California Supreme Court in *Williams v.*  
14 *Superior Court*, 3 Cal. 5th 531 (2017).<sup>2</sup> The Court then ordered the production of contact information  
15 for KCAs at the club locations where Madrigal worked. Desai Decl., ¶¶ 13-21.

16 Defendant contested the order and filed its own Motion for Reconsideration shortly thereafter.  
17 The Court denied this motion, and then Defendant agreed to provide the contact information for the  
18 KCAs that worked at facilities where Madrigal worked pursuant to a *Belaire-West* notice process.  
19 Defendant provided the names in April 2016. Plaintiff Madrigal continued to seek Court intervention to  
20 obtain the contact information and timekeeping data for all KCAs, ultimately obtaining the names and  
21 last known contact information for all KCAs employed in California during the liability period.  
22 Defendant also produced time data and Kids Club swipe records (showing entry and exit into the Kids  
23 Clubs) for 20% of the KCAs employed in California since July 22, 2013 (approximately 956  
24 individuals). Desai Decl., ¶¶ 15-17.

25 In an effort to create a manageable trial plan, Plaintiff Madrigal proposed that Defendant  
26 stipulate that the 20% sample of time data and Kids Club swipe records is representative of the time data  
27 and swipe records for all 5,050 KCAs. Defendant did not agree, and Plaintiff Madrigal proposed that  
28 Defendant produce additional data for all the KCAs. At a December 2017 Status Conference, the Court  
29

30  
31 <sup>2</sup> In *Williams*, the California Supreme Court ruled that PAGA did not contain any heightened  
32 proof standard prior to discovery and extended PAGA discovery as broadly as class action discovery. 3  
Cal.5th at 544.

1 ordered the Parties to meet and confer about the production of the additional data so the Parties could  
2 proceed with crafting a trial plan. Desai Decl., ¶¶ 17-19.

3 Plaintiff Madrigal also successfully opposed a Motion for Summary Judgment. After the Court  
4 denied the Motion, Defendant appealed the ruling up to the California Supreme Court, but the appeal  
5 was denied. Desai Decl., ¶ 22.

6 At present, Plaintiff Madrigal has taken six depositions: two Person Most Knowledgeable  
7 witnesses and four Operations Managers who worked at locations where Plaintiff Madrigal worked. She  
8 has served two sets of special interrogatories and document requests, and has engaged in the extensive  
9 motion practice related to discovery described above. Plaintiff Madrigal has also been deposed by  
10 Defendant on two separate days. Plaintiff Madrigal's counsel has extensively analyzed and investigated  
11 the KCA claims, and prepared a detailed damages analysis model based on its findings. Desai Decl., ¶¶  
12 13, 20, 24-25.

### 13 **B. Vorise Action**

14 Plaintiff Vorise filed his action in Contra Costa County Superior Court on November 5, 2015.  
15 Plaintiff Vorise worked for Defendant as a non-exempt Service Representative, Lead Service  
16 Representative, and Athletic Monitor from November 2012 until October 2014 at four club locations in  
17 San Diego. *Id.* at ¶ 9. He alleged various Labor Code violations against Defendant on behalf of himself  
18 and a putative class of non-exempt employees, including (1) failure to authorize, permit, and make  
19 available meal and rest periods, (2) waiting time penalties, (3) failure to provide accurate, itemized wage  
20 statements, and (4) unfair competition pursuant to California's Business and Professions Code. Plaintiff  
21 Vorise also brought PAGA claims predicated on the above violations. Declaration of Carolyn Hunt  
22 Cottrell in Support of Motion to Approve Settlement Pursuant to Private Attorneys General Act of 2004  
23 ("Cottrell Decl."), ¶ 8.

24 Following extensive motion practice and discovery, on May 25, 2016, the Court entered an order  
25 compelling arbitration of Plaintiff Vorise's individual claims, dismissing his putative class claims,  
26 severing his representative PAGA claims, and staying the action pending arbitration. On June 17, 2016,  
27 Plaintiff Vorise requested dismissal of his individual claims without prejudice and the Court entered the  
28 dismissal as requested. Defendant moved to vacate the dismissal, and the Court denied the motion on  
29 July 22, 2016. Plaintiff Vorise's PAGA-only claims are all that remain in the *Vorise* action. Cottrell  
30 Decl., ¶¶ 11-12.

31 Defendant next filed a demurrer challenging the sufficiency Plaintiff Vorise's PAGA Notice.  
32 The Court issued its order overruling Defendant's demurrer on December 21, 2016. Following the

1 Court's certifying its denial of the demurrer for interlocutory review, Defendant filed a Petition for Writ  
2 of Mandate seeking review of that order, which the Court of Appeal denied on January 12, 2017.  
3 Defendant filed a Petition for Review of the Court of Appeal's Order with the California Supreme Court.  
4 Plaintiff Vorise opposed the petition, and the California Supreme Court denied it on March 15, 2017.  
5 Cottrell Decl., ¶ 13.

6 Once all issues relating to Defendant's demurrer were put to rest, significant discovery disputes  
7 followed. Plaintiff Vorise was required to litigate two motions to compel—both of which successfully  
8 compelled Defendant to produce substantial informational, documentary, and data-based evidence. As a  
9 result of these motions, and in addition to other common documentary evidence (policies, handbooks,  
10 job descriptions, training modules, etc.) Defendant has produced, or was in the process of producing, the  
11 following:

- 12 • The names, addresses, telephone numbers, timekeeping data, and meal period premium data for  
13 employees at the four clubs where Plaintiff Vorise worked, as well as four other club locations  
14 Plaintiff Vorise unilaterally selected;
- 15 • The names, addresses, and telephone numbers for a 40% random sample of all non-exempt,  
16 hourly employees who worked at any other clubs in California from October 3, 2014 to the  
17 present. This sample provides the complete contact information for in excess of 14,000  
18 aggrieved employees;
- 19 • For these 14,000-plus employees, the timekeeping data, meal/rest period premium data, and final  
20 payroll data for a 60% random sample of this group – in other words, relevant data for over  
21 8,000 aggrieved employees;
- 22 • All meal period waivers and on-duty meal period agreements electronically maintained by  
23 Defendant, for all aggrieved employees; and
- 24 • The location, square footage, quarterly customer check-in data, quarterly average of employees,  
25 club amenities, and job titles and classifications for every club in the State of California.

26 Cottrell Decl., ¶¶ 14-15.

27 After receiving contact information for other aggrieved employees, Plaintiff Vorise's counsel  
28 completed interviews with approximately 70 of Defendant's employees in an intensive outreach effort.  
29 Plaintiff Vorise also served three sets of requests for production of documents and one set of special  
30 interrogatories, and has also been deposed by Defendant. Defendant deposed Vorise during a full-day  
31 deposition, which occurred on February 13, 2018. Plaintiff Vorise's extensive investigations confirmed  
32 that many non-exempt employees are denied reasonable opportunities to take meal and rest breaks,  
providing a foundation for developing a detailed damages model to analyze Defendant's exposure.

Cottrell Decl., ¶¶ 16-18.

1           **C.       *Holley Action***

2           Plaintiff Holley filed the instant *Holley* action in Riverside Superior Court on February 24, 2016.  
3           Plaintiff Holley worked as a former, non-exempt Group Exercise Instructor and a Personal Trainer at  
4           Defendant’s Glendora and Eastvale, California locations from approximately June 2008 to May 2015.  
5           Bringing a PAGA-only action on behalf of Defendant’s current and former non-exempt, hourly  
6           employees, she alleges unpaid overtime, unpaid minimum wages, failure to provide meal and rest  
7           periods, failure to provide itemized accurate wage statements, failure to provide split shift premiums,  
8           failure to reimburse necessary business expenses, failure to provide notice under Labor Code section  
9           2810.5, and derivative Labor Code violations. Perez Decl., ¶ 3.

10          Following the filing of her Complaint, the parties engaged in considerable motion practice. On  
11          May 2, 2016, Defendant filed a Motion to Strike Portions of Plaintiff’s Complaint, which was granted in  
12          part—without leave to amend as to the claim for violation of Labor Code Section 2810.5, and with leave  
13          to amend as to the “aggrieved employee” definition to allow Plaintiff Holley to file a supplemental  
14          PAGA notice expanding the scope to all non-exempt employees. After Plaintiff Holley filed her First  
15          Amended Complaint (“FAC”). Defendant on July 13, 2016 file a demurrer, arguing that she had failed to  
16          exhaust PAGA’s “pre-filing requirements” by failing to provide the LWDA with the requisite notice of  
17          the facts and theories supporting her allegations. The Court overruled the demurrer in its entirety. Perez  
18          Decl., ¶ 4.

19          For the remainder of 2016 and the beginning of 2017, the *Holley* Parties were embroiled in  
20          discovery disputes regarding the scope of initial discovery, requiring two separate informal discovery  
21          conferences. At the first informal discovery conference, the Court limited initial discovery to the Eastvale  
22          location where Plaintiff Holley worked during the PAGA period. However, after the Supreme Court  
23          published its decision in *Williams* (a case successfully litigated by Holley’s counsel, Capstone), Plaintiff  
24          Holley was subsequently granted leave to file a motion to compel to seek broader discovery. Perez Decl.,  
25          ¶ 5.

26          In approximately July 2017, Plaintiff Paul Williams, who worked for Defendant as an hourly,  
27          non-exempt Overnight Service Representative and later as a Personal Trainer from December 2015 to  
28          August 2016 at its fitness club location in Fairfield, California, was added as a second named  
29          representative in their Second Amended Complaint. Shortly thereafter, the Parties began discussing  
30          mediation of this action. Perez Decl., ¶ 6.

1 In August 2017, the *Holley* Parties reached an agreement to mediate and refrain from further  
2 motion practice until after mediation. Perez Decl. ¶ 7. The Parties agreed that significant additional  
3 discovery was required for a productive mediation, including:

- 4 • Plaintiff Holley’s deposition, which took place over two days on December 7, 2017 and  
5 February 8, 2018;
- 6 • Plaintiff Williams’s deposition, which occurred on February 20, 2018;
- 7 • Two PMK depositions, which occurred on February 19, 2018 and February 23, 2018;
- 8 • The production of the names and contact information for all aggrieved employees in 10  
9 randomly selected clubs throughout California;
- 10 • The production of the time, payroll, and training records for all aggrieved employees in 10  
11 randomly selected clubs throughout California—which were analyzed by the *Holley* Plaintiffs’  
12 expert to determine violation rates and PAGA exposure;
- 13 • The production of aggregate data regarding pay periods, aggrieved employees, meal break  
14 premiums, rest break premiums, and reimbursements issued during the PAGA period

15 Plaintiff Holley completed the required pre-mediation discovery, and completed an in-depth analysis of  
16 Defendant’s PAGA exposure. Perez Decl., ¶ 8.

#### 17 **D. Global Mediation**

18 With over eight years of combined, intense litigation in these three actions, the *Holley* Plaintiffs  
19 and Defendant decided to expand the scope of their long-planned mediation by inviting the *Madrigal*  
20 and *Vorise* Plaintiffs in order to explore a global resolution of all PAGA claims currently pending against  
21 24 Hour. On January 31, 2018, the Parties agreed to participate in a joint mediation of the three cases.  
22 Perez Decl. ¶ 9; Cottrell Decl. at ¶ 20. The mediation took place on February 27, 2018 in Oakland,  
23 California before Jeffrey Ross, Esq., an experienced and respected wage and hour mediator. Perez Decl.  
24 ¶ 10; Cottrell Decl. at ¶ 21. The mediation involved serious and intensive arms-length negotiations. *Id.*  
25 At the conclusion of mediation, Mr. Ross presented the Parties with a “mediator’s proposal,” which  
26 outlined the principal terms of a global settlement of all three cases. The Parties later accepted, subject to  
27 certain conditions, including approval of the Settlement by Defendant’s Board of Directors. Perez Decl. ¶  
28 10; Cottrell Decl. at ¶ 21. On March 20, 2018, Defendant’s Board of Directors approved the terms of the  
29 Settlement. *Id.* at ¶ 23.

### III. THE SETTLEMENT AND DISTRIBUTION OF PAGA PENALTIES

#### A. Terms of the Settlement and Distribution of PAGA Penalties

The Settlement provides that Defendant will pay a non-reversionary settlement amount of \$11,000,000.00 (the “Maximum Settlement Amount”). From the Maximum Settlement Amount, payments will be made to the LWDA and the PAGA Settlement Employees, to the Named Plaintiffs for General Release Payments, to Plaintiffs’ attorneys for fees and litigation costs, and to the Settlement Administrator (CPT Group) for settlement administration costs. Settlement, ¶¶ 2.16, 4.16. The Settlement sets aside \$15,000.00 for each of the four Named Plaintiffs for General Release Payments, in return for their release of all claims of any kind against Defendant. Settlement, ¶ 4.11. Plaintiffs’ counsel will seek a standard fee award of one-third of the Maximum Settlement Amount, to be split among Plaintiffs’ counsel in the three actions, along with reimbursement of actual litigation costs (not to exceed \$100,000.00). Settlement, ¶ 4.14. The administration costs are currently estimated at \$70,000.00. Settlement, ¶¶ 4.6.1, 4.6.2.

After distributions for the General Release Payments, attorneys’ fees and costs, and Settlement Administrator costs, approximately \$7,103,333.00 will be available as estimated net proceeds (the “Net Settlement Amount”). Settlement, ¶ 2.17. The Net Settlement Amount will be allocated between the General PAGA Penalties Fund (approximately \$4,510,616.00, or 63.5% of the Net Settlement Amount) and a 558 Civil Penalties Fund for PAGA penalties under Labor Code § 558 (approximately \$2,592,716.00, or 36.5% of the Net Settlement Amount). Settlement, ¶¶ 2.1, 2.11. Pursuant to Labor Code § 2699(i), 75% of the General PAGA Penalties Fund will be paid to the LWDA (to be used to assist in the enforcement of labor laws and education of employers and employees about their rights and responsibilities under the Labor Code), and the remaining 25% will be paid to the PAGA Settlement Employees. Settlement, ¶ 4.7. Additionally, 100% of the 558 Civil Penalties Fund will be paid to the PAGA Settlement Employees. Settlement, ¶ 4.8.

Accordingly, the LWDA will receive approximately \$3,382,962.00 from the PAGA Settlement. The employees will receive approximately \$3,720,370.00 from the Net Settlement Amount. The following chart reflects the estimated payments under the Settlement, which may fluctuate slightly based on the actual amount of costs:

|                                       |                       |
|---------------------------------------|-----------------------|
| <b>Maximum Settlement Amount</b>      | \$11,000,000.00       |
| Less General Release Payments         | \$60,000.00           |
| Less Settlement Administrator Payment | \$70,000.00           |
| Less Attorneys’ Fees                  | \$3,666,667.00        |
| Less Attorneys’ Costs                 | \$100,000.00          |
| <b>Net Settlement Amount</b>          | <u>\$7,103,333.00</u> |

|                                                             |                       |
|-------------------------------------------------------------|-----------------------|
| General PAGA Penalties Fund                                 | \$4,510,616.46        |
| 558 Civil Penalties Fund                                    | \$2,592,716.55        |
| Portion of General PAGA Penalties Fund payable to employees | \$1,127,654.11        |
| 558 Civil Penalties Fund payable to employees               | \$2,592,716.55        |
| <b>Total Net Settlement Amount available to employees</b>   | <b>\$3,720,370.66</b> |
| <b>General PAGA Penalties Fund payable to State of CA</b>   | <b>\$3,382,962.34</b> |

The PAGA Settlement Employees encompassed by the proposed Settlement include (i) all current and former employees of Defendant who worked as KCAs and/or Kids Club Supervisors in California at any time from June 19, 2013 through October 2, 2014; and (ii) all current and former non-exempt employees of Defendant, including but not limited to KCAs and/or Kids Club Supervisors, who worked in clubs in California from October 3, 2014 through the Approval Date of the Settlement. Settlement, ¶ 2.22. Thus, in addition to KCAs and Kids Club Supervisors, the PAGA Settlement Employees include other non-exempt employees such as Service Representatives, Night Service Representatives, Club Attendants, Personal Trainers, Group Exercise Instructors, Facilities Technicians, Juice Bar Attendants and Managers, Athletic Monitors, Fitness Managers, Sales Managers, and Sales Advisors. Cottrell Decl. at ¶ 25. There are approximately 36,500 PAGA Settlement Employees. *Id.* at ¶ 26.

#### **B. Allocations for the PAGA Settlement Employees**

Payments to PAGA Settlement Employees will be made from General PAGA Penalties Fund and 558 Civil Penalties Fund. The individual allocations will be calculated on a pro-rata basis using the number of pay periods worked by each employee. Defendant will provide the total number of pay periods worked by each PAGA Settlement Employee and the total number of pay periods worked by all PAGA Settlement Employees during the PAGA Release Period.<sup>3</sup> Settlement, ¶ 4.91. The Settlement Administrator will determine each PAGA Settlement Employee's payment using the proportional number of pay periods during which the employee worked. Thus, the Settlement Administrator will perform the following calculation to determine individual awards: Settlement Payment = [25% of General PAGA Penalties Fund + 100% of 558 Civil Penalties Fund] × [pay periods worked by

<sup>3</sup> "PAGA Release Period" is defined in the Settlement as the periods (i) from June 19, 2013 through October 2, 2014 for all current and former KCAs and/or Kids Club Supervisors in California; and (ii) from October 3, 2014 through the Approval Date with respect to all current and former non-exempt employees of Defendant in California, including but not limited to KCAs and/or Kids Club Supervisors.

individual PAGA Settlement Employee during PAGA Release Period ÷ total pay periods worked by all PAGA Settlement Employees during the PAGA Release Period]. Settlement, ¶ 4.92. This is a fair and equitable means of allocating the penalties. PAGA Settlement Employees who worked for a longer duration during the Release Period will be receiving proportionally larger payments than those employees who worked for shorter tenures.

As the Settlement payments to the PAGA Settlement Employees are for the compromise of claims for alleged PAGA civil penalties, the payments will be treated as non-wage income with no taxes withheld, and will be reported by the Settlement Administrator on IRS Form 1099s to the respective PAGA Settlement Employee and governmental authorities.<sup>4</sup> Settlement, ¶ 4.10.

### C. Payments to the PAGA Settlement Employees

The payments under the Settlement are triggered by the occurrence of the Effective Date. If no objection is made to the Settlement, the Effective Date is the date on which all of the following have occurred: this Court has approved the Settlement and entered the approval order, both *Madrigal* and *Vorise* have been dismissed with prejudice,<sup>5</sup> and this Court has entered Judgment.<sup>6</sup> Settlement, ¶ 2.8. Within 21 days after the Effective Date, Defendant will wire the \$11,000,000.00 Maximum Settlement Amount to the Settlement Administrator and provide a Database that includes the name, last known address, social security number, and the total number of pay periods for each of Defendant's employees in California during the PAGA Release Period. Settlement, ¶ 4.13.3. The payments to PAGA Settlement Employees and the LWDA will be made within 14 days after Defendant's funding of the Maximum Settlement Amount. Settlement, ¶¶ 4.13.4, 4.5. With each check, the Settlement Administrator will include a letter explaining the nature of the payment (a draft of which is attached as an Exhibit to the PAGA Settlement). *Id.* Because this is a PAGA settlement, there is no claims procedure or "opt out"

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<sup>4</sup> The \$15,000.00 General Release Payment to each Named Plaintiff are for the settlement and compromise of both wage and non-wage claims. Each Named Plaintiff will receive two payments: (1) one for \$2,500.00, less applicable withholdings and taxes, with IRS Form W-2, and (2) a second for \$12,500.00 for alleged non-wage damages, including alleged damages for expense reimbursement, penalties and statutory interest, with IRS Form 1099.

<sup>5</sup> If the Court approves the Settlement, then Plaintiffs *Madrigal* and *Vorise* will file stipulated dismissals without prejudice of their actions within five court days after the Approval Date.

<sup>6</sup> If an objection is made and the Settlement is approved, but no appeal is filed, then the Effective Date is the date on which the deadline for any appeals expires (i.e., 60 days from when the Judgment is entered), provided that both *Madrigal* and *Vorise* have been dismissed and the Riverside Superior Court thereafter has entered Judgment. If an objection is made and the Settlement is approved, and an appeal is filed, then the Effective Date is the date on which the appeal is finally resolved resulting in a final court order approving this Settlement, provided that both *Madrigal* and *Vorise* have been dismissed and the Riverside Superior Court has entered Judgment.

1 process, and notice will not be provided to the PAGA Settlement Employees in advance of the  
2 payments. Cottrell Decl., ¶ 27.

3 Prior to mailing, the Settlement Administrator will confirm and update the addresses in the  
4 Database using the National Change of Address database. Settlement, ¶ 4.13.5. Moreover, the Settlement  
5 Administrator will promptly re-mail any checks returned as non-deliverable with forwarding address  
6 affixed. *Id.* If no forwarding address is provided, the Settlement Administrator will attempt to determine  
7 the correct address using a skip-trace and will perform a single re-mailing. *Id.* Checks issued to PAGA  
8 Settlement Employees will expire 180 calendar days from the date they are issued; after the 180-day  
9 period, the Settlement Administrator will remit any unclaimed funds to the State of California  
10 Unclaimed Wages Fund in the name of the PAGA Settlement Employee. Settlement, ¶ 4.13.6.

#### 11 **D. The Releases**

12 The California Supreme Court has explained that a judgment in “a representative action brought  
13 by an aggrieved employee under the Labor Code Private Attorneys General Act of 2004 ... is binding not  
14 only on the named employee plaintiff but also on government agencies and any aggrieved employee not  
15 a party to the proceeding.” *Arias*, 46 Cal. 4th at 985-986. Accordingly, the PAGA Settlement Employees  
16 release certain PAGA claims under the Settlement that accrue through the Approval Date. Settlement, ¶  
17 2.20. These “PAGA Released Claims” are Labor Code wage and hour claims against Defendant (and its  
18 affiliates) under the PAGA, including claims under Labor Code Section 558 and the Industrial Welfare  
19 Commission Wage Order 2-2001, to the extent they are raised by the allegations in the complaints,  
20 amended complaints, and LWDA notices in these actions. *Id.* Thus, the PAGA Released Claims include  
21 PAGA claims for violations involving meal periods, rest breaks, off-the-clock work, minimum wages,  
22 overtime, unlawful deductions, pay stubs/wage statements, final pay, timing of pay, record  
23 keeping/retention, expense reimbursement, and associated claims for attorneys’ fees and costs and  
24 interest. *Id.* The PAGA Released Claims include a waiver under California Civil Code Section 1542. *Id.*  
25 However, by its definition, the release does not encompass non-PAGA claims for the underlying wage  
26 and hour violations under the Labor Code. Upon the Effective Date, each PAGA Settlement Employee  
27 will be deemed to have fully released 24 Hour from the PAGA Released Claims. Settlement, ¶ 4.12.1.

28 Additionally, the four Named Plaintiffs in these actions agree to a broader general release of all  
29 claims of any kind against Defendant, including claims for interest, attorneys’ fees and costs, restitution,  
30 and equitable and declaratory relief. Settlement, ¶ 2.21. In particular, the Named Plaintiffs release the  
31 wage and hour claims that they could pursue directly against Defendant for the underlying violations that  
32 they allege. *Id.* The Named Plaintiffs would retain these potential Labor Code claims against 24 Hour

1 separate and apart from their PAGA claims, and their general release of these claims pursuant to the  
2 \$15,000.00 General Release Payments is a fair compromise. Upon the Effective Date, each the Named  
3 Plaintiffs will be deemed to have fully released 24 Hour from any and all claims. Settlement, ¶ 4.12.2

#### 4 **IV. PAGA AND ITS REQUIREMENTS**

5 Enacted in 2003, PAGA provides an enforcement mechanism for California’s Labor Code by  
6 enlisting individual plaintiffs as private attorneys general to recover civil penalties for the state, with a  
7 share also going to the individual plaintiffs and other employees. Prior to PAGA, the recovery of civil  
8 penalties for violations of certain Labor Code provisions were solely the province of the California  
9 Department of Labor. *See Arias*, 46 Cal.4th at 980.

10 The Labor Code’s primary purpose is to “ensure employees are not required or permitted to  
11 work under substandard unlawful conditions ... and to protect employers who comply with the law from  
12 those who attempt to gain a competitive advantage at the expense of their workers by failing to comply  
13 with minimum labor standards.” Cal. Lab. Code § 90.5(a). In enacting PAGA, the Legislature expressly  
14 stated that “the only meaningful deterrent to unlawful conduct is the vigorous assessment and collection  
15 of civil penalties as provided in the Labor Code.” Stats. 2003 ch. 906, § 1(b). The Legislature thus  
16 determined that it is “in the public interest to allow aggrieved employees, acting as private attorneys  
17 general, to recover civil penalties for Labor Code violations, with the understanding that labor law  
18 enforcement agencies were to retain primacy over private enforcement efforts.” *Arias*, 46 Cal.4th at 980.  
19 Under PAGA, an aggrieved employee may bring an action personally and on behalf of other current and  
20 former aggrieved employees without meeting the requirements of class certification such as typicality  
21 and commonality. *Arias*, 46 Cal.4th at 980-88.

22 Under this regime, Plaintiffs Madrigal, Vorise, Holley, and Williams, acting as private attorneys  
23 general and proxies for the State of California, filed these actions seeking civil penalties for Defendant’s  
24 alleged violations of the Labor Code. Penalties recovered under PAGA “shall be distributed as follows:  
25 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws and  
26 education of employers and employees about their rights and responsibilities under this code ...; and 25  
27 percent to the aggrieved employees.” Cal. Lab. Code § 2699(i). In addition, Labor Code § 558 allows  
28 Plaintiffs, as the LWDA’s proxy, to recover civil penalties in the form of underpaid wages for  
29 themselves and other aggrieved employees, and Section 558(a)(3) provides that these wages shall be  
30 paid in whole to the affected employees. *See Thurman v. Bayshore Transit Mgmt.*, 203 19 Cal. App. 4th  
31 1112 (2012); *Lawson v. ZB, N.A.* 18 Cal. App. 5th 705, 722-25 (2017), *petition for review granted*, Case  
32 No. S246711, 2018 WL 1440035 (Mar. 21, 2018). In other words, Plaintiffs assert that pursuant to

1 *Thurman and Lawson*, Labor Code section 558 is “an express exception to the general rule that civil  
2 penalties recovered in a PAGA action are distributed 75 percent to the [LDWA] and 25 percent to the  
3 aggrieved employees.” *See Thurman*, 203 Cal. App. 4th at 1145.

4 Any settlement of a PAGA action brought by an aggrieved employee must be approved by the  
5 Court. Cal. Lab. Code § 2699(l)(2). However, because PAGA is not subject to class certification  
6 procedures, the Court must simply review the settlement and approve it if it is deemed to be fair and  
7 reasonable. *See Arias*, 46 Cal. 4th at 976, 986.

8 **V. THE SETTLEMENT IS FAIR, REASONABLE, AND WARRANTS COURT**  
9 **APPROVAL**

10 This Court issued a Case Management Order (“CMO”) requesting certain information to  
11 evaluate the facts and claims underlying any proposed PAGA settlement. Plaintiffs’ counsel have  
12 conducted large amounts of discovery and extensive outreach to the PAGA Settlement Employees. They  
13 used this information and data to perform in-depth analyses of the claims and Defendant’s exposure, the  
14 results of which are presented here.

15 **A. Nature of the Alleged Violations**

16 Plaintiffs allege three core sets of claims in the actions: meal period and rest break claims, unpaid  
17 wage claims, and failure to reimburse necessary business expense claims. Each of these claims expose  
18 Defendant to PAGA penalties. Cottrell Decl., ¶ 27; Perez Decl., ¶ 12.

19 **1. Meal Period and Rest Break Claims**

20 The principal claim in all three actions is that 24 Hour systematically failed to provide legally  
21 compliant meal periods and rest periods to non-exempt employees during the PAGA period, through  
22 understaffing, not providing proper break coverage, failing to schedule meal and rest periods, not  
23 providing “paid” rest breaks, and requiring certain employees to work through their meal breaks while  
24 off-the-clock. Labor Code Section 512 and Section 11 of the applicable Industrial Welfare Commission  
25 Wage Orders provide that an employer may not employ an employee for more than five hours without  
26 providing a 30-minute meal period. Pursuant to California Labor Code Section 226.7 and the IWC Wage  
27 Orders, employers must also authorize and permit all employees to take one 10-minute rest period per  
28 four 4 hours of work, or major fraction thereof, unless the total daily work time is less than 3.5 hours.  
29 Plaintiffs allege that Defendant’s practices uniformly prevented the PAGA Settlement Employees from  
30 taking legally compliant breaks, and its managers discouraged workers from taking their breaks.  
31 Plaintiffs claim that Defendant did not pay the required premium payments for missed breaks. Cottrell  
32 Decl., ¶ 28; Perez Decl., ¶ 13.

1 For example, with respect to Personal Trainers, 24 Hour puts the onus on its employees to  
2 schedule their own breaks; however, fitness training sessions are often scheduled for four, one-hour long  
3 sessions in a row with mandatory team meetings and other required non-session time before and after  
4 fitness training sessions. The mere ten minutes between each session is needed for fitness trainers to  
5 prepare routines, complete paperwork, meet and greet club members, clean and wipe down the facility,  
6 and stock towels and soap dispensers. Moreover, 24 Hour puts hard caps on the amount of non-session  
7 time employees are able to use each month and requires that non-session time be reserved for only  
8 specific tasks such as team meetings, one-on-one meetings with management, and fitness orientations.  
9 Thus, if Personal Trainers had additional time between two scheduled fitness sessions, they were  
10 instructed to clock out and not use non-session hours because every non-session hour had to be  
11 approved. Cottrell Decl., ¶ 31; Perez Decl., ¶ 14.

12 Plaintiffs contend that Night Service Representatives, who often work alone during the  
13 graveyard shifts at Defendant's clubs, typically had insufficient coverage from co-workers to take  
14 breaks. As the only worker on site, they could not be relieved of all duties to take a break. Night Service  
15 Representatives typically executed "on-duty" meal period agreements at or near the time of hire.  
16 Plaintiffs challenge the validity of these "on-duty" meal agreements because the nature of the work  
17 performed by employees did not necessitate an "on-duty" meal period under California law, but  
18 Defendant stands by the agreements and the issue would be vigorously disputed. Cottrell Decl., ¶ 30;  
19 Perez Decl., ¶ 15.

20 KCAs experienced meal and rest break issues because only certified employees could provide  
21 their break relief. All employees who supervised children were required to have special certification  
22 (including a background check), and there are strict employee to children ratios required under state  
23 regulations. Plaintiffs allege that with insufficient staffing to provide break relief, the KCAs remained on  
24 duty, as they could not leave the children under their care unattended. Cottrell Decl., ¶ 32; Perez Decl., ¶  
25 16.

26 Group Exercise Instructors ("GXIs") experienced rest break issues because they are paid on a  
27 piece-rate basis for the number of classes that they teach. Defendant only started compensating its GXIs,  
28 such as Plaintiff Holley, for rest period time effective January 1, 2016. Labor Code Section 226.2  
29 provides that employers must separately compensate such employees for rest periods and other  
30 nonproductive time at or above specified minimum hourly rates. Section 226.2 further requires  
31 employers to provide these employees with itemized statements stating the hours and pay rates for  
32 compensable rest periods. A piece-rate compensation system that does not separately compensate

employees for rest periods does not comply with California’s minimum wage law. *Bluford v. Safeway*, 216 Cal. App. 4th 864, 872 (2013). Cottrell Decl., ¶ 33; Perez Decl., ¶ 17.

## **2. Unpaid Wage Claims**

Plaintiffs also allege PAGA violations for off-the-clock work performed by non-exempt employees, including Personal Trainers and GXIs. California law defines “hours worked” as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 578 (2000). Requiring employees to work without compensation violates California’s minimum wage and overtime laws. See Cal. Lab. Code §§ 510, 1194, 1197, 1197.1 and 1198. Cottrell Decl., ¶ 34; Perez Decl., ¶ 18.

Plaintiffs allege that 24 Hour’s policies and mandatory job requirements for Personal Trainers necessitated that they work off-the-clock to complete all the tasks required of them. For example, Plaintiff Holley, who worked as a Personal Trainer and GXI, was sometimes required to clock out at the end of her scheduled shift and complete paperwork for her clients. In addition to training clients, Personal Trainers design comprehensive fitness programs, create, maintain, and regularly update folders for personal training clients, schedule all personal training sessions, and perform general tasks such as restocking towels and soap dispensers, re-racking weights, and wiping down equipment. Because Personal Trainers are scheduled to complete 50-minute training sessions back to back, Plaintiffs allege that 24 Hour unrealistically expects them to complete all of these tasks in the 10-minute time frame between sessions. Plaintiffs allege that, as they unable to do so, the Personal Trainers have no choice but to finish the leftover tasks off-the-clock. Plaintiffs also maintain that Defendant had a company-wide practice of requiring its Personal Trainers and GXIs to communicate with managers and personal training/group instruction clients via their own personal cellular phones, including on their days off and outside of their scheduled shifts. This created additional off-the-clock work. Cottrell Decl., ¶ 34; Perez Decl., ¶ 19.

Plaintiffs also allege that Defendant improperly paid required overtime to non-exempt employees, including GXIs, Personal Trainers and KCAs. Defendant incorrectly used a 0.5 multiplier, instead of a 1.5 multiplier, to compensate these employees for overtime hours. This creates additional PAGA violations for these workers.

## **3. Failure to Reimburse**

Plaintiffs allege that 24 Hour expected Personal Trainers to use their personal cell phones to keep in contact with clients during non-work hours to provide fitness counseling and schedule fitness training

sessions, but did not reimburse them. Labor Code Section 2802 provides that “[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer ....” The statutory right to reimbursement cannot be waived. *Stuart v. RadioShack Corp.*, 641 F. Supp. 2d 901, 902 (N.D. Cal. 2009); Cal. Lab. Code § 2804. The use of personal cell phones for work-related calls is a reimbursable expense. *Cochran v. Schwan’s Home Serv., Inc.*, 228 Cal. App. 4th 1137, 1140 (2014). Cottrell Decl., ¶ 36; Perez Decl., ¶ 20.

Until January 23, 2016, the Defendant did not reimburse Personal Trainers for their personal cell phone costs, when required. Effective January 23, 2016, 24 Hour implemented its “Eligible Team Member Mobile Device Reimbursement Policy” which reimburses certain managers and fitness trainers \$2.08 per pay period. Plaintiffs allege that this amount fails to fairly compensate employees who are expected to use their cellular phones for work related purposes. Cottrell Decl., ¶ 36; Perez Decl., ¶ 21.

#### **B. Number Of Alleged Violations And Total Potential PAGA Penalties**

Based on a comprehensive analysis of Defendant’s discovery productions and data, information provided by employees during interviews with Plaintiffs’ counsel, and a review of employee payroll records, Plaintiffs’ counsel were able to calculate Defendant’s maximum potential exposure for the claims at issue, as summarized in the chart below. Cottrell Decl., ¶¶ 37-46; Perez Decl., ¶ 22.

|                                             |                                                 |                                    |
|---------------------------------------------|-------------------------------------------------|------------------------------------|
| <b>Total Number of Affected Employees</b>   |                                                 | 36,500                             |
| <b>Total Number of Pay Periods At Issue</b> |                                                 | 1,008,810                          |
| <b>Claim</b>                                | <b>Total No. of Pay Periods with Violations</b> | <b>Maximum Potential Penalties</b> |
| Meal Period Claim                           | 46,924                                          | \$6,652,020.00                     |
| Rest Period Claim                           | 128,281                                         | \$23,783,105.00                    |
| Off-the-Clock/Overtime Claim                | 64,168                                          | \$12,709,590.00                    |
| Business Expense Claim                      | 14,641                                          | \$3,210,600.00                     |
| <b>Total</b>                                | <b>264,032</b>                                  | <b>\$ 45,455,315.00</b>            |

Adding together the above violations, Plaintiffs’ counsel estimate that Defendant committed approximately 264,000 PAGA violations for all PAGA Settlement Employees during the PAGA period. The total exposure for the core claims is approximately \$45.5 million. Cottrell Decl., ¶ 47; Perez Decl., ¶ 23.

1           **C.       Factors Supporting A Reduction In Total Penalty Amount Based On The**  
2                           **Anticipated Trial Result, Weight Of Evidence, Clarity Of Controlling Law, And**  
3                           **Defendant's Defenses**

4           Defendant has vigorously defended these actions, denying that it violated any section of the  
5 Labor Code or Wage Order. Specifically, Defendant maintains that its approximately 230 health and  
6 fitness clubs in California vary significantly based on size, employee population, and the types of  
7 amenities and services available to club members. Defendant has six different types of clubs, some of  
8 which are small and offer few amenities, while others are sprawling and provide a wide array of facilities  
9 and amenities. The larger clubs feature employee positions like lifeguard and juice bar attendant that do  
10 not exist at the smaller clubs. Cottrell Decl., ¶ 48; Perez Decl., ¶ 24.

11           Defendant argues that its policies, procedures, and training are facially compliant with California  
12 labor law. Defendant has produced evidence that new employees go through onboarding and new hire  
13 orientation on 24 Hour's employment policies, including the Team Member Handbook. The Team  
14 Member Handbook includes facially compliant provisions for meal periods, rest breaks, recording all  
15 hours worked, logging time spent working outside of club locations (e.g., for personal trainer responses  
16 to client communications outside of normal work hours), travel time, and expense reimbursement. 24  
17 Hour employees are also required to complete compliance trainings, including courses on Time & Labor  
18 Practices (i.e., time recording) and Wage and Hour practices. Each employee must certify at the end of  
19 each pay period that they have reviewed their hours recorded, including meal periods and any manager  
20 edits, and that their hours are accurately recorded. The employee is given the option to disagree with the  
21 accuracy of their recorded hours, and they will still be paid for the recorded time but the disagreement  
22 will be escalated. Employees continue training throughout their employment via online learning courses  
23 that address compliance with applicable wage and hour requirements. Cottrell Decl., ¶ 49; Perez Decl., ¶  
24 25.

25           Plaintiffs recognize that the Court could credit Defendant for maintaining facially compliant  
26 policies and requiring training on wage and hour issues for all employees. Defendant maintained copious  
27 records to document employee completion of the training, including for the Named Plaintiffs here.  
28 Additionally, Defendant has implemented changes to its wage and hour practices since the filing of these  
29 actions. Defendant implemented an online payroll system in October 2016 that allows employees to  
30 input and edit their time at any location where they have internet access (i.e., outside of 24 Hour clubs);  
31 employees no longer have to complete manual time adjustment forms. Thus, for example, if a Personal  
32 Trainer has to take a client call at home, he or she can input this time more easily. Defendant also

1 implemented a mobile device reimbursement policy in February 2016. And as discussed, Defendant  
2 began providing rest break compensation to piece-rate employees (i.e., GXIs) effective January 2016.  
3 All of these measures reflect a recognition of the importance of wage and hour laws, and there is a  
4 significant chance that the Court will credit these efforts by reducing the penalties for Plaintiffs' claims  
5 for meal and rest breaks, off-the-clock work, and failure to reimburse business expenses. Cottrell Decl., ¶  
6 52-53; Perez Decl., ¶ 26.

7 In sum, Defendant argues that its wage and hour policies which applied to Plaintiffs during the  
8 relevant time period complied with California law. Defendant claims that none of the Plaintiffs can prove  
9 that he or she is actually an "aggrieved employee." On this basis, and in light of the numerous different  
10 positions, compensation methods, scheduling practices, and club locations, Defendant argues that  
11 Plaintiffs should not be able to prosecute these actions on a representative basis. Defendant contends that  
12 to do so would be unmanageable and would impinge upon its due process rights. Cottrell Decl. at ¶ 50;  
13 Perez Decl. at ¶ 27.

14 Applying all defenses and risks of litigation discussed above, including the likelihood of  
15 prevailing on a representative basis for all employees, and factoring in the Court's discretion to reduce  
16 the civil penalties, Plaintiffs assess a realistic trial value as follows:

- 17 • Plaintiffs' claims for meal break violations are worth approximately \$2.50 million
- 18 • Plaintiffs' claims for rest break violations are worth approximately \$9.8 million
- 19 • Plaintiffs' claim for off-the-clock work and unpaid overtime is worth approximately  
20 \$5.7 million
- 21 • Plaintiffs' claim for failure to reimburse Personal Trainers for business expenses is worth  
22 approximately \$866,000
- 23 • Plaintiffs' derivative claims (i.e., claims for wage statement violations and waiting-time  
24 penalties based on the foregoing claims) are only as strong as the underlying predicate  
claims. Their value was realistically assessed at approximately \$3.8 million.

25 Cottrell Decl., ¶¶ 58-59; Perez Decl., ¶ 28.

26 Plaintiffs recognize that there is a significant chance that the Court would decline to stack  
27 penalties. The potential exposure described here incorporates the possibility that multiple violations can  
28 be assessed for a particular pay period for a particular employee. There is a significant chance that the  
29 Court would decline to stack on derivative violations for an employer that maintains comprehensive,  
30 facially compliant policies and training and made voluntary changes to improve its wage and hour  
31  
32

practices.<sup>7</sup> Cottrell Decl., ¶ 54; Perez Decl., ¶ 29.

With respect to derivative claims, such as penalties under Labor Code section 203 as incorporated into the PAGA, Defendant would have argued that no waiting-time penalties can be awarded unless the failure to pay wages is “willful,” an element that Plaintiffs acknowledge would have been difficult to prove. See 8 C.C.R 13520 (“[a] willful failure to pay wages within the meaning of Labor Code section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages were due.”); *Smith v. Rae Venter Law Group*, 29 Cal.4th 345, 354 n.2 (2002) (holding that a good faith dispute that any wages are due will preclude an award of waiting time penalties). Defendant would also have argued that an employer’s failure to pay wages is not willful unless it reached the standard of “gross negligence or recklessness.” See *Amaral v. Cintas*, 163 Cal. App. 4th 1157, 1201 (2008). Cottrell Decl., ¶ 56; Perez Decl., ¶ 30.

Plaintiffs also recognize that some courts have interpreted Labor Code section 2699(f)(2) to impose the enhanced “subsequent violation penalty” or “heightened penalty” only after an employer has been notified that its conduct violates the Labor Code. See *Trang v. Turbine Engine Components Technologies Corp.*, No. CV 12–07658 DDP (RZx), 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012) (“courts have held that employers are not subject to heightened penalties for subsequent violations unless and until a court or commissioner notifies the employer that it is in violation of the Labor Code”); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, No. 05cv1199–IEG–CAB, 2009 WL 2448430 (S.D. Cal. 2009) (finding that California law imposes the “subsequent violation penalty” only after an employer has been notified its conduct violates the Labor Code). While Plaintiffs regards this interpretation as flawed, they nonetheless recognize that this interpretation has gained traction with some courts. Cottrell Decl., ¶ 57; Perez Decl., ¶ 31.

The PAGA also gives the Court wide latitude to reduce the amount of civil penalties “based on the facts and circumstances of a particular case” when “to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(h). In reducing PAGA penalties, Courts have considered issues including whether the employees suffered actual injury from the violations, whether Defendant was aware of the violations, and the employer’s willingness to fix the violation. *Cotter v. Lyft, Inc.*, 193 F.Supp.3d 1030, 1037 (N.D. Cal. 2016); *Fleming v. Covidien*, 2011

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<sup>7</sup> Even without stacking derivative violations, a given employee may present multiple PAGA violations (e.g., for meal and rest violations, off-the-clock work, and failure to reimburse) for a particular pay period. There is a chance that the Court would decline to assess multiple violations per pay period per employee.

1 WL 7563047, at \*4 (C.D. Cal. 2011). For instance, in the *Lyft* case, the Court found that a \$1 million  
2 PAGA settlement was fair and reasonable in light of the unsettled nature of the law, resulting in a \$2.52  
3 per pay period award to the aggrieved employees (there were 397,110 pay periods in a \$1 million PAGA  
4 settlement, resulting in a 97.5% reduction from the maximum). In *Fleming v. Covidien*, the Court  
5 reduced the potential penalties by over 82%, awarding \$500,000 for 28,742 pay periods at issue. Here,  
6 Defendant argues the Court should exercise its discretion to significantly reduce the PAGA penalties.  
7 Cottrell Decl., ¶ 51; Perez Decl., ¶ 32.

8 Considering the issues, defenses, and the risks, an \$11 million settlement is an excellent result  
9 and furthers PAGA's objectives.

## 10 **VI. THE REQUESTED ATTORNEYS' FEES AND LITIGATION COSTS ARE FAIR** 11 **AND REASONABLE**

12 For their efforts and the substantial risk they undertook in obtaining a large common fund  
13 settlement to benefit the LWDA and the PAGA Settlement Employees, the Parties allocated one-third of  
14 the Maximum Settlement Amount to Plaintiffs' Counsel for reasonable attorneys' fees, plus actual  
15 litigation costs in an amount not to exceed \$100,000.00. These fees are warranted under the law and  
16 within the range commonly awarded in similar cases.

### 17 **A. Plaintiffs' Counsel Are Entitled to Recover Attorneys' Fees under the Common** 18 **Fund Doctrine in This *Qui Tam* Action**

19 PAGA provides that a plaintiff is entitled to recover reasonable attorneys' fees, expenses, and  
20 costs. Section 2699(g)(1) of the California Labor Code provides that "[a]ny employee who prevails in  
21 any action shall be entitled to an award of reasonable attorney's fees and costs." As discussed below, in a  
22 *qui tam* action, reasonable attorneys' fees and costs are typically awarded under the common fund  
23 doctrine where, as here, the litigation creates a common fund of money in a specific amount for the  
24 benefit of others.

25 A *qui tam* action allows a private person to sue to recover damages or penalties, all or part of  
26 which will be paid to the government. "A *qui tam* action 'is a type of private attorney general lawsuit'  
27 [citation], in which 'the *qui tam* plaintiff stands in the shoes of the state or political subdivision  
28 [citation].'" *People ex rei. Stratham v. Acacia Research Corp.*, 210 Cal. App. 4th 487, 501 (2012). A  
29 PAGA action is a *qui tam* action because the statute allows the employee plaintiff, acting as the proxy of  
30 the State's labor law enforcement agency, to sue his or her employer for Labor Code violations and  
31 recover civil penalties that otherwise would have been assessed and collected by the LWDA. See  
32 *Iskanian*, 59 Cal.4th at 382 ("A PAGA representative action is therefore a type of *qui tam* action.").

1 Indeed, majority of the civil penalties recovered in a PAGA action are paid to the State, with a smaller  
2 portion paid to the aggrieved employees (e.g. 75% paid to the state; 25% paid to the aggrieved  
3 employees). See Cal. Lab. Code § 2699(i).

4 As here, where a common fund is created in a *qui tam* action by the successful litigation of a  
5 plaintiff and her attorneys, the plaintiff's attorneys are entitled to recover their fees from the common  
6 fund:

7 Those benefiting from the recovery of the fund, in this case some depositors and  
8 eventually the People of the State of California, must bear their share of the cost of  
9 litigation. Fees for taxpayers' attorneys will be deducted from the judgment, and each  
10 claimant's share reduced proportionately. To the extent the judgment relies upon section  
1021.5 for recovery of attorney fees, it must be modified to confine the award of fees to  
the common fund theory.

11 *Bank of America v. Cory*, 164 Cal. App. 3d 66, 91 (1985) (authorizing common fund fees in a *qui tam*  
12 taxpayer suit against certain banks).

13 Likewise, in these cases, through the successful efforts of Plaintiffs and their attorneys, a  
14 common fund was created in the amount of \$11 million for the benefit of the employees and the State of  
15 California. Thus, these beneficiaries must bear their share of the costs and attorneys' fees, to be deducted  
16 from the Maximum Settlement Amount under the common fund theory. *Id.* Such fees are deducted as a  
17 percentage of the settlement amount. See, e.g., *Boeing Co. v. Van Gernert*, 444 U.S. 472, 478-482  
18 (1980); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990);  
19 *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997); *Staton v. Boeing*  
20 *Co.*, 327 F.3d 938, 967 (9th Cir. 2003).

21 The California Supreme Court recently upheld the use of the common fund theory of recovery  
22 for attorneys' fees in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 506 (2016). In *Laffitte*, the  
23 settlement created a common fund of \$19 million. The Court approved the award of attorneys' fees in  
24 the amount of one third of the gross \$19 million settlement (e.g., an award of \$6.33 million) under the  
25 common fund theory. *Id.* By awarding counsel a percentage of the total recovery, rather than fees based  
26 on hours worked, the common fund method encourages attorneys to efficiently litigate to achieve the  
27 best results possible for the class. See *Laffitte*, 1 Cal. 5th at 492-494. Indeed, "the percentage method is  
28 generally favored in common fund cases because it allows courts to award fees from the fund in a  
29 manner that rewards counsel for success and penalties it for failure. *Id.* at 493 (quoting *In re Rite Aid*  
30 *Corp. Securities Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (internal quotations omitted).

31 California state and federal courts routinely award attorneys' fees equaling one-third of the  
32 common fund. See, e.g., *Laffitte v. Robert Half Int'l*, 180 Cal. Rptr. 3d 136, 149 (2016) ("33 1/3 percent

of the common fund is consistent with, and in the range of, awards in other class action lawsuits”); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66 n.11 (2008) (accord); Eisenberg & Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, J. of Empirical Legal Studies, Vol. 1, Issue 1, 27-78, March 2004, at 35 (independent studies of class action litigation nationwide conclude that fees representing one-third of the total recovery is consistent with market rates). Notably, the California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent of the fund. *See Laffitte*, 1 Cal. 5th at 506.

A one-third common fund attorneys’ fee award is also consistent with what courts have awarded in other representative action cases. The following list shows PAGA actions where attorneys’ fees were awarded on a common fund basis of 33.33%:

- *Garcia v. Macy’s*, San Bernardino County Superior Court, Case No. CIVDS1516007 (33.33% fee awarded on \$12,500,000 settlement of a PAGA only case);
- *Garcia v. Pep Boys*, Orange County Superior Court, Case No. 30-2014-00720574-CU-OE-CJC (33.33% fee awarded on a \$1,030,000 settlement of a PAGA only case);
- *Brewer v. Connell Chevrolet*, Orange County Superior Court, Case No. 30-2016-00852123-CU-OC-CXC (33.33% fee awarded on a PAGA only case);
- *Perez v. Staffmark Investment, LLC*, Riverside County Superior Court, Case No. MCC1401137 (33.33% fee awarded on a \$650,000 settlement of a PAGA only case).

Based on the foregoing, awarding attorneys’ fees based on a one-third percentage of the gross settlement amount is favored by California Courts when a fund established for the common benefit of others is involved, as is the case here. Accordingly, awarding fees on this basis in the amount of one third of the \$11 million Maximum Settlement Amount is reasonable and appropriate.

**B. A Fee of One-Third of the Gross Settlement Amount Is Fair and Reasonable and Serves the Public Policy of Attracting Competent Counsel to Litigate These Cases**

An award of fees from the gross settlement amount under the common fund doctrine prevents unjust enrichment of those who benefit from the common fund created through the successful efforts of plaintiff’s counsel and furthers the important goal of attracting competent counsel to handle representative actions enforcing minimum labor standards. *Laffitte*, 1 Cal.5th at 503. In affirming the use of the common fund doctrine in California, the California Supreme Court summarized the benefits of the percentage method of recovery stating: “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.” *Id.*

Among the factors considered in determining whether the requested fee percentage is reasonable are: (1) the results achieved; (2) the risk of further litigation; (3) the skill required of plaintiff’s counsel and the quality of work performed by plaintiff’s counsel; (4) the contingent nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). All these factors support an award here of one-third of the common fund.

First, Plaintiffs’ counsel’s efforts resulted in a common fund settlement amount of \$11 million. This is a very large PAGA settlement by any standard, and an especially good result in light of the challenges Plaintiffs would face in litigating the claims on a representative basis and the facially compliant policies that Defendant maintained. This result was achieved by the work and success of Plaintiffs’ counsel, who negotiated the Settlement after extensive preparation, discovery, deposition, a full mediation session, and substantial negotiations. Desai Decl., ¶ 3; Cottrell Decl., ¶¶ 4-22; Perez Decl., ¶¶ 2-10.

Second, Plaintiff faced significant risks going forward with the litigation. Defendant raised various defenses throughout this litigation, any one of which, if successful, could have decimated Plaintiffs’ case. A key risk was, again, Plaintiffs’ ability to litigate on a representative basis, and Defendant argued that the affected employees did not incur the wage and hour violations alleged. Defendant vowed to raise all of its defenses at trial and would continue to raise them on appeal (in fact, Defendant already filed numerous appeals in these actions). Accordingly, Plaintiffs faced serious risks with forward with their cases, and it would have taken several more years to realize any recovery.

Third, Plaintiffs’ counsel are experienced representative action litigators. See Desai Decl., ¶¶ 6-9; Cottrell Decl., ¶ 62-65; Perez Decl., ¶¶ 38-41, Ex. 3, Ho. Decl., ¶¶ 3-4, Exhs. B-C. This experience and expertise, combined with the high quality of work performed in this case by Plaintiffs’ counsel, resulted in the Settlement achieved.

Fourth, Plaintiffs’ counsel have been representing Plaintiffs (and the State of California) in these matters on strictly contingency basis, and had to forego opportunities to litigate other cases, incurred the risk of non-recovery after a substantial investment of time, money, and resources, and have done so since the inception of the cases without any payment or compensation. This is no easy burden for any firm. If, despite these hardships and risks, Plaintiffs’ counsel are paid only basic hourly rates multiplied by the number of hours worked on the case, they would not be fairly compensated for the hardships and serious risks they incurred. More generally, plaintiff’s attorneys would not be incentivized to take on similar

1 private attorney general/*qui tam* cases in the future.

2 Fifth, as discussed above, the request for attorneys' fees in the amount of one-third of the  
3 common fund falls well within the range accepted by state and federal courts in California in comparable  
4 wage and hour actions. The award of a one-third fee recovery under the common fund doctrine was  
5 recently approved by the California Supreme Court in *Laffitte*, 1 Cal.5th at 503.

6 For all of these reasons, a common fund fee award in the amount of one-third of the \$11 million  
7 common fund created by Plaintiffs and their attorneys is fair and reasonable.

8 **C. A Lodestar Cross-Check Confirms the Reasonableness of the Fee Award**

9 The trial court may use an abbreviated lodestar "cross-check" for common fund awards if the  
10 court considers it useful. *Laffitte*, 1 Cal. 5th at 504-05. However, under *Laffitte*, this is not meant to  
11 displace the percentage analysis, but rather to act as a backstop. Indeed, the Supreme Court expressly  
12 instructed that "the lodestar calculation, when used in this manner, does not override the trial court's  
13 primary determination of the fee as a percentage of the common fund and thus does not impose an  
14 absolute maximum or minimum on the fee award." *Id.* at 505. Critically, the Court in *Laffitte*  
15 emphasized that only where the "multiplier calculated by means of a lodestar cross-check is  
16 **extraordinarily high or low**" should the court "consider whether the percentage should be adjusted so  
17 as to bring the imputed multiplier within a justifiable range." *Id.* (emphasis added). Accordingly, when  
18 the cross-check multiplier is within a normal range, the lodestar-cross check does not provide a basis for  
19 a court to reduce the fee award. Furthermore, in conducting a lodestar cross-check, the court is not  
20 "required to closely scrutinize each claimed attorney-hour." *Id.* at 505. An evaluation may be done by  
21 reviewing "counsel declarations summarizing overall time spent." *Id.*

22 In conducting a lodestar cross-check, the Court first determines a lodestar value for the fees by  
23 multiplying the time reasonably spent by plaintiffs' counsel on the case by a reasonable hourly rate. *In re*  
24 *Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556-57 (2009). To determine whether the requested  
25 rate is reasonable, courts look to the prevailing rate for similar work in the pertinent geographic region.  
26 *PLCM Group v. Drexler*, 22 Cal. 4th 1084, 1096-97 (2000) (using prevailing hourly rate in community  
27 for comparable legal services even though party used in-house counsel). Here, Plaintiffs' counsel's  
28 hourly rates are comparable to, or less than, those charged by other class action plaintiffs' counsel and  
29 the firms defending class actions, and have been approved by numerous federal and state courts. Here,  
30 the aggregate lodestar for the firms who litigated the *Holley*, *Madrigal*, and *Vorise* actions is  
31 approximately \$2.53 million. This is comprised of approximately \$525,000 for *Holley* counsel,  
32 approximately \$1,115,600 for *Madrigal* counsel, and \$890,000 for *Vorise* counsel. Desai Decl., ¶¶ 3, 10;

1 Cottrell Decl., ¶¶ 66-67; Perez Decl., ¶¶ 34-36, Ho. Decl., ¶¶ 8-9 (detailed breakdowns of each firm’s  
2 lodestar by attorney and staff member, and by project, are included in counsel’s declarations).

3 Applying a modest 1.45 multiplier to that lodestar yields the requested fees. A 1.45 multiplier is  
4 not “extraordinarily high”—to the contrary, the normal range for a multiplier on a lodestar cross-check  
5 “can range from 2 to 4 or even higher.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 255  
6 (2001); *see also See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (multipliers  
7 “ranging from one to four are frequently awarded ... when the lodestar method is applied”; affirming fees  
8 where the cross-check multiplier is 3.65).

9 Courts routinely accept multipliers ranging from 2 to 4 on a lodestar cross-check. *See, e.g., Sutter*  
10 *Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (applying a 2.52 multiplier on a  
11 lodestar cross-check); *Chavez.*, 162 Cal. App. 4th at 66 (applying a 2.5 multiplier in a consumer class  
12 action); *Willner v. Manpower Inc.*, No. 11-CV-02846-JST, 2015 WL 3863625, at \*7 (N.D. Cal. June 22,  
13 2015) (approving a 2.10 multiplier on settlement of California Labor Code violations); *Dyer v. Wells*  
14 *Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (approving attorneys’ fees that resulted in  
15 lodestar multiplier of 2.83); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-LHK, 2013 WL 496358,  
16 at \*5 (N.D. Cal. Feb. 6, 2013) (approving a multiplier of 2.76 in settlement of Labor Code violations).

17 Indeed, courts following *Laffitte* have reaffirmed that a multiplier between 2 and 4 to be  
18 reasonable and not so “extraordinarily high” as to require greater judicial scrutiny. *See Spann v. J.C.*  
19 *Penney Corp.*, 211 F. Supp. 3d 1244, 1265 (C.D. Cal. Sept. 30, 2016) (finding that a 3.07 multiplier is  
20 “well within the range for reasonable multipliers” under *Laffitte*); *Beaver v. Tarsadia Hotels*, No. 11-CV-  
21 01842-GPC-KSC, 2017 WL 4310707, at \*13 (S.D. Cal. Sept. 28, 2017) (“The one-third fee Class  
22 Counsel seeks reflects a multiplier of 2.89 on the lodestar which is reasonable for a complex class action  
23 case.”). The lodestar cross-check confirms that Plaintiffs’ fee request is fair and reasonable and should be  
24 approved.

25 A cross-check of Plaintiffs’ counsel’s aggregate lodestar, which results in the application of a  
26 modest 1.45 multiplier, confirms that a fee award of one third of the \$11 million Settlement amount is a  
27 reasonable and fair payment.

#### 28 **D. The Litigation Costs Are Fair and Reasonable**

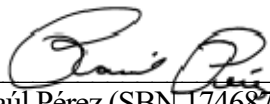
29 Plaintiffs’ counsel request reimbursement of their actual out-of-pocket expenses incurred to  
30 prosecute these actions, not to exceed a total of \$100,000.00. Attorneys are permitted to recover their  
31 litigation costs and expenses under PAGA and the common fund doctrine. Cal. Lab. Code § 2699(g)(1);  
32 *Serrano III*, 20 Cal.3d at 35; *Rider v. County of San Diego*, 11 Cal.App.4th 1410, 1424 n.6 (1992). To

1 date, Plaintiffs' counsel's costs total approximately \$63,610 for all firms. Desai Decl., ¶ 3; Cottrell Decl.,  
2 ¶ 71; Perez Decl., ¶ 37, Ho. Decl., ¶ 9. Plaintiffs' counsel incurred costs including mediation fees, filing  
3 fees, online research, court reporters, deposition costs, travel to hearings and depositions, and service of  
4 process fees. These expenses were incidental and necessary to the effective representation of the PAGA  
5 Settlement Employees. Desai Decl., ¶ 3; Cottrell Decl., ¶ 71; Perez Decl., ¶ 37, Ho. Decl., ¶ 9. They are  
6 reasonable and uncontested, and should be approved.

7 **VII. CONCLUSION**

8 As set forth herein, the proposed PAGA Settlement provides excellent results for both the State  
9 of California and the PAGA Settlement Employees. Plaintiffs respectfully request that the Court approve  
10 the Settlement.

11  
12 Dated: June 15, 2018

  
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