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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF RIVERSIDE
9

10 ELMAR GARCIA, as an aggrieved employee
pursuant to the Private Attorneys General Act
11 ("PAGA"),

12 Plaintiff,

13 vs.
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15 TRACTOR SUPPLY COMPANY, a Tennessee
corporation; and DOES 1 through 100, inclusive,

16 Defendants.
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Case No. MCC1600273
Reservation No.: RES85383

**NOTICE OF MOTION AND MOTION FOR
COURT APPROVAL OF THE PARTIES'
PAGA SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

Date: January 15, 2019
Time: 8:30 a.m.
Place: Department 5

Complaint Filed: April 4, 2016

1 **TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on January 15, 2019 at 8:30 a.m., or as soon thereafter as
3 counsel may be heard, in Department 5 of the above-captioned court, located at located at 4050 Main
4 Street, Riverside, California 92501, the Honorable Craig G. Riemer presiding, Plaintiff Elmar Garcia
5 will, and hereby does, move this Court for entry of an order approving the Parties' PAGA settlement
6 pursuant to Labor Code section 2699(1)(2).

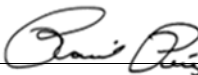
7 This Motion is based upon: (1) this Notice of Motion and Motion; (2) the Memorandum of
8 Points and Authorities in Support of Motion for Court approval of the PAGA Settlement; (3) the
9 Declaration of Raul Perez, which attaches the PAGA Settlement Agreement;¹ (4) the [Proposed] Order
10 Approving the PAGA Settlement Agreement; (5) the records, pleadings, and papers filed in this action;
11 and (6) upon such other documentary and oral evidence or argument as may be presented to the Court at
12 or prior to the hearing of this Motion.

13
14 Dated: November 27, 2018

Respectfully submitted,

Capstone Law APC

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17 By: _____



Raul Perez
Bevin Allen Pike

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19 Attorneys for Plaintiff Elmar Garcia
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¹ Plaintiff has e-filed a copy of the PAGA Settlement Agreement with the LWDA. See Declaration of Raul Perez, Exhibit 2 (confirmation of receipt from LWDA).

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to the Labor Code Private Attorneys General Act of 2004 (Lab. Code. §§ 2698, *et seq.*, “PAGA”), Plaintiff Elmar Garcia seeks Court approval of the settlement of his claim for PAGA civil penalties with Defendant Tractor Supply Company (“Defendant” or “Tractor Supply”) (collectively with Plaintiff, the “Parties”).

The PAGA provides that “[t]he superior court shall review and approve any settlement of any civil action filed pursuant to this part.” Lab. Code § 2699(l)(2). Other than the provision quoted above, however, the PAGA does not establish a standard for evaluating PAGA settlements. Indeed, the LWDA has stated that it is, “not aware of any existing case law establishing a specific benchmark for PAGA settlements, either on their own terms or in relation to the recovery on other claims in the action.” See *Smith v. H.F.D. No. 55, Inc.*, No. 2:15-CV-01293-KJM-KJN, 2018 WL 1899912, at *2 (E.D. Cal. Apr. 20, 2018); *Gutilla v. Aerotek, Inc.*, No. 1:15-CV-00191-DAD-BAM, 2017 WL 2729864, at *2 (E.D. Cal. Mar. 22, 2017) (“the court is unable to find . . . any published authority identifying the proper standard of review of PAGA settlements to be employed by the court”).

The California Labor Workforce and Development Agency (“LWDA”) has explained that when trial courts are reviewing PAGA settlements, they should consider whether, “the relief provided for under the PAGA [is] genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public” *O’Connor v. Uber Techs., Inc.*, No. 13-03826-EMC, 201 F. Supp. 3d 1110, 1133 (N.D. Cal. Aug. 18, 2016). And nothing in the PAGA changes the strong judicial preference in support approving settlements. See, e.g., *Osumi v. Sutton*, 151 Cal. App. 4th 1355, 1357 (2007) (confirming the “[s]trong public policy in favor of the settlement of civil cases . . .”).

The principal terms of the PAGA Settlement Agreement² are as follows:

- (1) The creation of a PAGA Penalties Fund of approximately \$150,500, which will be paid to aggrieved employees and the LWDA in full satisfaction of all claims for PAGA civil penalties under the California Labor Code, Wage Orders, regulations, and/or other provisions of law alleged to have been violated in the proposed Third Amended Complaint [“TAC”] with respect to Aggrieved Employees (“PAGA Penalties Fund”).
 - (a) Seventy-five percent of the PAGA Penalties Fund, or approximately \$112,875, will be paid to the LWDA pursuant to Labor Code section 2699(i).
 - (b) Twenty-five percent of the PAGA Penalties Fund, or approximately \$37,625,

² Unless indicated otherwise, all capitalized terms used herein have the same meaning as those defined by the PAGA Settlement Agreement, which is attached as Exhibit 1 to the Declaration of Raul Perez filed in conjunction with this motion. Proof that the PAGA Settlement Agreement has been e-filed with the LWDA is attached as Exhibit 2 to the Perez Decl.

will be paid to all persons who were employed by Defendant as non-exempt hourly employees in California at any time during the period from February 26, 2015 through the date of the order approving the settlement (“Aggrieved Employees”). There are approximately 2,200 Aggrieved Employees.

- (2) A \$7,500 General Release Payment, which will be paid to Plaintiff as consideration for a general release of all claims he may have against Defendant arising out of his employment.
- (4) Reasonable attorneys’ fees and costs under Labor Code section 2699(g) for Plaintiff’s counsel’s successful prosecution and resolution of this action. Plaintiff requests \$195,000 in attorneys’ fees and up to \$32,000 in costs for his counsel, Capstone Law APC (“Plaintiff’s Counsel”).
- (5) Settlement Administration Costs of \$15,000.

The settlement was negotiated by the parties at arm’s length with the assistance of Michael Loeb, Esq., an experienced and well-respected mediator of wage and hour actions, including PAGA actions. The civil penalties secured by the settlement represent a fair compromise of Plaintiff’s PAGA claims in view of the risks of continued litigation and the hotly contested issues of law and fact relating to PAGA claims. The Settlement accomplishes PAGA’s objectives by imposing sufficient civil penalties “to punish and deter” Defendant from committing any of the Labor Code violations alleged, while also ensuring that the penalties are not “unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(e)(2); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 384 (2014).

For these reasons and the reasons discussed in more detail below, Plaintiff respectfully requests that the Court approve the PAGA Settlement Agreement and enter the proposed Order Approving the PAGA Settlement Agreement to which the Parties have stipulated.

II. FACTS AND PROCEDURE

A. Overview of the Litigation

Tractor Supply is a national chain of retail stores offering products for home improvement, agriculture, lawn maintenance, and pet/animal care. Tractor Supply employed Mr. Garcia as a non-exempt Assistant Manager from about December 2013 to December 2015 at its Tulare and Hemet, California retail stores.

On April 4, 2016, Mr. Garcia filed this action in the Riverside County Superior Court alleging a single cause of action under PAGA for civil penalties for various underlying Labor Code violations. The *Garcia* Action was initially assigned to the Honorable Judge Raquel A. Marquez in Department S303 for all purposes. At the October 3, 2016 initial Case Management Conference, the Parties agreed to engage in private mediation to be concluded no later than August 11, 2017. As part of the agreement, the Parties agreed to informally exchange discovery for mediation but to stay the case until the date of the

1 continued Trial Setting Conference, which was set for August 21, 2017, and stipulate to the filing of a
2 First Amended Complaint (“FAC”) that narrowed the scope of the issues for mediation. Pursuant to a
3 stipulation and order, Mr. Garcia filed the FAC on May 12, 2017, dismissing several claims. On June 14,
4 2017, the Parties mediated the case with mediator Michael Loeb, but were unable to reach a settlement.
5 (Perez Decl. ¶ 2.)

6 The Parties subsequently agreed to lift the stay and Plaintiff commenced formal discovery on
7 June 26, 2017, serving responses to Defendant’s outstanding discovery requests on July 3, 2017. On the
8 same day, Defendant subpoenaed Plaintiff’s consumer records. Plaintiff moved to quash the subpoenas,
9 but the motion was taken off calendar after Defendant agreed to withdraw its subpoenas. Plaintiff also
10 moved to amend the Complaint to reinstate the claims that were dismissed as part of the agreement to
11 mediate. (Perez Decl. ¶ 3.)

12 On August 18, 2017 before the hearing on the pending motions, Plaintiff received notice that the
13 case was transferred to the Honorable Sharon Waters. On August 22, 2017, the Court issued a Case
14 Management Order staying all discovery “pending approval of a proposed discovery plan.” (Perez Decl.
15 ¶ 4.)

16 On August 28, 2017, the Court in part denied and in part granted Plaintiff’s motion for leave to
17 file a second amended complaint. Specifically, the Court denied Plaintiff’s request to reinstate the
18 dismissed claims but permitted Plaintiff to clarify his rest break theory of liability. Plaintiff was deposed
19 on August 30, 2017. (Perez Decl. ¶ 5.)

20 Mr. Garcia filed a Second Amended Complaint (“SAC”) on September 19, 2017, adding new
21 allegations of meal and rest break violations and dismissing one claim under Labor Code section
22 226(a)(2). On October 3, 2017, the Court denied Plaintiff’s motion for reconsideration of the ruling
23 denying in part his motion for leave to amend. (Perez Decl. ¶ 6.)

24 Thereafter, Defendant sought to dismiss certain allegations in Plaintiff’s SAC. Defendant also
25 argued that discovery should be stayed until after resolution of its anticipated motions challenging the
26 pleading. After meet and confer communications, Plaintiff agreed to dismiss the request for penalties
27 under Labor Code 558 via a Request for Dismissal, which was entered by the Court on November 6,
28 2017. On November 7, 2017, Tractor Supply demurred to the SAC, and in the alternative, moved to
29 strike portions of the SAC, specifically those sections alleging violations of Labor Code sections 204 and
30 222.5. Garcia opposed both motions. (Perez Decl. ¶ 7.)

31 On December 21, 2017, the Court overruled the demurrer but granted the alternative motion to
32 strike as to the alleged violation of Labor Code sections 204 and 222.5. In addition, the Court found that

the issues concerning the Labor Code section 204 and 222.5 claims were appropriate for interlocutory appellate review and advised the parties to seek a writ, which Garcia did on February 23, 2018. Prior to Plaintiff's writ petition, Plaintiff applied *ex parte* for an order certifying the issues for appeal under Code of Civil Procedure section 166.1, which the Court denied without argument. The writ was denied on May 24, 2018. (Perez Decl. ¶ 8.)

B. Plaintiff's Counsel Conducted a Thorough Investigation of the Factual and Legal Issues

Beginning shortly after Plaintiff retained Plaintiff's Counsel, and continuing for nearly two-and-a-half years until a settlement in principle was reached, Plaintiff's Counsel conducted a thorough investigation of the factual and legal issues. (Perez Decl. ¶ 9.)

Pre-Litigation Investigation: At the outset and throughout litigation, Mr. Garcia provided Plaintiff's Counsel with a detailed narrative of his experiences working for Defendant, and the circumstances that gave rise to the alleged Labor Code violations. Because Defendant had been employed by Mr. Garcia for approximately two years, he was able to share with Plaintiff's Counsel his intimate familiarity and understanding of Defendant's policies and practices, and how these policies and practices were instituted on a daily basis. In addition to informing Plaintiff's Counsel's initial evaluation of the lawsuit, the information provided by Mr. Garcia also influenced Plaintiff's Counsel's formal discovery efforts. (Perez Decl. ¶ 10.)

Discovery: Plaintiff's written discovery requests, and protracted discovery meet and confer efforts, led to the production of considerable evidence, including the policies and practices directly at issue, as well as those policies and procedures that allegedly affected Defendant's ability to comply with the Labor Code. Plaintiff's Counsel analyzed hundreds of pages of documents that were produced by Defendant, and were able to identify the policies and procedures that would ultimately have formed the backbone of Plaintiff's presentation at trial. Plaintiff's Counsel also sought and received employee payroll records. Plaintiff's Counsel's analysis of these records was used to value the case and prepare Plaintiff's mediation brief. In addition to the above written discovery, Plaintiff was deposed by Defendant's counsel on August 30, 2017. (Perez Decl. ¶ 11.)

Trial Preparation: Because trial was set to begin on October 12, 2018, Plaintiff had begun preparing for trial, including developing trial plans and gathering trial witnesses. (Perez Decl. ¶ 12.)

In summary, by engaging in a thorough investigation and evaluation of Plaintiff's claims, Plaintiff's Counsel can opine that the Settlement, for the consideration and on the terms set forth in the Settlement Agreement, is fair and reasonable. (Perez Decl. ¶ 13.)

1 **C. The Parties Settled with the Assistance of a Respected Mediator**

2 On June 14, 2017, the Parties participated in an all-day of mediation with Michael Loeb, Esq., an
3 experienced mediator of wage and hour class actions and PAGA actions. Mr. Loeb helped to manage the
4 Parties' expectations and provided a useful, neutral analysis of the issues and risks to both sides.
5 Although the parties did not settle at mediation, they remained in contact with Mr. Loeb so that he could
6 continue to supervise and guide their continuing settlement negotiations as the litigation resumed. (Perez
7 Decl. ¶ 14.)

8 As the Parties were preparing for trial, they agreed to resume their settlement negotiations under
9 Mr. Loeb's supervision. With the benefit of Mr. Loeb's guidance, the Parties eventually agreed on the
10 principal terms of a settlement, which are now set forth herein. (Perez Decl. ¶ 15.)

11 **D. The Parties Negotiated a Fair and Reasonable Settlement of Plaintiff's Claims**

12 **1. Terms of the Settlement and Distribution of PAGA Penalties**

13 The Settlement provides that Defendant will pay a total of \$400,000 to settle this action. From
14 this amount, payments will be made to the LWDA and the Aggrieved Employees, to Mr. Garcia as
15 compensation for a general release of claims, to Plaintiff's Counsel for their attorneys' fees and litigation
16 costs, and to the Settlement Administrator (CPT Group) for settlement administration costs. Settlement
17 Agreement ¶ 18.

18 The resulting balance will be distributed to the LWDA and Aggrieved Employees. The LWDA
19 will receive approximately \$112,875. Settlement Agreement ¶ 19. Aggrieved Employees will receive
20 approximately \$37,625. *Id.* The Aggrieved Employees encompassed by the proposed Settlement are all
21 persons who were employed by Defendant as non-exempt hourly employees in California at any time
22 during the period from February 26, 2015 through the date of the order approving the settlement. *Id.* at ¶
23 15. There are approximately 2,200 Aggrieved Employees.

24 **2. Allocations to the LWDA and Aggrieved Employees**

25 Payments to Aggrieved Employees will be made from the PAGA Penalties Fund. The individual
26 allocations will be calculated on a pro-rata basis using the number of pay periods worked by each
27 employee. Defendant will provide the total number of pay periods worked by each Aggrieved Employee
28 and the total number of pay periods worked by all Aggrieved Employees during the Settlement Period.
29 Settlement Agreement ¶ 19. The Settlement Administrator will calculate each Aggrieved Employee's
30 payment using the proportional number of pay periods during which the employee worked. Thus, the
31 Settlement Administrator will perform the following calculation to calculate individual payments:
32 Settlement Payment = (25% of PAGA Penalties Fund) × (pay periods worked by individual Aggrieved

Employee during the Settlement Period ÷ total pay periods worked by all Aggrieved Employees during the Settlement Period). Settlement Agreement ¶ 19. This is a fair and equitable means of allocating the penalties. Aggrieved Employees who worked for a longer duration during the Settlement Period will receive proportionally larger payments than those employees who worked for shorter durations.

As the Settlement payments to the Aggrieved 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. Settlement Agreement ¶ 28.

3. Payments to the Aggrieved 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 the Court enters the Order. Settlement Agreement ¶ 25. Within seven days after the Effective Date, Defendant will wire the \$400,000 settlement fund 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 Settlement Period. Settlement Agreement ¶ 27. The payments to Aggrieved Employees and the LWDA will be made within seven days after Defendant's funding of the settlement fund. *Id.* 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" process, and notice will not be provided to Aggrieved Employees in advance of the payments.

Prior to mailing, the Settlement Administrator will confirm and update the addresses in the Database using the National Change of Address database. Settlement Agreement ¶ 28. Moreover, the Settlement Administrator will promptly re-mail any checks returned as non-deliverable with forwarding address affixed. *Id.* If no forwarding address is provided, the Settlement Administrator will attempt to determine the correct address using a skip-trace and will perform a single re-mailing. *Id.* Checks issued to Aggrieved Employees will expire 120 calendar days from the date they are issued; after the 120-day period, the Settlement Administrator will remit any unclaimed funds to the State of California Unclaimed Wages Fund in the name of the PAGA Settlement Employee. *Id.*

4. The Settled PAGA Claims

Upon entry of the Order, (i) Plaintiff, individually, and in his capacity as a private attorney general for and proxy or agent of the California Labor Workforce Development Agency, and (ii) the LWDA, as the real party in interest, will irrevocably release, acquit, and forever discharge Defendant

(including its past, present and/or future, direct and/or indirect, officers, directors, members, managers, employees, agents, representatives, attorneys, insurers, partners, investors, shareholders, administrators, parent companies, subsidiaries, affiliates, divisions, predecessors, successors, assigns, and joint venturers) of and from all claims for civil penalties recoverable under Labor Code section 2699(a) that were or reasonably could have been brought in this Action based on the facts and legal theories alleged in the proposed Third Amended Complaint (“TAC”), attached as Exhibit A to the PAGA Settlement Agreement. Settlement Agreement ¶ 29.

The Settled Claims include: (1) unpaid wages for the time spent on employer-mandated drug test and/or physical examination pursuant to Labor Code sections 1182.12, 1194, 1197, 1197.1, 1198 and California Code of Regulations, Title 8, section 11050(2)(K); (2) rest period violations pursuant to Labor Code sections 226.7 and 1198; (3) unpaid rest period premiums pursuant to Labor Code section 226.7; (4) untimely payment of wages during and after employment only insofar as it is based on claims enumerated in (1), (2), and (3) above and pursuant to Labor Code sections 201, 202, 203, 204, and 210; (5) wage statement violations only insofar as it is based on claims enumerated in (1), (2), and (3) above and pursuant to Labor Code sections 226(a), 226.3, 1174(d), 1174.5 and 1198.³ It is understood and agreed that the Settled Claims are limited to claims for civil penalties recoverable under Labor Code section 2699(a). This release shall bar any person purporting to represent the LWDA or to sue on its behalf from seeking to recover PAGA penalties for the Settled Claims during the Settlement Period. Settlement Agreement ¶ 29.

³ The Settled Claims exclude, and will in no way bar or prohibit via res judicata or collateral estoppel the litigation of, all claims in the related PAGA action titled *Charles Lathan v. Tractor Supply Company*, Riverside Superior Court Case No. RIC1724482 (“Lathan Action”), that are alleged in the operative Second Amended Complaint, a copy of which is attached hereto as Exhibit A, (the “Excluded Claims”). The Excluded Claims include (1) unpaid overtime due to failure to record all hours worked and/or failure to include bonuses and incentive pay in the calculation of regular rate of pay pursuant to Labor Code sections 510 and 1198; (2) unpaid minimum wages due to failure to record all hours worked pursuant to Labor Code sections 1182.12, 1194, 1197, 1197.1, and 1198; (3) meal period violations pursuant to Labor Code sections 226.7, 512(a), and 1198; (4) unpaid meal period premiums pursuant to Labor Code section 226.7; (5) wage statement violations pursuant to Labor Code sections 226(a), 226.3, 1174(d), 1174.5 and 1198 only insofar as it is based on claims enumerated in (1), (2), and (4) in this sentence; (6) payroll recordkeeping violations pursuant to Labor Code sections 1174(d) and 1198 only insofar as it is based on claims (1) through (5) in this sentence; (7) untimely payment of wages upon termination pursuant to Labor Code sections 201, 202, and 203 only insofar as it is based on claims enumerated in (1), (2), and (4) in this sentence; and (8) unreimbursed business expenses pursuant to Labor Code section 2802. It is understood and agreed that this Settlement does not affect the right of the plaintiff in the Lathan Action to amend his complaint to add claims which could reasonably be added to the Lathan Action by stipulation or motion to amend the operative complaint, except to the extent such claims constitute Settled Claims, as defined above.

1 Additionally, Mr. Garcia has agreed to a broader general release of all claims of any kind against
2 Defendant, including claims for interest, attorneys’ fees and costs, restitution, and equitable and
3 declaratory relief. Settlement Agreement ¶ 21.

4 **III. ARGUMENT**

5 **A. The PAGA Penalties Secured by the Settlement Are Genuine and Meaningful, and** 6 **Fulfill PAGA’s Underlying Purpose to Benefit the Public**

7 The California legislature enacted PAGA to “augment the limited enforcement capability of the
8 [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency.”
9 *Iskanian*, 59 Cal. 4th at 383. PAGA authorizes an employee to bring an action for “civil penalties on
10 behalf of the state against his or her employer for Labor Code violations committed against the employee
11 and fellow employees” *Id.* at 360. The goal of a PAGA enforcement action is to impose civil
12 penalties for Labor Code violations “significant enough to deter violations.” *Id.* at 379.

13 Fundamentally, “a PAGA action is a statutory action in which the penalties available are
14 measured by the number of Labor Code violations committed by the employer.” *Sakkab v. Luxottica*
15 *Retail N. Am., Inc.*, 803 F.3d 425, 435 (9th Cir. 2015). Under the general provisions of the PAGA
16 scheme, 75% of the civil penalties recovered goes to the state while the remaining amount is given to the
17 aggrieved employees. Lab. Code § 2699(i). For Labor Code violations for which no penalty is provided,
18 PAGA provides that the penalties are generally \$100 for each aggrieved employee per pay period for the
19 initial violation and \$200 per pay period for each subsequent violation. Cal. Lab. Code § 2699(f)(2). The
20 court, “may award a lesser amount than the maximum civil penalty amount specified by this part if,
21 based on the facts and circumstances of the particular case, to do otherwise would result in an award that
22 is unjust, arbitrary and oppressive, or confiscatory.” Cal. Lab. Code § 2699(e)(2); *see also Amaral v.*
23 *Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1213 (2008).

24 Moreover, the PAGA statute expressly distinguishes and preserves the right of employees to
25 separately (or concurrently) pursue their own causes of action against their employers and to recover
26 other available federal and state remedies. Cal. Lab. Code § 2699(g)(1); *see Baumann v. Chase Inv.*
27 *Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir. 2014) (explaining the differences between the finality in
28 class action judgments and the limited res judicata effect of PAGA judgments). “Unlike a class action
29 seeking damages or injunctive relief for injured employees, the purpose of PAGA is to incentivize
30 private parties to recover civil penalties for the government that otherwise may not have been assessed
31 and collected by overburdened state enforcement agencies.” *McKenzie v. Federal Express Corp.*, 765 F.
32 Supp. 2d 1222, 1233 (C.D. Cal. 2011).

1 The PAGA statute specifically provides that “[t]he superior court shall review and approve any
2 settlement of any civil action filed pursuant to this part.” Cal. Lab. Code § 2699(l)(2). Other than the
3 provision quoted above, however, the PAGA does not establish a standard for evaluating PAGA
4 settlements. Indeed, the LWDA has stated that it, “is not aware of any existing case law establishing a
5 specific benchmark for PAGA settlements, either on their own terms or in relation to the recovery on
6 other claims in the action.” See *Smith v. H.F.D. No. 55, Inc.*, No. 2:15-CV-01293-KJM-KJN, 2018 WL
7 1899912, at *2 (E.D. Cal. Apr. 20, 2018); *Gutilla v. Aerotek, Inc.*, No. 1:15-CV-00191-DAD-BAM,
8 2017 WL 2729864, at *2 (E.D. Cal. Mar. 22, 2017) (“the court is unable to find . . . any published
9 authority identifying the proper standard of review of PAGA settlements to be employed by the court”).

10 In the absence of an explicit statutory requirement, the LWDA has provided guidance,
11 explaining that courts should evaluate settlements of PAGA claims based on whether “the relief
12 provided for under the PAGA [is] genuine and meaningful, consistent with the underlying purpose of the
13 statute to benefit the public.” *O’Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110, 1133 (N.D. Cal.
14 2016) (quoting the above passage). Courts defer to the agency’s interpretation of a statute where
15 authority has been delegated to that agency. See *New Cingular Wireless PCS, LLC v. Pub. Utilities*
16 *Comm’n*, 246 Cal. App. 4th 784, 807 (2016). When evaluating a PAGA settlement, the Court should
17 analyze whether the amount of civil penalties obtained is “genuine and meaningful” in light of PAGA’s
18 statutory purpose.

19 The Court’s evaluation of the settlement should therefore **not focus** on the average recovery per
20 aggrieved employee but rather take into account PAGA’s statutory purpose in deterring Labor Code
21 violations through the imposition of civil penalties, with special attention on whether the relief is
22 “genuine and meaningful.” Thus, the Court’s evaluation of the settlement should therefore not focus on
23 “restitution” to employees, as in a class action settlement, but rather on the PAGA’s statutory purpose in
24 deterring Labor Code violations through the imposition of civil penalties, with special attention on
25 whether the relief is “genuine and meaningful.”

26 **B. Nature of the Alleged Violations**

27 Plaintiff alleges two core sets of claims in the actions: (1) Defendant violated the Labor Code
28 and applicable wage orders by prohibiting Aggrieved Employees from leaving the worksite during their
29 rest breaks and thus illegally maintaining control over employees during their rest breaks and (2)
30 Defendant violated Labor Code sections Labor Code sections 1182.12, 1194, 1197, 1197.1, and 1198
31 and the applicable Wage Orders by failing to compensate Plaintiff and other Aggrieved Employees for
32 the time they spent traveling to and undergoing drug tests that Defendant required at the time of hire.

Each of these claims expose Defendant to PAGA penalties for the period from February 26, 2015 through the present. (Perez Decl. ¶ 17.)

1. PAGA Penalties for Rest Period Allegations

Plaintiff alleges that Defendant violated the Labor Code law by prohibiting Aggrieved Employees from leaving the worksite during their rest breaks and thus illegally maintaining control over employees during rest breaks. Because Defendant’s “on-premises” rest break policy applied to all Aggrieved Employees, Plaintiff alleges that all rest breaks taken by Aggrieved Employees during the Settlement Period resulted in a rest break violation. (Perez Decl. ¶ 18.)

Recently, in *Augustus v. ABM Security Services, Inc.*, 2 Cal. 5th 257 (2016), the California Supreme Court held that “[d]uring required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time,” including where they take their breaks. *Augustus* explicitly holds that “[d]uring rest periods, employers must relieve their employees of all duties and **relinquish any control over how employees spend their break time.**” 2 Cal. 5th at 260 (emphasis added). Indeed, *Augustus* prohibits employers from exerting any control over employees during rest periods—including control over the locations where employees may spend their break time. *Id.* at 269-70 (employees **must be free of employer control** during rest breaks **so that they may take “a brief walk—five minutes out and five minutes back. . .”**) (emphasis added). (Perez Decl. ¶ 19.)

In so holding, the California Supreme Court distinguished between inherent or “practical limitations” that impact all rest breaks and therefore do not amount to “employer control,” from an employer-imposed constraint that dictates how employees are to spend their break time—which does constitute unlawful “employer control.” (Perez Decl. ¶ 20.)

2. PAGA Penalties for the Drug-Test Allegation

Plaintiff alleges that Defendant violated Labor Code sections 1182.12, 1194, 1197, 1197.1, and 1198 and the applicable Wage Orders by failing to compensate Plaintiff and other Aggrieved Employees for the time they spent traveling to and undergoing drug tests that Defendant required at the time of hire. (Perez Decl. ¶ 21.)

Wage Order No. 7 defines “employer” as “any person as defined in Section 18 of the Labor Code, who directly or indirectly...employs or exercises control over the wages, hours, or working conditions of any person.” 8 Cal. Code Regs. § 11070(2)(F). Further, Wage Order No. 7 also defines “hours worked” as “time during which an employee is subject to the control of the employer, and

1 includes all the time the employee is suffered or permitted to work, whether or not required to do so.” 8
2 Cal. Code Regs. § 11070(2)(G). The California Supreme Court made clear that the factors of “time
3 during which an employee is subject to the control of an employer” and “time the employee is suffered
4 or permitted to work” are independent factors, each of which defines whether certain time spent is
5 compensable as “hours worked.” *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal. 4th 833, 839 (2015)
6 (citing *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 582 (2000). Thus, “an employee who is subject
7 to an employer’s control does not have to be working during that time to be compensated . . .” *Id.*
8 (citations omitted). (Perez Decl. ¶ 22.)

9 Ultimately, the level of control an employer exerts is determinative of whether the time is
10 compensable. *Mendiola*, 60 Cal. 4th at 840. In explaining the concept of control, the Supreme Court held
11 that when an employer “prevents the employee from using the time effectively for his or her own
12 purposes, that employee remains subject to the employer’s control.” *Id.* (quoting *Morillion*, 22 Cal. 4th at
13 583) (internal quotations omitted). The Supreme Court also noted that another appropriate consideration
14 is whether the time “is spent primarily for the benefit of the employer and its business.” *Mendiola*, 60
15 Cal. 4th at 841. (Perez Decl. ¶ 23.)

16 C. Number of Alleged Violations and Total Potential PAGA Penalties

17 Based on a comprehensive analysis of Defendant’s discovery productions and a review of
18 employee payroll records, Plaintiff’s Counsel were able to calculate Defendant’s maximum potential
19 exposure for the core claims, as summarized below. (Perez Decl. ¶ 24.)

20 **Penalties for Rest Period Claim:** Plaintiff’s Counsel determined that Aggrieved Employees
21 worked a combined total of approximately 58,070 pay periods during the statute of limitations period.
22 Because Plaintiff alleged that all pay periods had rest period violations, Defendant’s maximum potential
23 exposure for PAGA penalties would be calculated as follows: [2,200 (initial pay periods) x \$100] +
24 [55,870 (subsequent pay periods) x \$200] = \$11,394,000. (Perez Decl. ¶ 25.)

25 **Penalties for Drug-Test Claim:** Plaintiff’s Counsel determined at the time of settlement that
26 there were a total of approximately 2,200 Aggrieved Employees. Because Plaintiff alleged that
27 Defendant should have paid each of these employees minimum wages for time spent in connection with
28 drug-testing, Defendant’s maximum potential exposure for PAGA penalties would be calculated as
29 follows: 2,200 (initial pay periods) x \$100 = \$220,000. (Perez Decl. ¶ 26.)

30 **Penalties for Wage Statement Claim:** Based on the preceding violations, Plaintiff alleges that
31 Defendant failed to provide Aggrieved Employees with compliant wage statements. Defendant’s
32 maximum potential exposure for PAGA penalties would be calculated as follows: [2,200 (initial pay

periods) x \$100] + [55,870 (subsequent pay periods) x \$200] = \$11,394,000. (Perez Decl. ¶ 27.)

Penalties for 203 Claim: Based on the preceding violations, Plaintiff alleges that Defendant failed to pay Aggrieved Employees all outstanding wages due to them on their final paychecks. Penalties would be calculated as follows: 1,150 (approximate number of former employees) x \$100 = \$115,000. (Perez Decl. ¶ 28.)

D. Factors Supporting A Reduction In Total Penalties Based On The Anticipated Trial Result, Weight Of Evidence, Clarity Of Controlling Law, And Defendant’s Defenses

Defendant has vigorously defended this action, denying that it violated any section of the Labor Code or Wage Order. With respect to the rest period claim, Defendant argued that *Augustus* does not specifically address the requirement that employees remain at the worksite during their rest period; rather, *Augustus* addressed whether employers could satisfy their obligation to relieve employees from duty and control during rest periods while still having to remain on-call. (Perez Decl. ¶ 29.)

Regarding the drug-testing claim, Defendant argued that activities undertaken by job applicants at the time of hiring—such as employer-mandated drug tests and physical examinations—are not “work” performed by an “employee,” and are therefore not compensable time. *See Gunawan v. Howroyd-Wright Employment Agency*, 997 F. Supp. 2d 1058, 1062 (C.D. Cal. 2014). In *Gunawan*, following a job interview, a prospective employee was sent to a second interview with one of the prospective employer’s clients. After an employment relationship was later established, the plaintiff sought compensation for the time spent on the second interview. The court held that a prospective employee is not “entitled to payment of the minimum wage for time spent interviewing for prospective employment” and granted summary judgment because, during these pre-employment tasks, *Gunawan* “was not an employee of KForce performing compensable work.” *Id.* (finding that section 1194 “[q]uite clearly . . . contemplates that only an employee, and not a prospective employee or applicant for employment, can recover”). (Perez Decl. ¶ 30.)

Defendant would also have argued that under *Morillon v. Royal Packing Co.*, 22 Cal. 4th 575, 587 (2000), an employer does not exercise “control” over employees by simply requiring them to appear at some specific destination. *Id.* at 583 (rejecting argument that commuting and grooming would be paid under the “control” rule because the “level of the employer’s control over its employees, *rather than the mere fact that the employer requires activity*, is determinative”) (emphasis added). *See also Gunawan*, 997 F. Supp. 2d at 1063 (finding time spent on second interview was not under “control” of prospective employer because, although company sent applicant to second interview and controlled communications

1 with second interviewer, there was “no evidence that KForce had control over the questions asked . . . or
2 more importantly, over the answers she provided . . . over the length . . . or that KForce required Ms.
3 Gunawan to act in a certain manner while she was there”). Because these arguments, if accepted, would
4 serve as complete defenses to the merits of Plaintiff’s claim, Plaintiff appropriately discounted his
5 estimate of the maximum potential PAGA penalties at issue by the strength of this defense. (Perez Decl.
6 ¶ 31.)

7 With respect to derivative claims, such as penalties under Labor Code section 203 as
8 incorporated into the PAGA, Defendant would have argued that no waiting-time penalties can be
9 awarded unless the failure to pay wages is “willful,” an element that Plaintiff acknowledges would have
10 been difficult to prove. *See* 8 C.C.R. 13520 (“[a] willful failure to pay wages within the meaning of Labor
11 Code section 203 occurs when an employer intentionally fails to pay wages to an employee when those
12 wages were due.”); *Smith v. Rae Venter Law Group*, 29 Cal.4th 345, 354 n.2 (2002) (holding that a good
13 faith dispute that any wages are due will preclude an award of waiting time penalties). Defendant would
14 also have argued that an employer’s failure to pay wages is not willful unless it reached the standard of
15 “gross negligence or recklessness.” *See Amaral v. Cintas*, 163 Cal. App. 4th 1157, 1203 (2008). (Perez
16 Decl. ¶ 32.)

17 Further, to award statutory penalties under section 226(e), Defendant would have argued that
18 Plaintiff would have needed to show that Defendant “knowingly and intentionally” issued wage
19 statements with unlawful deficiencies. *See* Labor Code § 226; *Price v. Starbucks Corp.*, 192 Cal. App.
20 4th 1136, 1142-43 (2011). Thus, there was a significant risk that Defendant would have been able to
21 avoid liability due to a defense that they did engage in a “knowing and intentional” violation, and also
22 Defendant’s assertion that it should not be penalized for mere “technical” violations that do not result (as
23 Defendant would claim) in any injury. (Perez Decl. ¶ 33.)

24 **Rest Period Claim:** Considering the weight of the evidence, the clarity of the applicable law,
25 and the strength of any factual or legal defense likely to be asserted by the Defendant, Plaintiff estimated
26 the chances of recovering *maximum penalties* at trial at approximately 25%, which is the product of the
27 following contingent events: [the odds that a PAGA trial would be found manageable ($\approx 95\%$)] x [the
28 odds of prevailing on all summary judgment/motions in limine on the rest period claim ($\approx 60\%$)] x [the
29 odds of prevailing at trial on the rest period claim and recovering full penalties ($\approx 55\%$)] x [the odds of
30 prevailing on appeal, i.e., a complete affirmance of all awarded penalties ($\approx 80\%$)]. (Perez Decl. ¶ 34.)

31 **Drug-Test Claim:** Considering the weight of the evidence, the clarity of the applicable law, and
32 the strength of any factual or legal defense likely to be asserted by the Defendant, Plaintiff estimated the

chances of recovering *maximum penalties* at trial at approximately 20%, which is the product of the following contingent events: [the odds that a PAGA trial would be found manageable ($\approx 95\%$)] x [the odds of prevailing on all summary judgment/motions in limine on the drug-test claim ($\approx 60\%$)] x [the odds of prevailing at trial on the drug test claim and recovering full penalties ($\approx 50\%$)] x [the odds of prevailing on appeal, i.e., a complete affirmance of all awarded penalties ($\approx 70\%$)]. (Perez Decl. ¶ 35.)

Wage Statement Claim: Considering the weight of the evidence, the clarity of the applicable law, and the strength of any factual or legal defense likely to be asserted by the Defendant, Plaintiff estimated the chances of recovering *maximum penalties* at trial for wage statement violations at approximately 10%, which is the product of the following contingent events: [the odds that a PAGA trial would be found manageable ($\approx 95\%$)] x [the odds of prevailing on all summary judgment/motions in limine, including on the issue as to whether Defendant’s failure to provide compliant wage statements was “knowing and intentional” ($\approx 50\%$)] x [the odds of prevailing at trial on the wage statement claim (and underlying predicate claims) and recovering full penalties ($\approx 45\%$)] x [the odds of prevailing on appeal, i.e., a complete affirmance of all awarded penalties ($\approx 45\%$)]. (Perez Decl. ¶ 36.)

Penalties for 203 Claim: Considering the weight of the evidence, the clarity of the applicable law, and the strength of any factual or legal defense likely to be asserted by the Defendant, Plaintiff estimated the chances that the 203 claim would likely prevail at trial at approximately 10%, which is the product of the following contingent events: [the odds that a PAGA trial would be found manageable ($\approx 95\%$)] x [the odds of prevailing on summary judgment/motions in limine, including on the issue as to whether Defendant willfully withheld wages ($\approx 50\%$)] x [the odds of prevailing at trial ($\approx 45\%$)] x [the odds of prevailing on appeal, i.e., a complete affirmance of all awarded penalties ($\approx 45\%$)]. (Perez Decl. ¶ 37.)

Plaintiff also notes that some courts have recognized an alternative approach to calculating PAGA penalties which differs from the approach applied above in one significant respect; namely, these 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) (“Trang”) (“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) (“AFL”) (finding that California law imposes the “subsequent violation penalty” only after an

employer has been notified its conduct violates the Labor Code). While Plaintiff regards this interpretation as flawed, he nonetheless recognizes that this interpretation has gained traction with some courts, and if applied here, Defendant’s maximum potential exposure would actually be only about 52% of Plaintiff’s calculation (i.e., \$11,949,000 instead of \$23,123,000). (Perez Decl. ¶ 38.)

Claim	Maximum Penalties	Reduction Per Trang/AFL	Odds of Recovering Maximum Penalties	Realistic Award of Penalties at Trial (If Awarded)
Rest Period Claim	\$11,394,000	\$5,807,000	25%	\$1,451,750
Drug-Test Claim	\$220,000	\$220,000	20%	\$44,000
226 Claim	\$11,394,000	\$5,807,000	10%	\$580,700
203 Claim	\$115,000	\$115,000	10%	\$11,500
Total	\$23,123,000	\$11,949,000		\$2,087,950

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 WL 7563047, at *4 (C.D. Cal. 2011). For instance, in the *Lyft* case, the Court found that a \$1 million PAGA settlement was fair and reasonable in light of the unsettled nature of the law, resulting in a \$2.52 per pay period award to the aggrieved employees (there were 397,110 pay periods in a \$1 million PAGA settlement, resulting in a 97.5% reduction from the maximum). In *Fleming v. Covidien*, the Court reduced the potential penalties by over 82%, awarding \$500,000 for 28,742 pay periods at issue. Here, Defendant argues the Court should exercise its discretion to significantly reduce the PAGA penalties. (Perez Decl. ¶ 39.)

Considering the issues, defenses, and the risks, a \$400,000 settlement is a fair and just result and furthers PAGA’s objectives. Indeed, courts throughout the county routinely approve settlements that provide a similar, if not greater, discounted range of the maximum potential recovery. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 256-58 (D. Del. 2002) (recognizing that a reasonable settlement amount can be 1.6% to 14% of the total estimated damages); *In Re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1373 (N.D. Ga. 1979) (settlements with a value of 1% to 8% of the estimated total damages were approved); *In Re Four Seasons Secs. Laws Litig.*, 58 F.R.D. 19, 37 (W.D. Okla.1972) (approving 8% of damages); *Balderas v. Massage Envy Franchising, LLP*, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (finding that settlement

1 which amounted to 8% of maximum recovery “[fell] within the range of possible initial approval based on the
2 strength of plaintiff’s case and the risk and expense of continued litigation.”); *In re Omnivision Techs., Inc.*, 559
3 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) (approving settlement of 6% to 8% of estimated damages). (Perez
4 Decl. ¶ 40.)

5 **E. The Parties’ Settlement of Attorneys’ Fees Is Reasonable In Light of Plaintiff’s**
6 **Counsel’s Lodestar**

7 The Settlement provides for \$195,000 in attorneys’ fees and up to \$32,000 in costs to Plaintiff’s
8 Counsel. Plaintiff’s Counsel are entitled to attorneys’ fees as a matter of right under California Labor
9 Code section 2699(g)(1), which provides that “[a]ny employee who prevails in any action shall be
10 entitled to an award of reasonable attorneys’ fees and costs.” See *Gouskos v. Aptos Village Garage, Inc.*,
11 94 Cal. App. 4th 754, 765 (2001) (holding that attorneys’ fees to prevailing party are mandatory when
12 the statute uses the word “shall”). It is undisputed that Plaintiffs are the prevailing party. See *Graciano v.*
13 *Robinson Ford Sales*, 144 Cal. App. 4th 140, 153 (2006) (“[P]laintiffs may be considered ‘prevailing
14 parties’ for attorney’s fee purposes if they succeed on any significant issue in the litigation that achieves
15 some of the benefit the parties sought in bringing suit.” (internal citation omitted)).

16 In fixing fees under the lodestar method, successful attorneys should recover “all attorney fees
17 reasonably expended, **without limiting the fees to a proportion of [the] actual recovery.**” *Graciano*,
18 144 Cal. App. 4th at 164 (emphasis added). “[T]here is ‘no mathematical rule requiring proportionality
19 between compensatory damages and attorneys’ fees award.’” *Harman v. City and County of San*
20 *Francisco*, 158 Cal. App. 4th 407, 421 (2007) (citation omitted). For instance, in *Harman*, the court
21 affirmed a fee award of \$1.1 million on damages of \$33,300 under the Civil Rights Act after determining
22 that it cannot be tied to a proportion of the recovery. *Id.* at 419-22.

23 The non-proportionality rule applies generally to attorneys prosecuting employment cases. See,
24 e.g., *Taylor v. Nabors Drilling U.S.A.*, 222 Cal. App. 4th 1228 (2014) (affirming \$680,520 in attorneys’
25 fees on a \$150,000 recovery in an employment discrimination case).⁴ And it applies with equal force to
26

27 ⁴ Plaintiffs who prevail on a private attorney general action are also not limited to a proportion of
28 the damages recovered. See *Building a Better Redondo, Inc. v. City of Redondo Beach*, 203 Cal. App. 4th
29 852, 870-73 (2012) (awarding fees under the private attorney general statute in an action to compel a city
30 to put a measure on the ballot); *Vo v. Las Virgenes Mun. Water Dist.*, 79 Cal. App. 4th 440, 445 (2000)
31 (affirming a \$470,000 fee award when plaintiff recovered only \$37,500); *Engel v. Washington*, 60 Cal.
32 App. 4th 628, 635 (1997) (a plaintiff who recovered only \$250 “may well be entitled to every penny of
the requested [\$80,875] fee award” and that “[t]o deny him the full amount of requested fees would be
tantamount to finding that the fees were unreasonable per se, some of his efforts unwarranted, or his
goals unworthy”). Outside of common fund recoveries, the rule that fees cannot be tied to proportional

1 PAGA cases. *See Salas v. Hallmark Aviation Services LP*, No. BC586585 (Los Angeles County
2 Superior Court February 17, 2017) (awarding plaintiff \$600,000 in attorneys' fees on PAGA penalties
3 totaling \$605,000); *Monroe v. Continental Design Co., Inc.*, No. RG16817667 (Alameda County
4 Superior Court June 21, 2017) (awarding plaintiff \$110,000 in fees on PAGA penalties totaling
5 \$90,000); *Ramirez v. Benito Valley Farms, LLC*, No. 16-CV-04708-LHK, 2017 WL 3670794, at *6
6 (N.D. Cal. Aug. 25, 2017) (awarding attorneys' fees under the lodestar method with no regard to the
7 proportion of the fees to civil penalties).⁵

8 In determining the reasonableness of statutory fees, the court should apply the lodestar method.
9 *See Ketchum v. Moses*, 24 Cal. 4th 1122, 1136 (2001) (holding that the court should "presume that the
10 Legislature intended courts to use the prevailing lodestar adjustment method" in fixing statutory fees).
11 This method most effectively compensates successful counsel for "all the hours reasonably spent." *Id.* at
12 1133. The base lodestar is produced by multiplying the number of hours reasonably expended by
13 counsel by a reasonable hourly rate. *Id.* at 1134-36. The base lodestar then may be adjusted by a
14 multiplier to account for contingent risk and other factors.

15 For hourly rates, the Court must evaluate whether that rate is "within the range of reasonable
16 rates charged by and judicially awarded comparative attorneys for comparable work." *Children's*
17 *Hospital & Med. Ctr. v. Bontá*, 97 Cal. App. 4th 740, 783 (2002). Determination of a reasonable rate is
18 derived from the community "where the services are rendered." *MBNA Am. Bank v. Gorman*, 147 Cal.
19 App. 4th Supp. 1, 13 (2006). Plaintiff's Counsel's rates reasonable and are within the range of similar
20 attorneys in the Southern California area where the services are rendered and where the action was
21 litigated. In the past few years, numerous courts have approved the exact same rates requested here. As
22 the requested rates are within the range of market rates, they should be approved.

23 In evaluating hours worked, the general principle is that "the attorney who takes [a statutory fee-
24 shifting] case can anticipate receiving full compensation for every hour spent litigating a claim even
25

26 recovery applies across the board, to all types of cases involving fee-shifting statutes, in both federal and
27 state courts. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561, 578-79 (1986) (awarding \$245,000 in
28 attorneys' fees for damages of \$33,350); *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 639 (9th Cir. 1989)
29 ("[T]here is no reason to treat attorney's fees in antitrust cases under [the Clayton Act] different from
30 attorney's fees in civil rights cases under section 1988. We have recognized the public benefit of antitrust
31 litigation."); *Lytle v. Carl*, 382 F.3d 978, 988 (9th Cir. 2004) (fee award more than three times damages);
32 *Fair Housing of Marin v. Combs*, 285 F.3d 899 (9th Cir. 2002) (affirming \$508,606 fee award that was
more than five times damages awarded); *Niederer v. Ferreira*, 189 Cal. App. 3d 1485 (1987) (applying
the anti-proportionality logic in an action to collect from the guarantor of a note).

⁵ Likewise, the non-proportionality rule applies generally to attorneys prosecuting employment
cases. *See, e.g., Taylor v. Nabors Drilling U.S.A.*, 222 Cal. App. 4th 1228 (2014) (affirming \$680,520 in
attorneys' fees on a \$150,000 recovery in an employment discrimination case).

against the most polemical opponent.” *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1175 (1998). However, courts should not be “enmeshed in a meticulous analysis of every detailed facet of the professional representation.” *Serrano v. Unruh*, 32 Cal. 3d 621, 642 (1982). Rather, “[t]he essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection.” *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011).

In determining the reasonableness of the hours expended, “the court should defer to the winning lawyer’s professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.” *Kerkeles v. City of San Jose*, 243 Cal. App. 4th 88(2015) (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)). Whether attorneys expended reasonable hours in pursuit of the litigation is the major building block of any fee award. *See Serrano v. Unruh*, 32 Cal. 3d at 632 (“absent facts rendering the award unjust, parties who qualify for a fee should recover for all hours reasonably spent.”). Typically, all time reasonably spent by prevailing attorneys during the course of litigation should be awarded if it is the type of work that would be paid by a fee-paying client. *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983).

The chart below provides a summary of the hours billed by Plaintiff’s Counsel to the litigation:

Lawyer	Title	CA Bar Adm.	Rate	Hours	Fees
Raul Perez	Partner	1994	\$725	44.5	\$32,262.50
Liana Carter	Senior Counsel	1999	\$670	122.5	\$82,075.00
Jennifer Bagosy	Fmr. Senior Counsel	2002	\$595	208.2	\$123,879.00
Andrew Sokolowski	Fmr. Senior Counsel	2003	\$595	62.8	\$37,366.00
Bevin Allen Pike	Senior Counsel	2002	\$595	17.1	\$10,174.50
Eduardo Santos	Senior Counsel	2007	\$495	59.1	\$29,254.50
Jamie Greene	Senior Counsel	2007	\$495	33.8	\$16,731.00
Suzy Lee	Fmr. Associate	2010	\$395	634.8	\$250,746.00
Total				1182.8	\$582,488.50

As shown above, multiplying Plaintiff’s Counsel’s hourly rates by hours billed to the litigation to date (not including anticipated additional work on this case, such as supervising the administration of the settlement) yields a lodestar of \$582,488.50, which is nearly triple the amount of fees actually requested.

Although Plaintiff does not request a multiplier for contingent risk, courts recognize that contingent-fee attorneys should obtain a larger fee than the market-value if their services help to secure adequate representation for Plaintiff unable to afford an accomplished attorney’s hourly rates. *See Ketchum*, 24 Cal. 4th at 1132 (“[A] contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable.”). To factor in contingent risk, courts will apply a “risk multiplier” to the base lodestar if circumstances warrant. *See*

Graham, 34 Cal. 4th at 580 (explaining California’s policy of adjusting the lodestar upward to account for contingent risk). A court abuses its discretion if it fails to apply a risk multiplier where the attorneys undertook the case with the expectation that they would receive a risk enhancement if they prevailed, the case was risky, and the hourly rate does not reflect that risk. *See Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002).

In summary, the Court should find that amount allocated in the settlement for fees is reasonable.

F. The Requested Recovery In Litigation Expenses Is Reasonable

Plaintiff’s Counsel is also entitled to reimbursement of its discretionary litigation costs. Cal. Lab. Code §2699(g)(1). Out-of-pocket discretionary expenses are compensable if they would normally be billed to a fee-paying client. *See Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1419 (1991), *overruled in part on other grounds in Olson v. Automobile Club of Southern Calif.*, 42 Cal. 4th 1142 (2008). Such discretionary costs may be claimed as part of an attorneys’ fees motion when seeking statutory fees under the Labor Code. *See Amaral*, 163 Cal. App. 4th at 1218 n. 27 (awarding costs that are necessarily incurred). The following chart reflects the costs incurred by Plaintiff’s Counsel:

Cost & Expense Categories	Amount
Copying, Printing & Scanning and Facsimiles	\$211.50
Court Fees, Courier Fees, Filings & Service of Process	\$13,017.53
Court Reporters, Transcripts & Depositions	\$3,350.73
Delivery & Messenger (UPS, FedEx, messenger, etc.)	\$417.50
Fountain Consulting, Inc.	\$1,100.00
Investigation Services	\$4,314.55
Mediation Fees	\$6,594.21
Postage & Mailings	\$1,872.77
Research Services (PACER, Westlaw, etc.)	\$449.20
Telephone (Long distance, conference calls, etc.)	\$7.80
Travel-Related Costs and Expenses	\$1,612.16
Total	\$32,947.95

As indicated above, Plaintiff’s Counsel advanced \$32,947.95 in out-of-pocket costs to the State for, among other things, filing fees, postage, photocopying, deposition costs, and mediation fees. (Perez Decl. ¶ 48.) Plaintiff’s request for \$32,000 in litigation costs and expenses is therefore fair and reasonable.

G. The General Release Payment is Fair and Reasonable

Paragraph 21 of the Parties’ settlement agreement provides that Defendant will pay Plaintiff the sum of \$7,500 for a general release of all claims arising out of his employment. This release covers not only the settled PAGA claims, but also underlying predicate Labor Code claims for, e.g., unpaid wages

1 and meal/rest period premiums, and other penalties, and also Mr. Garcia’s potential claim for wrongful
2 termination (see Garcia Decl. ¶ 11). Considering that juries have awarded damages equal to one year’s
3 salary for such claims, could easily be worth tens of thousands of dollars if not more. See *Agbalaya v.*
4 *James Brown Enterprises, Inc.*, No. B158541, 2003 WL 21154115, at *7 (Cal. Ct. App. May 20, 2003)
5 (“[t]otal damages of only about one year’s wages in these circumstances is not excessive”), citing *Bihun*
6 *v. AT & T Information Systems, Inc.*, 13 Cal. App. 4th 976, 996-997 (1993) and *Iwekaogwu v. City of*
7 *Los Angeles*, 75 Cal. App. 4th 803, 820-821 (1999); *E.E.O.C. v. AIC Security Investigations, Ltd.*, 55
8 F.3d 1276 (7th Cir. 1995) (award of \$50,000 not excessive for claim of wrongful termination); *Neal v.*
9 *Honeywell*, 191 F.3d 827 (7th Cir. 1999) (upheld remitted damage award of \$200,000 from \$550,000 for
10 claim of wrongful termination). By that measure, Mr. Garcia’s wrongful termination could be worth
11 approximately \$50,000, which is roughly the amount of wages Mr. Garcia earned in a year. Assuming
12 15% odds of prevailing on the wrongful termination claim, Mr. Garcia’s settlement for \$7,500 is fair and
13 reasonable.

14 Other considerations support the payment. First, the additional settlement payment is justified in
15 light of the reputational risk that Mr. Garcia has assumed by litigating claims against a former employer.
16 See *Billinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 267-68 (N.D. Cal. 2015) (finding “personal
17 detriment” upon testimony that future employers can easily learn that a prospective employee served as a
18 plaintiff through the internet); see also *Guippone v. BH S&B Holdings LLC*, No. 09 Civ. 1029, 2011
19 U.S. Dist. LEXIS 126026, at **4, 20 (S.D.N.Y. Oct. 28, 2011) (“[T]he fact that a plaintiff has filed a
20 federal lawsuit is searchable on the internet and may become known to prospective employers when
21 evaluating the person . . . Even where there is not a record of actual retaliation, notoriety, or personal
22 difficulties, [representative Plaintiffs] merit recognition for assuming the risk of such for the sake of
23 absent [parties].”).

24 Employers commonly screen employee candidates to determine whether they have ever filed
25 suit, and employee candidates who might be branded “litigious” are likely to be screened out of the
26 process. In fact, an entire industry has developed for providing employers with background information
27 on employee candidates. By bringing this action against an employer, Mr. Garcia has assumed
28 considerable reputational risk that may impact his ability to find employment in the future. *La Fleur v.*
29 *Medical Management Intern, Inc.*, No. 13-00398-VAP, 2014 WL 2967475, *8 (C.D. Cal. June 25,
30 2014) (awarding \$15,000 to each named plaintiff in part for attesting to their fear that the lawsuit will
31 harm their future job prospects in the industry).

32 Second, the separate settlement payment is reasonable because Mr. Garcia “remained fully

involved and expended considerable time and energy during the course of the litigation.” See *In re Toys ‘R’ Us-Del FACTA Litig.*, 295 F.R.D. at 471 (citation omitted). Mr. Garcia devoted his time and effort toward assisting his attorneys with the prosecution of the claims, was deposed, and assisted his counsel with finalizing the settlement. See Garcia Decl. ¶¶ 3-10.

The separate payment is also appropriate because Mr. Garcia otherwise “will not gain any benefit beyond that he would receive as an ordinary [Aggrieved Employee].” *In re Toys “R” Us FACTA Litig.*, 295 F.R.D. at 472; *Van Vranken*, 901 F. Supp. at 299 (holding that a substantial award is appropriate where a [representative’s] claim made up “only a fraction of the common fund.”). Here, absent the separate payment, Mr. Garcia will recover no more than other Aggrieved Employees, despite undergoing personal sacrifice in bringing this suit on behalf of the State of California and Aggrieved Employees.

IV. CONCLUSION

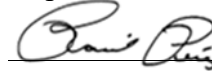
The Parties have negotiated a fair and reasonable settlement of Plaintiff’s PAGA claims. Having appropriately presented the materials and information necessary for approval, the Parties request that the Court approve the Settlement.

Dated: November 27, 2018

Respectfully submitted,

Capstone Law APC

By: _____



Raul Perez

Bevin Allen Pike

Attorneys for Plaintiff Elmar Garcia

PROOF OF SERVICE

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1875 Century Park East, Suite 1000, Los Angeles, California 90067.

On **November 27, 2018**, I served the document(s) described as: **NOTICE OF MOTION AND MOTION FOR COURT APPROVAL OF THE PARTIES' PAGA SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** on the interested parties in this action by sending [] the original [✓] a true copy thereof [✓] to interested parties as follows [or] [] as stated on the attached service list:

Christopher W. Decker
Kathleen J. Choi
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
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Facsimile: 213.239.9045

Attorneys for Defendants
TRACTOR SUPPLY COMPANY

- (X) **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal Service that same day in the ordinary course of business with postage thereon fully prepaid at Los Angeles, California.
- () **BY PERSONAL SERVICE:** I caused delivery of the document(s), enclosed in a sealed envelope, by hand via ProLegal Network to the offices of the addressee(s) named herein.
- (X) **BY EMAIL:** I hereby certify that I emailed a electronic copy to counsel of record at Christopher.Decker@ogletreedeakins.com and Kathleen.Choi@ogletreedeakins.com
- () **BY OVERNIGHT DELIVERY:** I am "readily familiar" with this firm's practice of collection and processing correspondence for overnight delivery. Under that practice, overnight packages are enclosed in a sealed envelope with a packing slip attached thereto fully prepaid. The packages are picked up by the carrier at our offices or delivered by our office to a designated collection site.

Executed on **November 27, 2018**, at Los Angeles, California.

Min Jee Kim
Type or Print Name


Signature