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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

JEREMY LEGARDE, an individual, on behalf
of the State of California, as a private attorney
general,

PLAINTIFF,

v.

SPECTRA360, INC. DBA RASO
SOLUTIONS; and DOES 1 thru 50, inclusive,

DEFENDANTS.

Case No. . 22CV402965

[Case Assigned for All Purposes to Hon.
Judge Theodore C. Zayner in Dept. 19]

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

Date: TBD

Time: TBD

Dept.: 19

Complaint Filed: September 12, 2022

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on TBD at TBD in Department 19 of the above-entitled
3 court, Plaintiff JEREMY LEGARDE will move the Court for an Order Granting Approval of
4 Representative Action Settlement.

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

7 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
8 and Authorities, the Declaration of Liane Katzenstein Ly, the PAGA Settlement Agreement
9 (Exhibit "A" to the concurrently filed Ly Declaration), all other papers and records on file in this
10 action, and on such oral and documentary evidence as may be presented at the hearing on this
11 Motion.

12
13 DATED: December 14, 2023

KINGSLEY & KINGSLEY, APC

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17 By: 

18 Liane Katzenstein Ly
19 Attorneys for Plaintiff JEREMY LEGARDE and All
20 Aggrieved Employees
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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY	1
A.	Litigation Overview and Procedural History	1
B.	The Discovery Process and Mediation	2
III.	PAGA ACTIONS AND THE REQUIREMENTS	3
A.	The PAGA Statutory Scheme	3
B.	The Court Has Discretion When Awarding the Amount of Penalties	4
C.	Standards for Settlement Approval	5
IV.	THE SETTLEMENT	5
V.	ARGUMENT	6
A.	The Court Should Approve the Agreement	6
B.	The Risks of Moving Forward with Plaintiff’s PAGA Claim	6
1.	The Risks Associated with the Rest Period Claim.....	7
2.	The Risks Associated with the Reimbursement Claim.....	9
3.	The Risks Associated with the Wage Statement Claims.....	9
4.	The Risks Associated with the Waiting Time Penalties Claim.....	10
C.	There is a Strong Risk the Higher \$200 Civil Penalty Triggered for “Subsequent” Violations Will Not Apply	11
D.	A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty Awarded for Technical Violations of the Labor Code.....	11
E.	Based on the Risks Above and the Analysis of the Maximum Penalties Available, Plaintiff Believes this Settlement is Fair and Reasonable	13
VI.	THE REQUEST FOR ATTORNEYS’ FEES AND COSTS	13

1	A.	Plaintiff’s Counsel are Entitled to a Fee from the Common Fund	13
2	B.	The Attorneys’ Fees Request Are Well Within the Range of Fees in Comparable	
3		Cases	15
4	C.	PAGA Counsel’s Fee Request is Reasonable Under a Lodestar Crosscheck.....	15
5	i.	Requested Multiplier.....	15
6	VII.	THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF	
7		COSTS	16
8	VIII.	THE COURT SHOULD APPROVE THE PROPOSED ENHANCEMENT TO	
9		PLAINTIFF.....	17
10	IX.	CONCLUSION.....	17

TABLE OF AUTHORITIES

Federal Cases

<i>Fleming v. Covidien, Inc.</i> , (C.D. Cal., Aug. 12, 2011 No (OPX)), 2011 WL 7563047	12
<i>McKenzie v. Federal Exp. Corp.</i> , (C.D. Cal. 2011) <i>supra</i> , 765 F.Supp.2d	4
<i>Medina v. Vander Poel</i> , (E.D. Cal. 2015) 523 B.R. 820.....	4
<i>Moreno v. Autozone, Inc.</i> , (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942	4, 11
<i>O'Connor v. Uber Techs., Inc.</i> , (N.D. Cal. 2016) 201 F. Supp. 3d 1110	5
<i>Rodriguez v. West Publishing Corp.</i> , (9th Cir. 2009) 563 F.3d 948	17
<i>Staton v. Boeing Co.</i> , (9th Cir.2003) 327 F.3d 938	17
<i>Willner v. Manpower, Inc.</i> , (N.D. Cal. June 30, 2014) <i>supra</i> . 35 F. Supp. 3d.....	4

State Cases

<i>Amaral v. Cintas Corp. No. 2</i> , 163 Cal. App. 4th 1157 (2008)	4, 10, 11
<i>Arias v. Superior Court</i> , (2009) <i>supra</i> , 46 Cal.4th	3, 5, 6
<i>Barnhill v. Robert Saunders & Co.</i> , (1981) 125 Cal.App.3d 1	10
<i>Brinker Rest. Corp v. Superior Court</i> , (2008) <i>supra</i> , 53 Cal.4th	7, 8
<i>Brown v. Ralphs Grocery Co.</i> , (2011) 197 Cal.App.4th 489	3
<i>Carrington v. Starbucks Corp.</i> , (2018) 30 Cal. App. 5th 504	12

1	<u>Chavez v. Netflix, Inc.,</u>	
2	(2008) 162 Cal.App.4th 43, fn 11	15
3	<u>Ciani v. San Diego Trust & Sav. Bank,</u>	
4	(1994) 25 Cal.App.4th 563	14
5	<u>Clark v. American Residential Services LLC,</u>	
6	(2009) 175 Cal.App.4th 785	17
7	<u>Consumer Privacy Cases,</u>	
8	(2009) 175 Cal.App.4th 545	15
9	<u>Diaz v. Grill Concepts Services, Inc.,</u>	
10	(2018) 23 Cal.App.5th 859	10
11	<u>Dunk v. Ford Motor Co.,</u>	
12	(1996) 48 Cal.App.4th 1794	14
13	<u>Iskanian v. CLS Transp. Los Angeles, LLC,</u>	
14	(2014) 59 Cal. 4th 348	3
15	<u>Ketchum v. Moses,</u>	
16	(2001) 24 Cal.4th 1122	15
17	<u>Laffitte v. Robert Half Intern. Inc.,</u>	
18	(Cal. 2016) 205 Cal.Rptr.3d 555.....	13, 14
19	<u>Lealao v. Beneficial Calif., Inc.,</u>	
20	(2000) 82 Cal.App.4th 19	14
21	<u>Mamika v. Barca,</u>	
22	(1998) 68 Cal.App.4th 487	10
23	<u>Montano v. The Wet Seal Retail, Inc.,</u>	
24	232 Cal.App.4th 1214 (2015)	3
25	<u>Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles,</u>	
26	(2010) 186 Cal.App.4th 399	17
27	<u>Murphy v. Kenneth Cole Productions, Inc.,</u>	
28	(2007) 40 Cal.4th 1094	8
	<u>Rebney v. Wells Fargo Bank,</u>	
	(1991) <i>supra</i> , 232 Cal.App.3d.	16
	<u>Reyes v. Macy's, Inc.,</u>	
	202 Cal.App.4th 1119(2011)	3

1	<u>Save El Toro Ass’n v. Days,</u>	
2	(1979) 98 Cal.App.3d 544	14
3	<u>Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.,</u>	
4	234 Cal.App.4th 1109 (2015)	3, 4
5	<u>Serrano v. Priest III,</u>	
6	(1977), 20 Cal.3d.	14, 15
7	<u>Valley Audubon Soc., Inc. v. County of Tulare,</u>	
8	(1984) 155 Cal.App.3d 738	15
9	<u>Wershba v. Apple Computer, Inc.,</u>	
10	(2001) 91 Cal.App.4th 224	14, 15, 16
11	<u>Woodland Hills Residents Assn., Inc. v. City Council,</u>	
12	(1979) 23 Cal.3d 917	14
13	<u>State Statutes</u>	
14	Labor Code § 201 ,.....	2
15	Labor Code § 202,.....	2
16	Labor Code § 203.....	2, 10
17	Labor Code § 210.....	11
18	Labor Code § 225.5.....	11
19	Labor Code § 226.....	11
20	Labor Code § 226(a)	passim
21	Labor Code §§ 226(a)(2) and (9)	9
22	Labor Code § 226.3.....	6
23	Labor Code § 226.7,.....	2
24	Labor Code § 226.7, subdivision (c).....	7
25	Labor Code §2699.....	1, 2, 6, 11
26	Labor Code § 2699 (a) & (f)	3
27	Labor Code §2699.3(a)(2)(A).....	2
28	Labor Code § 2699(e)(1) and (e)(2).....	7

1	Labor Code §2699(e)(2)	4, 11, 12
2	Labor Code § 2699(f)(2)	4, 11, 12
3	Labor Code § 2699(i)	1, 4
4	Labor Code §2699(l)	6
5	Labor Code § 2699(1)(2)	1
6	Labor Code § 2699(l)(2)	5
7	Labor Code § 2699.3	2
8	Labor Code § 2699.3(a)(1)	1, 4
9	Labor Code § 2802	2, 9
10	Labor Code, § 2802, subd. (a)	9

State Regulations

12	Cal. Code Regs., tit. 8, § 11050, subd. 12(B)	8
13	Cal. Code Regs., tit. 8, § 11070, subd. 12(A)	7

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jeremy Legarde (“Plaintiff”) submits this Memorandum of Points and Authorities
4 in support of Motion for Approval of Representative Action Settlement. Plaintiff and Defendant
5 SPECTRA360, INC. DBA RASO SOLUTIONS (“Defendant”) (collectively, the “Parties”) have
6 reached a proposed settlement documented in the PAGA Settlement Agreement (“Settlement” or
7 “Agreement”), attached to the concurrently-filed declaration of Liane Katzenstein Ly.¹

8 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699,
9 et seq. (“PAGA”). The Gross Settlement Amount is \$95,000.00. After deduction of attorney’s
10 fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration
11 costs as discussed in the Agreement, the remaining amount to be divided between the Labor and
12 Workforce Development Agency (“LWDA”) and the aggrieved employees as required by Labor
13 Code section 2699(i) is \$41,833.34, with \$31,375.00 (or 75%) going to the LWDA and
14 \$10,458.34 (or 25%) distributed to the aggrieved employees.²

15 Plaintiff requests that the Court “review and approve any settlement of any civil action
16 filed pursuant to this part” (*See* Lab. Code § 2699(1)(2).) If the Court deems the Settlement fair
17 and acceptable, Plaintiff requests that the Court: (1) enter an order approving the Settlement and
18 ordering the Parties to carry the terms of the Settlement Agreement; and (2) and enter a Final
19 Judgement thereon.³

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

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

22 On July 8, 2022, and in compliance with Labor Code § 2699.3(a)(1), written notice to
23 Defendant and the Labor and Workforce Development Agency (“LWDA”) was provided seeking
24

25 ¹ The Parties also entered into a separate confidential settlement for Plaintiff Jeremy Legarde’s individual claims.

26 ² Pursuant to PAGA, civil penalties recovered by aggrieved employees shall be distributed 75 percent to the
Labor and Workforce Development Agency (“LWDA”) and 25 percent to the aggrieved employee(s). Lab.
Code § 2699(i).

27 ³ Plaintiff’s Motion for Approval of Representative Action Settlement will be concurrently uploaded to the
LWDA’s website on the date this Motion is filed. Proof of submission of Plaintiff’s Motion for Approval of
28 Representative Action Settlement, all related documents, and copy of the email from the LWDA confirming
receipt can be provided to the Court upon request. (Ly Decl. ¶93.)

1 civil penalties under PAGA for violation of Labor Code §§201, 202, 203, 226(a), 226.7, and 2802,
2 and mailed by certified mail to Defendant setting forth the specific facts and theories of the
3 violations alleged against Defendant. (Declaration of Liane Katzenstein Ly (“Ly Decl.”) ¶5.)
4 Pursuant to Labor Code §2699.3(a)(2)(A), no notice was received by Plaintiff from the LWDA
5 evidencing its intention to investigate within 65 calendar days of the postmark date of the notice.
6 (Ly Decl. ¶6.) Therefore, Plaintiff was entitled to commence a civil action as though the LWDA
7 has chosen not to investigate. (Ly Decl. ¶7.) Plaintiff has complied with all of the requirements set
8 forth in Labor Code § 2699.3 to commence a representative action under PAGA. (Ly Decl. ¶ 8.)

9 On September 12, 2022, Plaintiff Jeremy Legarde filed a representative action complaint
10 against Defendant in Santa Clara County Superior Court, Case No. 22CV402965, entitled
11 *JEREMY LEGARDE, an individual, on behalf of the State of California, as a private attorney*
12 *general, PLAINTIFF, v. SPECTRA360, INC. DBA RASO SOLUTIONS; and DOES 1 thru 50,*
13 *inclusive, DEFENDANTS.* (the “Action”), alleging a single cause of action for penalties pursuant
14 to Labor Code §2699, et seq. for violations of Labor Code §§201, 202, 203, 226(a), 226.7, and
15 2802. (Ly Decl. ¶9.)

16 On April 5, 2023, Defendant moved the court to compel Plaintiff’s individual PAGA
17 claims to arbitration and dismiss the representative PAGA claims in the case. (Ly Decl. ¶10.) The
18 Parties’ agreement stated, in pertinent part, that the Parties “agree to resolve any disputes
19 exclusively through recourse to arbitration or mediation either of which shall take place in
20 California.” (*Id.*) Plaintiff opposed the motion, arguing that the agreement required that the Parties
21 either use mediation or arbitration to resolve their disputes, but does not specifically require
22 arbitration. (Ly Decl. ¶11.) On May 18, 2023, Defendant’s motion was denied in its entirety,
23 finding that under the agreement, “the aggrieved party has the option to initiate whichever
24 procedure it prefers” and that the agreement did not have any conditions requiring that either
25 mediation or arbitration be invoked in certain circumstances. (Ly Decl. ¶12.) On July 12, 2023,
26 Defendant appealed the Court’s order regarding the Motion to Compel Arbitration. (Ly Decl. ¶13.)

27 B. The Discovery Process and Mediation

28 The Parties engaged in extensive informal pre-mediation discovery. Prior to mediation,

1 Defendant produced sample time and pay data for the Aggrieved Employees, as well as Plaintiff's
2 personnel records. (Ly Decl. ¶ 14.) Based on Defendant's records, the data reveals that there are an
3 estimated 53 Aggrieved Employees (including Plaintiff) who worked a total of 1,139 PAGA Pay
4 Periods at issue. (Ly Decl. ¶ 15.)

5 On September 18, 2023, the Parties participated in an all-day mediation presided over by
6 experienced mediator Alan Berkowitz, Esq., which led to this formal PAGA Settlement Agreement
7 that is subject to the approval of the Court. (Ly Decl. ¶ 16.)

8 Although Defendant denies that it violated any pertinent law, it recognized the risks and
9 attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to
10 finalization of a formal PAGA Settlement Agreement and the approval of the Court. (Ly Decl.
11 ¶17.) The Parties negotiated the terms and conditions of the Agreement and now present the
12 agreed-upon Settlement to the Court for Approval. (*Id.*)

13 **III. PAGA ACTIONS AND THE REQUIREMENTS**

14 **A. The PAGA Statutory Scheme**

15 PAGA creates a means of “deputizing” citizens as private attorney generals to enforce the
16 Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489,
17 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A
18 plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own
19 behalf as an individual claim, but “as the proxy or agent of the state’s labor law enforcement
20 agencies.” *Id.*, at 986; *see also Reyes v. Macy’s, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011);
21 *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380).

22 When an aggrieved employee brings a PAGA claim, “the government is always the real
23 party in interest.” *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th
24 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) (“[A]
25 PAGA action is a dispute between an employer and the State agency.”). Accordingly, a plaintiff
26 that brings a PAGA claim represents “the same legal right and interest as state labor law
27 enforcement agencies,” in that the plaintiff is seeking to recover those civil penalties that otherwise
28 would have been assessed and collected by the LWDA. *Arias, supra*, 46 Cal.4th at 986; Lab. Code

§ 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 (holding “PAGA plaintiffs do not have property rights in their cases.”). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties recovered; thus, recoveries are principally for the state and only secondarily for aggrieved employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a PAGA claim, he or she is properly conceived of as a private attorney general prosecuting violations of California’s labor laws on behalf of the state.

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

“The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.”

Lab. Code § 2699.3 (a)(1)

As explained above, Plaintiff has complied with the notice requirements and has properly pled a PAGA cause of action.

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

PAGA provides for penalties in the amount of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2).

“PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that Defendant violated the Labor Code.⁴ *Amaral v. Cintas Corp. No. 2* 163 Cal. App. 4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code §2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case,

⁴ *See also Willner, supra*. 35 F. Supp. 3d at 1136; *McKenzie, supra*, 765 F.Supp.2d at 1232.

to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Here, Defendant denies that it violated any law or that it engaged in any knowing or intentional conduct giving rise to liability, and expressly deny that any employees suffered harm.

C. Standards for Settlement Approval

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

IV. THE SETTLEMENT

Defendant will pay the total sum of \$95,000.00 in full and final settlement of the PAGA claims alleged. (Ly Decl. ¶18., Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount	\$95,000.00
PAGA Counsel Fees Payment	\$31,666.66
PAGA Counsel Litigation Expenses Payment	\$8,500.00 ⁵
Administrator Expenses Payment	\$3,000.00
Enhancement Payment	\$5,000.00
PAGA Penalties	\$41,833.34 (\$31,375.00 to the LWDA; \$10,458.34 to Aggrieved Employees)

(Ly Decl. ¶19., Exhibit 1, ¶¶3.1-3.2.)

Each aggrieved employee shall receive a pro-rata portion of the remaining amount in PAGA

⁵ The Agreement provided for counsel to receive cost reimbursement up to \$8,500.00. However, counsel’s final costs come to \$6,723.01. (Ly Decl. ¶20, Ex. 5) The extra \$1776.99 will remain in the net settlement fund, causing the net amount for distribution to the LWDA and Aggrieved Employees to be slightly higher than the \$41,833.34 contemplated in the settlement agreement. (See Ly Decl., Ex. 1 ¶3.2.1)

penalties by dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period⁶, and then multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. (Ly Decl. ¶21., Exhibit 1, ¶3.2.5.1.)

For settlement purposes, the Aggrieved Employees are defined as: "all employees who are employed or have been employed as an hourly employee by SPECTRA360, INC. DBA RASO SOLUTIONS, in the State of California who worked one or more pay periods since July 8, 2021 to the present." (Ly Decl. ¶23., Exhibit 1, ¶1.4.) The PAGA Period runs from July 8, 2021 to September 18, 2023.

V. ARGUMENT

A. The Court Should Approve the Agreement

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

B. The Risks of Moving Forward with Plaintiff's PAGA Claim

To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation and discount taken follows. (Ly Decl. ¶ 24.) Plaintiff believed that Defendant may persuasively argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether waive any penalties under PAGA. ((Ly Decl. ¶ 25.) Pursuant to Labor Code §226.3, the Labor Commissioner has the discretion to "decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake." (Ly Decl. ¶ 26.) And in accordance with PAGA, the court in a PAGA action has the same discretion "to assess a civil

⁶ The PAGA Period means the period from July 8, 2021 through September 18, 2023. (Ly Decl. ¶22., Exhibit 1, ¶1.19.)

penalty” that the Labor Commissioner would have, as well as complete discretion to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)).

PAGA Counsel anticipated that, at trial, Counsel for Defendant could make a potentially persuasive argument that Defendant (1) provided all Aggrieved Employees with the opportunity to take rest breaks in compliance with California law; (2) all Aggrieved Employees were properly paid and/or reimbursed in accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate Aggrieved Employees was the result of inadvertence and clerical error; (3) until this Action was filed, no employees had complaints about any alleged failure to provide rest breaks, reimburse expenses, issue accurate itemized wage statements, and issue all wages due at the time of termination; (4) none of Defendant’s employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff’s allegations. (Ly Decl. ¶ 27.) All of which, Counsel for Defendant would argue, should mitigate in factor of significantly reducing or waiving any PAGA penalties. (*Id.*) While Plaintiff disagrees that this analysis is legal correct or persuasive, PAGA Counsel had to consider the foregoing facts and arguments and how they might impact any judgment ultimately awarded to Aggrieved Employees if the Court were persuaded by them. (Ly Decl. ¶28.)

1. The Risks Associated with the Rest Period Claim

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

Plaintiff and the aggrieved employees’ rest period claims arise from a common course of conduct wherein they allege Defendant did not provide employees with the opportunity to take 10-minute rest breaks in compliance with California law. The California Supreme Court has held: “Employees are entitled to 10 minutes’ rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours and so on.” (*Brinker Rest. Corp v. Superior Court, supra*, 53 Cal.4th at 1029.)

1 In an eight-hour work day, being denied the two paid rest breaks in a day is “essentially perform[ing]
2 20 minutes of ‘free’ work.” (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094,
3 1104).

4 The Court has also clarified what steps an employer must take to make rest breaks available
5 to its employees:

6 An employer is required to authorize and permit the amount of rest break time
7 called for under the wage order for its industry. If it does not—if, for example,
8 it adopts a uniform policy authorizing and permitting only one rest break for
9 employees working a seven-hour shift when two are required—it has violated
the wage order and is liable. No issue of waiver ever arises for a rest break that
was required by law but never authorized; if a break is not authorized, an
employee has no opportunity to decline to take it.

10 (*Brinker Rest. Corp. v. Superior Court, supra*, 53 Cal.4th at 1033 (emphasis added).)

11 Employers must authorize and permit a net ten-minute paid rest period for every four hours,
12 or major fraction thereof, of work for its employees. If an employer does not, then the employer must
13 pay the employee one hour of pay at the employee’s regular rate of pay for each workday that the rest
14 period is not provided. (Cal. Code Regs., tit. 8, § 11050, subd. 12(B).)

15 Here, Plaintiff alleges Defendant failed to provide Plaintiff and the aggrieved employees with
16 uninterrupted rest breaks of not less than ten (10) minutes per four (4) hour work period, or major
17 fraction thereof. (Ly Decl. ¶29.) Instead, Plaintiff contends that while Defendant would seemingly
18 enforce rest periods, Plaintiff’s supervisors and coworkers would continue messaging Plaintiff about
19 work while on break. (Ly Decl. ¶30.) Because Plaintiff was required to have the messaging
20 application downloaded onto his phone, even if Plaintiff would step away from his workstation, he
21 would still receive message notifications. (Ly Decl. ¶31.) Moreover, Plaintiff contends he was
22 required to message his coworkers that he was taking his break in the group message. (Ly Decl. ¶32.)
23 Thus, Defendant knew that Plaintiff would be on his break, and would continue to message him about
24 work. (*Id.*) Occasionally, Plaintiff contends that Defendant would also cut Plaintiff’s breaks short by
25 telling him to go back to work so that he could finish his workload for the day. (Ly Decl. ¶33.)

26 Defendant raised the defense that employees received their rest breaks and presented
27 evidence that employees would testify as such. (Ly Decl. ¶34.)

28 ///

1 **2. The Risks Associated with the Reimbursement Claim**

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

5 Here, Plaintiff alleges that he and all aggrieved employees were required to incur
6 substantial expenses in direct consequent of the discharge of their duties for Defendant without
7 reimbursement. (Ly Decl. ¶35.) Specifically, Defendant has failed to reimburse Plaintiff and the
8 aggrieved employees the cost of using their personal cell phones and wi-fi for business related
9 purposes. (Ly Decl. ¶36.) Defendant required Plaintiff and other aggrieved employees to use their
10 cell phones and wi-fi to perform their job duties while working. (Ly Decl. ¶37.) As stated above,
11 Plaintiff was required to download a specific messaging application to communicate with
12 supervisors and coworkers. (Ly Decl. ¶38.) This was necessary to perform their job duties as it is
13 not possible for Plaintiff and other aggrieved employees to perform or commence their job duties
14 without the use of cell phones or wi-fi. (*Id.*) While Defendant provided a computer to work from
15 home, Defendant did not provide cell phones or reimburse for use of its employees’ home wi-fi.
16 (Ly Decl. ¶39.) Thus, Defendant failed to reimburse Plaintiff and the aggrieved employees for the
17 costs associated with using these personal cell phones and wi-fi. (*Id.*) Therefore, Plaintiff contends
18 that Defendant owes penalties under PAGA for violating Labor Code § 2802.

19 Plaintiff has acknowledged the risks posed and that the damages were relatively small.
20 (Ly Decl. ¶40.)

21 **3. The Risks Associated with the Wage Statement Claims**

22 California Labor Code §226(a) requires Defendant to provide its employees with an accurate,
23 itemized written wage statement that shows, in relevant part, total hours worked by the employee,
24 their name and address of the legal entity that is the employer, and all applicable hourly rates and the
25 corresponding number of hours worked. (Labor Code §§ 226(a)(2) and (9) respectively.

26 Here, Plaintiff alleges that Defendant has failed to furnish accurate itemized wage statements
27 that show all applicable hourly rates in effect during the pay period and the corresponding number of
28 hours worked at each hourly rate by the employee under Labor Code Section 226(a). (Ly Decl. ¶41.)

1 Plaintiff and the aggrieved employees are issued wage statements by Defendant that do not include
2 rest premiums as a result of the claims alleged above. (Ly Decl. ¶42.) Defendant's failure to provide
3 accurate itemized wages statements according to Labor Code § 226(a) was all done on a regular and
4 consistent basis. Thus, Defendant owes Plaintiff and the aggrieved employees penalties under PAGA
5 for failing to provide accurate and itemized wage statements.

6 As this is a derivative claim, the same risks present for the above claims were present for
7 this claim. (Ly Decl. ¶43.)

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

9 Under Labor Code section 203, if an employer fails to provide wages at the time of an
10 employee's termination or within seventy-two (72) hours of resignation, then the employee's
11 wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203
12 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g.,
13 *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68
14 Cal.App.4th 487, 492.)

15 Here, Plaintiff Legarde and numerous aggrieved employees are no longer employed by
16 Defendant. They allege that Defendant failed to pay all wages owed and due upon their termination
17 and/or resignation. (Ly Decl. ¶44.) Defendant's actions were willful, as they have intentionally
18 failed or refused to perform an act which was required to be done. (See *Amaral v. Cintas Corp.*
19 *No. 2* (2008) 163 Cal.App.4th 1157, 1201.) "The failure to pay is willful if the employer 'knows
20 what [it] is doing [and] intends to do what [it] is doing', and does not also require proof that the
21 employer acted with "a deliberate evil purpose to defraud work[ers] of wages which the employer
22 knows to be due.'" (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 868.)

23 Plaintiff factored in the risk of establishing that any violation was "willful" and the fact
24 that this claim is derivative. (Ly Decl. ¶45.)

25 In light of all these significant risks and given that PAGA gives the Court broad discretion
26 to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement
27 Amount of \$95,000.00 was fair and reasonable (Ly Decl. ¶46., Exhibit 1, ¶3.1.)

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

3 Plaintiff believes there is a strong risk that the Court will not award the \$200 civil penalty
4 triggered for “subsequent” violations. Labor Code section 2699(f)(2). If this case were to proceed
5 to trial, Plaintiff would argue that a “subsequent” violation simply means that Defendant violated
6 section 226(a) more than once for a given employee. Plaintiff is not aware of any case law that
7 interprets “subsequent” in the context of section 2699. However, Defendant is likely to rely on
8 *Amaral v. Cintas Corp. No. 2, 163 Cal. App. 4th 1157 (2008)* because it rejected a purely temporal
9 understanding of the term “subsequent” and interpreted its use in Labor Code sections 210 and
10 225.5 to require that “the employer has been notified that it is violated a Labor Code provision”
11 before higher penalties are triggered. *Id.* at 1209. Defendant presumably will take the position that
12 it has not been notified that it actually violated section 226 until the Labor Commissioner has
13 issued a formal citation or this Court made a finding that a violation existed. Even if the Court
14 would agree with Plaintiff that Defendant was put on notice on September 10, 2019, the date
15 Defendant was served with Plaintiff’s PAGA letter, the \$200 civil penalty would only apply to
16 violations for a period of 3 months, occurring between September 10, 2019 and April 11, 2020
17 (the end of the Covered Period).

18 D. A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty
19 Awarded for Technical Violations of the Labor Code

20 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a
21 showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp. No. 2 163 Cal. App 4th*
22 *1157, 1213 (2008)*; *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007
23 WL 1650942, at *3.

24 However, PAGA does provide the Court with discretion when it awards these penalties.
25 Labor Code section 2699(e)(2) states that “a court may award a lesser amount than the maximum
26 civil penalty amount specified by this part if, based on the facts and circumstances of the particular
27 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
28 confiscatory.”

1 In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, the
2 Court exercised its discretion to reduce the PAGA penalty amount. There, the plaintiff brought a
3 PAGA claim for violations of section 226(a) based on the following issues: (a) the statements did
4 not show either an employee identification number or the last four digits of the social security
5 number of the employee; (b) the statements did not show the beginning date of the pay period for
6 which the employee was paid; (c) the statements identified Covidien as the employee's employer.
7 (*Id.* At *2). There were approximately 28,000 wage statements at issue. (*Id.* at *3). The *Fleming*
8 court calculated the maximum potential civil penalty exposure at \$2.8 million (\$100 per wage
9 statement). (*Ibid*; see also Labor Code § 2699(f)(2)). After a bench trial, the Court elected to
10 exercise its discretion to reduce the civil penalty per wage statement to \$18 per wage statements,
11 reflecting 18% of the potential exposure. (*Id.* at *4). The Court reasoned:

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

17 *Id.* at *4. A court exercising its discretion to significantly reduce the civil penalty awarded under
18 PAGA is not a rare occurrence. See e.g., *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th
19 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbucks's
20 "good faith attempts" to comply and because the violations were minimal).

21 Here, as explained above, Plaintiff's counsel anticipated that, at trial, Counsel for
22 Defendant would argue that: (1) all Aggrieved Employees were properly paid and/or reimbursed
23 in accordance with Defendant's lawful policies and practices, and that any alleged failure to
24 compensate Aggrieved Employees was the result of inadvertence and clerical error; (2) all
25 Aggrieved Employees were provided with the opportunity to take rest breaks in compliance with
26 California law; (3) until this Action was filed, no employees had complaints about any alleged
27 failure to pay wages, provide rest breaks, reimburse expenses, issue accurate itemized wage
28 statements; (4) none of Defendant's employees suffered any harm from or actual damage as a

1 result of the conduct that forms the basis for Plaintiff's allegations. All of which, Counsel for
2 Defendant would argue, should mitigate in favor of significantly reducing the civil penalty. After
3 engaging in pertinent informal discovery in this Action, Plaintiff's counsel determined that a
4 settlement of \$95,000.00 is reasonable given the above risks.

5 E. Based on the Risks Above and the Analysis of the Maximum Penalties Available,
6 Plaintiff Believes this Settlement is Fair and Reasonable

7 Based on these figures, the maximum potential exposure for the PAGA claims for
8 Aggrieved Employees is \$113,900.00 (1,139 pay periods at issue multiplied by \$100 a pay
9 period). If the Court stacks pay periods, the full value could balloon up to over \$1,000,000.00,
10 but in light of the immense discretion available, Plaintiff believes the Settlement is reasonable.
11 Given that this Settlement is for \$95,000.00, Plaintiff believes this is a very fair and reasonable
12 settlement.

13 **VI. THE REQUEST FOR ATTORNEYS' FEES AND COSTS**

14 As detailed fully in the Agreement, the settlement provides for Defendant to create a Gross
15 Settlement Amount of \$95,000.00. (Ly Decl. ¶51; Ex. 1 at ¶¶1.10; 3.1.) From that fund, Plaintiff
16 requests an award of attorneys' fees for PAGA Counsel in the amount of \$31,666.66, or 33.33%
17 of the Gross Settlement Amount, and \$6,723.01 in reimbursement for litigation costs. (*Id*; Ex. 1 at
18 ¶3.2.1.)

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

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

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

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

3 The recognized advantages of the percentage method—including relative ease of
4 calculation, alignment of incentives between counsel and the class, a better
5 approximation of market conditions in a contingency case, and the encouragement
6 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.

7 (*Id.* at 573.)

8 An award of 33.33% of the common fund is appropriate here under the “substantial benefit”
9 theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer,*
10 *Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a
11 representative capacity to recover fees when the litigant’s efforts have created a substantial, actual,
12 and concrete benefit for members of an ascertainable class and the court’s jurisdiction over the
13 subject matter makes possible an award which spreads the cost proportionately among the
14 members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th
15 563, 578.)

16 This doctrine rests on the understanding that attorneys should normally be paid by their
17 clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from
18 the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979)
19 23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent
20 this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees against
21 the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano*
22 *III*, 20 Cal.3d at p. 35.) “A court, in the exercise of its equitable discretion, may decree that those
23 receiving the benefit should contribute to the costs of its production.” (*Save El Toro Assn., supra*,
24 98 Cal.App.3d at 548.) As this approach “better approximates the workings of the marketplace
25 than the lodestar approach,” there is “a greater judicial willingness to evaluate a fee award as a
26 percentage of the recovery” in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82
27 Cal.App.4th 19, 31, 48.)

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1 B. The Attorneys' Fees Request Are Well Within the Range of Fees in Comparable
2 Cases

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

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

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

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

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

24 i. Requested Multiplier

25 The purpose of using the lodestar/multiplier method is to mirror the legal marketplace.
26 Counsel will not handle cases for straight hourly fees payable only if they win; therefore, an
27 enhancement is often awarded so that the fee received is commensurate with what attorneys could
28 expect to be compensated for services in similar circumstances. (See *Tulare Valley Audubon Soc.*,

1 *Inc. v. County of Tulare* (1984) 155 Cal.App.3d 738, 755 [an award must be large enough “to
2 entice competent counsel to undertake difficult public interest cases”].) No specific findings
3 reflecting the court’s calculations are required. (*Wershba, supra*, 91 Cal.App.4th at 254; *Rebney,*
4 *supra*, 232 Cal.App.3d at p. 1349.) “The record need only show that the attorney fees were awarded
5 according to the ‘lodestar’ or ‘touchstone’ approach.” (*Ibid.*)

6 Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Ly Decl.
7 ¶60.) PAGA Counsel have an aggregate lodestar in the amount of \$32,482.50 which represents
8 46.90 hours of attorney work on this litigation from its inception through the date of this filing of
9 Plaintiff’s instant Motion, and five future hours. (*Id.*) As such, PAGA Counsel has billed more
10 hours than the fee, and no multiplier is requested. (Ly Decl. ¶61.)

11 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT** 12 **OF COSTS**

13 In addition to their request for fees, PAGA Counsel further request reimbursement of the
14 reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this
15 litigation, in the amount of \$8,500.00. (Ly Decl. ¶82.) To date, Kingsley and Kingsley has incurred
16 \$6,465.26 in costs. (Ly Decl. ¶83.) PAGA Counsel anticipates incurring an additional \$257.75 in
17 costs to file and serve this motion. (Ly Decl. ¶84.) As such, counsel is requesting a cost
18 reimbursement of \$6,723.01. (Ly Decl. ¶85.)

19 All of the requested costs are reasonable in amount and were necessarily incurred by PAGA
20 Counsel in prosecuting this litigation. (Ly Decl. ¶86; Exhibit 5 [Cost Report].) Expenses in this
21 matter to date include costs for filing fees, research, mediation, and additional costs for the
22 prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Liane
23 Katzenstein Ly. All of these costs have been incurred in the course of this litigation, and all costs
24 advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of
25 filing the present motion. (Ly Decl. ¶87.)

26 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
27 advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court
28 should approve the request for reimbursement in the amount of \$6,723.01. (Ly Decl. ¶88.)

1 **VIII. THE COURT SHOULD APPROVE THE PROPOSED ENHANCEMENT TO**
2 **PLAINTIFF**

3 The Agreement calls for an enhancement payment of \$5,000.00 to the named Plaintiff, to
4 be paid from the Gross Settlement Amount. (Ly Decl. ¶89; Ex. 1 at ¶3.2.2.) Incentive awards
5 “are intended to compensate class representatives for work done on behalf of the class, to make up
6 for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize
7 their willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.* (9th
8 Cir. 2009) 563 F.3d 948, 958-59. “[I]t is established that named plaintiffs are eligible for
9 reasonable incentive payments to compensate them for the expense or risk they have incurred in
10 conferring a benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los*
11 *Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC*
12 (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

13 Here, the enhancement takes into consideration the time, effort, and expense incurred by
14 Plaintiff in coming forward to litigate this matter on behalf of all Aggrieved Employees. The time
15 spent by Jeremy Legarde includes identifying competent counsel, providing information to PAGA
16 Counsel regarding his relevant employment experiences, compiling documents, meeting with
17 PAGA Counsel frequently to discuss the status of the case and the theories of liability, reviewing
18 settlement documents, and making himself available for a full day of mediation. (Ly Decl. ¶90.)

19 PAGA Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶91.)
20 The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiff
21 in coming forward to litigate this matter on behalf of all Aggrieved Employees. (Ly Decl. ¶92.)
22 Accordingly, Plaintiff should be awarded the agreed-upon enhancement of \$5,000.00.

23 **IX. CONCLUSION**

24 Plaintiff submits that the proposed Settlement as documented in the Agreement is fair,
25 adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiff
26 respectfully requests that the Court approve the Settlement and Order that the Settlement is carried
27 out according to the terms of the Agreement.

1 DATED: December 14, 2023

KINGSLEY & KINGSLEY, APC

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3
4 By: 

5 Liane Katzenstein Ly
6 Attorneys for Plaintiff JEREMY LEGARDE and All
7 Aggrieved Employees
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(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On December 14, 2023, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

DILLINGHAM & MURPHY, LLP
William F. Murphy
wfm@dillinghammurphy.com
Jenny J. Liao
jjl@dillinghammurphy.com
155 Sansome Street, Suite 700
San Francisco, CA 94104

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

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

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

Executed on December 14, 2023, at Los Angeles, California.



Taylor Gregg