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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF TULARE

ENVY AZEVEDO, an individual, on behalf of herself and others similarly situated, PLAINTIFF, v. TULARE NURSING & REHABILITATION HOSPITAL, INC.; and DOES 1 thru 50, inclusive, DEFENDANTS.	Case No. VCU293325 [Case Assigned for All Purposes to Hon. David C. Mathias in Dept. 1] **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** *[Filed concurrently with Declarations of Liane Katzenstein Ly, John G. Yslas; Lisa Mullins of ILYM Group, Inc., and Plaintiff Envy Azevedo in Support of Plaintiff's Motion for Approval of Representative Action Settlement; [Proposed] Order, and Judgment]* Date: November 21, 2024 Time: 8:30 a.m. Dept.: 1 Complaint Filed: September 14, 2022 Trial Date: None Set

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 21, 2024 at 8:30 a.m. in Department 1 of the above-entitled court, Plaintiff ENVY AZEVEDO will move the Court for an Order Granting Approval of Representative Action Settlement.

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

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declarations of Liane Katzenstein Ly and John G. Yslas, the PAGA Settlement Agreement (Exhibit "1" to the concurrently filed Ly Declaration), all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: October 29, 2024

KINGSLEY SZAMET & LY

By: ______________________

Liane Katzenstein Ly
Jessica Bulaon
Attorneys for Plaintiff and all aggrieved employees

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Envy Azevedo ("Plaintiff") submits this Memorandum of Points and Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiff and Defendants TULARE NURSING & REHABILITATION HOSPITAL, INC. and TULARE HEALTHCARE & WELLNESS CENTER, LP ("Defendants") (collectively, the "Parties") have reached a proposed settlement documented in the PAGA Settlement Agreement ("Settlement" or "Agreement"), attached to the concurrently-filed declaration of Liane Katzenstein Ly.

This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699, et seq. ("PAGA"). The Gross Settlement Amount is $318,500.00. After deduction of attorney's fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration costs as discussed in the Agreement, the remaining amount to be divided between the Labor and Workforce Development Agency ("LWDA") and the aggrieved employees as required by Labor Code section 2699(i) is $177,833.33, with $133,375.00 (or 75%) going to the LWDA and $44,458.33 (or 25%) distributed to the aggrieved employees.[1]

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

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Litigation Overview and Procedural History

On September 14, 2022, Plaintiff commenced this Action by filing a Class Action Complaint against Defendant TULARE NURSING & REHABILITATION HOSPITAL, INC.,

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[1] 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).

[2] 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 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. ¶5.)

alleging causes of action for (1) Failure to Reimburse Expenses Pursuant to Labor Code § 2802 and (2) Violation of Business & Professions Code § 17200. (Hereafter, the "Action"). (Declaration of Liane Katzenstein Ly ¶6.) ("Ly Decl.") Plaintiff filed a First Amended Class and Representative Action Complaint on November 21, 2022, adding an additional claim for civil penalties pursuant to Labor Code section 2699, *et seq*. ("PAGA") based upon the same alleged Labor Code violations at issue in the complaint. (*Id*.)

Pursuant to Labor Code § 2699.3(a)(1), Plaintiff uploaded her notice letters to the LWDA and mailed a letter by certified mail to Defendants' entity addresses, as proscribed by the Code on September 14, 2022 and September 23, 2022, describing Defendants' conduct in violation of Labor Code §§ 201, 202, 203, 204, 210, 226, 226.7, 510, 512, 1194, 1174.5, 1194.2, 1198, 1199, 2802, and IWC Wage Order 5. (Ly Decl. ¶7; Yslas Decl. ¶ 3.)

Plaintiff commenced a separate action on February 27, 2023 with Wilshire Law Firm asserting claims against Defendant TULARE HEALTH CARE & WELLNESS CENTER, LP on behalf of herself, the State of California and other aggrieved persons for civil penalties under PAGA stemming from allegations of Defendant's failure to pay for all hours worked (minimum, straight time, and overtime wages), failure to provide meal periods, failure to authorize and permit rest periods, failure to pay all earned wages twice per month, failure to maintain accurate records of hours worked and meal periods, failure to timely pay final wages, failure to furnish accurate wage statements, and failure to indemnify employees for expenditures. (Tulare County Case No. VCU296181). (Ly Decl. ¶8; Yslas Decl., ¶ 4.)

The Parties entered into a stipulation to dismiss Tulare County Case No. VCU296181, filed by Wilshire Law Firm, as Plaintiff's individual and PAGA representative claims asserted were joined into the Action. (Ly Decl. ¶9; Yslas Decl., ¶ 6.)

Plaintiff's counsel was provided a copy of an executed arbitration agreement by Plaintiff, governing her employment and the claims alleged in the Class Action, which included a waiver of her right to proceed with the alleged claims on a class-wide basis. (Ly Decl. ¶10.) Accordingly, on March 10, 2023, the class action allegations were dismissed without prejudice and the remaining PAGA claim was stayed pending mediation or notification by the Parties of the California Supreme

Court's *Adolph v. Uber Technologies, Inc.* 's decision. (*Id.*)

On May 6, 2024, the Parties participated in an all-day mediation presided over by experienced wage and hour mediator Honorable Zaven Sinanian, which led to this Agreement to settle the Action, subject to Court approval. (Ly Decl. ¶11.) In accordance with the settlement reached, Plaintiff filed a Second Amended Complaint adding TULARE HEALTH CARE & WELLNESS CENTER, LP as a named Defendant and alleging a cause of action against Defendants for penalties under PAGA for Defendants' violation of Labor Code §§ 201, 202, 203, 204, 226(a), 210, 226.3, 226.7, 510, 512, 1174.5, 1194, 1197, 1197.1, 1198, 2802, and IWC Wage Order 5. (Ly Decl. ¶12; Yslas Decl., ¶ 7.)

B. <u>The Discovery Process</u>

Prior to mediation, Plaintiff obtained, through informal discovery, time and pay data, relevant to both Plaintiff and the aggrieved employees, including handbooks and Plaintiff's personnel file. (Ly Decl. ¶13.) Through the exchange of information and attendant discussions between the Parties, Plaintiff learned that the number of Aggrieved Employees is no more than 406 (including Plaintiff) and there is a maximum of 12,740 PAGA Pay Periods at issue. (*Id.*; Ex. 1, ¶4.1.) Plaintiff asserts that the maximum potential exposure for the PAGA claims for Aggrieved Employees is $1,274,000.00 (12,740 PAGA Pay Periods at issue × $100 = $1,274,000.00). (*Id.*)

Thereafter, the Parties engaged in good faith, arms-length negotiations with Defendants concerning possible resolution of the claims asserted in the Litigation. (Ly Decl. ¶14.) The Parties were able to reach a tentative settlement, with the aid of an experienced wage and hour mediator, subject to finalization of a formal PAGA Settlement Agreement and the approval of the Court. (*Id.*) The Parties negotiated the terms and conditions of the Settlement and now present the agreed-upon Settlement to the Court for Approval. (Ly Decl. ¶15.)

Although Defendants deny that they violated any pertinent laws, they recognized the risks and attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to finalization of a formal PAGA Settlement Agreement and the approval of the Court. (Ly Decl. ¶16.) The Parties negotiated the terms and conditions of the Agreement and now present the agreed-upon Settlement to the Court for Approval. (*Id.*)

III. PAGA ACTIONS AND THE REQUIREMENTS

A. The PAGA Statutory Scheme

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

When an aggrieved employee brings a PAGA claim, "the government is always the real party in interest." *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) ("[A] PAGA action is a dispute between an employer and the State agency."). Accordingly, a plaintiff that brings a PAGA claim represents "the same legal right and interest as state labor law enforcement agencies," in that the plaintiff is seeking to recover those civil penalties that otherwise 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 Defendants violated the Labor Code.[3] *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, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Here, Defendants deny that they violated any law or that they 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

3 *See also Willner v. Manpower Inc., supra. 35 F. Supp. 3d at 1136*; *McKenzie v. Federal Exp. Corp*, *supra*, 765 F.Supp.2d at 1232.

settlement should go into effect.

IV. THE SETTLEMENT

Defendants will pay the total sum of $318,500.00 in full and final settlement of the PAGA claims alleged. (Ly Decl. ¶17, Exhibit 1, ¶3.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount:	$318,500.00	
Plaintiff's Counsel Fees Payment:	$106,166.67	
Plaintiff's Counsel Litigation Expenses Payment:	$22,000.00[4]	
Administrator Expenses Payment:	$7,500.00	
Named Plaintiff Enhancement:	$7,500.00	
PAGA Penalties:	$175,333.33 *($131,500.00 to the LWDA; $43,833.33 to remain in the Net Settlement Amount)*	

(Ly Decl. ¶18; *Id.*)

Each aggrieved employee shall receive a pro-rata portion of the remaining amount in PAGA penalties based by dividing the amount of the aggrieved employees' 25% share of PAGA Penalties by the total number of PAGA Pay Periods worked by all aggrieved employees during the PAGA Period[5], and then multiplying the result by each aggrieved employee's PAGA Pay Periods. (Ly Decl. ¶19, Ex. 1, ¶3.2.4.1.)

For settlement purposes, the Aggrieved Employees are defined as: "all persons who are employed or have been employed as an hourly employee by Defendant TULARE NURSING & REHABILITATION HOSPITAL, INC. and TULARE HEALTHCARE & WELLNESS CENTER, LP, in the State of California who worked one or more pay periods during the PAGA Period" ("Aggrieved Employee"). (Ly Decl. ¶21, Ex. 1, ¶1.4.)

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4 The Agreement provided for counsel to receive cost reimbursement up to $22,000.00. However, counsel's final costs come to $18,815.63. The extra $3,184.37 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 $175,333.33 contemplated in the settlement agreement. Specifically, $178,517.70 will be allocated as PAGA Penalties, with 75% ($133,888.28) to the LWDA and 25% ($44,629.43) to the Aggrieved Employees.

5 The PAGA Period means the period from September 14, 2021 to May 6, 2024. (Ly Decl. ¶20, Ex 1, ¶1.20)

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. ¶22.) Plaintiff believed that Defendants may persuasively argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether waive any penalties under PAGA. (Ly Decl. ¶23.) 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. ¶24.) And in accordance with PAGA, the court in a PAGA action has the same discretion "to assess a civil 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)). (Ly Decl. ¶25.)

Plaintiff's counsel anticipated that, at trial, counsel for Defendants could make a potentially persuasive argument that: (1) the Aggrieved Employees were properly paid wages and/or reimbursed in accordance with Defendants' lawful policies and practices, and that any alleged failure to compensate the Aggrieved Employees, or compensate them timely, was the result of inadvertence and clerical error; (2) the Aggrieved Employees were provided with the opportunity to take meal and rest breaks in compliance with California law and Defendants maintained accurate meal records; (3) until this Action was filed, no employees had complaints about any alleged failure to pay wages, including overtime, provide meal and/or rest breaks, reimburse expenses, and issue accurate itemized wage statements; and, (4) none of Defendants' employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff's allegations. (Ly Decl. ¶26.) All of which, counsel for Defendants would argue, should mitigate in factor of significantly reducing or waiving any PAGA penalties. (*Id.*) While Plaintiff disagrees that this analysis is legally correct or persuasive, Plaintiff's 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. ¶27.)

1. The Risks Associated with the Wages/Overtime Claim

California employees are entitled to compensation for all hours worked, which means "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Title 8 Cal. Code of Regs., § 11050(2)(K); See *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified on denial of reh'g (Aug. 29, 2018).) Time is compensable if an employee is "subject to the control of an employer" even if not working, or if an employee "is suffered or permitted to work" even if not "under the employer's control, provided the employer has or should have knowledge of the employee's work." (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh'g denied (May 13, 2020) (citations omitted.) An employer controls an employee if the employer directs an employee and the employee is unable to use their time how they wish. (*Id*. at p. 1047.) Other factors courts may consider include whether the activity is required, "the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures." (*Id*. at p. 1056; Cf. *Gibbs v. TWC Administration, LLC* (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768, at *9 (denying Defendant's motion for summary judgment when plaintiff-employees conducted off-the-clock pre-shift activity in preparation to start work right when they clocked in).)

In *Troester*, employees spent four to ten minutes completing tasks to close up the store, such as setting the alarm and locking the door. (*Troester*, 5 Cal.5th 829 at p. 843.) The Court held that

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California law prohibits employers from requiring employees to work off the clock, even for minutes, without compensation. (*Id*. at p. 848.) The Court explained:

> An employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine. As the facts here demonstrate, a few extra minutes of work each day can add up. . . . . What Starbucks calls "de minimis" is not de minimis at all to many ordinary people who work for hourly wages.

(*Id*. at p. 847.)

Additionally, California workers are statutorily entitled to overtime compensation, unless they are properly classified as falling within one of the narrow exemption categories. Under California law, "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek…shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." (Lab. Code, § 510, subd. (a).) Labor Code § 1198 also states that the employment of an employee for longer hours than those fixed by the IWC is unlawful.

Throughout the relevant time, Plaintiff and the Aggrieved Employees were subject to the control of Defendants prior to their scheduled start times, without being compensated for those "hours worked." (Ly Decl. ¶28.)

Plaintiff maintains that Defendants required Plaintiff and the Aggrieved Employees to work "off-the-clock," uncompensated, by, for example, requiring Plaintiff and the Aggrieved Employees to perform work during uncompensated meal periods and/or requiring Plaintiff and the Aggrieved Employees to perform work after clocking out for the workday. (Ly Decl. ¶29.) Plaintiff maintains that some of this unpaid work should have been paid at the overtime rate. In failing to pay for all hours worked, Plaintiff contends that Defendants also failed to maintain accurate records of the hours Plaintiff and the Aggrieved Employees worked. (Ly Decl. ¶30.)

All of this was done with the knowledge and direction of Defendants; thus Plaintiff and the Aggrieved Employees are certainly entitled to be compensated for this time worked. (Ly Decl. ¶31.) Thus, Defendants are liable for unpaid wages and/or overtime wages.

Defendants deny that these allegations are true. (Ly Decl. ¶32.) Plaintiff had to consider that Defendants could argue that no employees were required to work "off the clock", and, if they did, they could clock in again and receive payment. (Ly Decl. ¶33.) Further, given that this time was "off the clock" and not captured by the time clock, Plaintiff applied a discount to this claim. (Ly Decl. ¶34.)

2. The Risks Associated with the Meal Period Claim

California law requires employers to provide employees a duty-free, uninterrupted thirty (30) minute meal period when an employee works more than five (5) hours in a workday, and it must be provided within the first five (5) hours the employee works. Lab. Code 512; IWC Wage Order 5-2001, §11(A) and (C); *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. Employers must also provide employees with a second duty-free, uninterrupted thirty (30) minute meal period when an employee works more than (10) hours in a workday, and it must be provided before the end of the 10th hour of work. (*Ibid*.) Meal periods can be waived, but only under the following circumstances: (1) if an employee's total work period in a day is over five (5) hours but no more than six (6) hours, the required meal period may be waived by mutual consent of the employer and employee, and (2) if an employee's total work period in a day is over ten (10) hours but no more than twelve (12) hours, the required second meal period may be waived by mutual consent of the employer and employee, but only if the first meal period was not waived. (*Ibid*.)

Employers covered by Industrial Welfare Commission ("IWC") Wage Order 5-2001 have an obligation to both (1) relieve their employees for at least one meal period for shifts over five hours (see above), and (2) to record having done so. If the employer fails to properly record a valid meal period, it is presumed that no meal period was provided. IWC Wage Order 5-2001, §7(A)(3) ("Meal periods . . . shall also be recorded"); *Brinker, supra*, 53 Cal.4th 1004, 1052-1053, citing §7(A)(3) ("If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided").

Employers must pay employees an additional hour of wages at the employees' regular rate of pay for each missed or improper (e.g., less than 30 minutes, interrupted meal period, first meal period provided after 5 hours, second meal period provided after 10 hours) meal period. Lab. Code §226.7; IWC Wage Order 5-2001, §11(B) ("If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided"); *Brinker, supra*, 53 Cal.4th 1004.

Here, Plaintiff consistently worked shifts over five (5) hours. (Ly Decl. ¶35.) Defendants maintained a written policy for meal and rest periods but violated its own policies. (Ly Decl. ¶36.) Plaintiff alleges that Defendants failed to apprise Plaintiff of Plaintiff's rights associated with meal periods, failed to record meal periods, and failed to provide compliant meal periods. (Ly Decl. ¶37.)

Plaintiff contends that Defendants wrongfully failed to provide Plaintiff and the Aggrieved Employees with their legally mandated 30-minute, uninterrupted, and duty-free meal period in a manner required by law. Defendants also continued to assert control over Plaintiff and the Aggrieved Employees by, among other things, requiring, pressuring, or encouraging them to perform work tasks which could not be completed without working in lieu of taking mandatory meal periods, or by denying Plaintiff and the Aggrieved Employees permission to take a meal period under the conditions required by law, and without properly compensating Plaintiff and the Aggrieved Employees for meal periods that were not provided as required by law. (Ly Decl. ¶38.)

Plaintiff maintains that Defendants also never informed Plaintiff of her right to, nor permitted her to take, a second meal period when Plaintiff worked at least ten hours of work in a workday, and otherwise unlawfully pressured her to waive such breaks. (Ly Decl. ¶39.) Accordingly, Defendants' pattern and practice was not to provide meal periods to Plaintiff and the Aggrieved Employees in compliance with California law.

Additionally, Defendants have had a consistent policy of failing to pay Plaintiff one (1) hour of pay at Plaintiff's regular rate of compensation for each workday that the compliant meal period was not provided. (Ly Decl. ¶40.) On July 15, 2021, in *Ferra v. Loews Hollywood Hotel, LLC,* the California Supreme Court set forth the formula for calculating the one extra hour of bonus pay that employees are owed if an employer fails to provide a compliant meal period or rest break. (*Id.*) Specifically, the Court held that those bonus payments must include the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses, commissions, etc.), and cannot simply be paid at an employee's base hourly rate. (*Id*.)

Defendants have had a consistent policy of paying meal period premiums at the base rate and not the appropriate regular rate in violation of California law. (Ly Decl. ¶41.) Thus, Defendants failed to provide lawful meal periods and pay meal premiums out at the proper rate. Defendants therefore owe penalties.

Further, Plaintiff contends that Defendants failed to maintain accurate records of hours worked and all meal periods taken or missed by Plaintiff and the Aggrieved Employees.

Pursuant to California Labor Code § 1174.5, any person, including any entity, employing labor who willfully fails to maintain accurate and complete records required by California Labor Code § 1174 is subject to a penalty under § 1174.5. Pursuant to the applicable IWC Order § 7(A)(3), every employer shall keep time records showing when the employee begins and ends each work period. Meal periods and total hours worked daily shall also be recorded.

Plaintiff alleges that Defendants did not maintain accurate records of hours worked and all meal periods taken or missed by Plaintiff and all Aggrieved Employees. (Ly Decl. ¶42.) Defendants' failure to provide and maintain records required by the California Labor Code and applicable IWC Wage Orders deprived Plaintiff and the Aggrieved Employees the ability to know, understand and question the accuracy and frequency of meal periods, and the accuracy of their hours worked stated in Defendants' records. (Ly Decl. ¶43.) Therefore, Plaintiff and the Aggrieved Employees had no way to dispute the resulting failure to pay wages, all of which resulted in an unjustified economic enrichment to Defendants.

Defendants could argue that its employees, including Plaintiff, did receive their meal periods. (Ly Decl. ¶44.) Plaintiff had to acknowledge that there are some risks associated with the meal period claim and did consider them when evaluating this settlement. (Ly Decl. ¶45.)

3. The Risks Associated with the Rest Break 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.

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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, § 11050, subd. 12(A).)

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

The Court also clarified what steps an employer has to take to "make available" rest breaks to its employees. Under *Brinker*,

> An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for 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.

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

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

Here, Plaintiff contends that Defendants failed to maintain a lawful procedure of providing rest breaks to Plaintiff. (Ly Decl. ¶46.) Plaintiff maintains that Defendants failed to provide Plaintiff with uninterrupted rest breaks of not less than ten (10) minutes as required by the Labor Code during the relevant time period and did not ensure it occurred within the first 3.5 hours of Plaintiff's shift. (Ly Decl. ¶47.)

Plaintiff also maintains that Defendants have wrongfully failed to authorize and permit Plaintiff and the Aggrieved Employees to take legally compliant rest periods in a manner required by law. Plaintiff asserts that Defendants regularly required Plaintiff and the Aggrieved Employees to work in excess of four consecutive hours a day without Defendants authorizing and permitting them to take a 10-minute, uninterrupted, duty-free rest period for every four hours of work (or major fraction of four hours), and without properly compensating Plaintiff and the aggrieved employees for rest periods that were not authorized or permitted. (Ly Decl. ¶48.) Instead, among other things, Defendants continued to assert control over Plaintiff and the Aggrieved Employees by requiring, pressuring, or encouraging them to perform work tasks which could not be completed without working in lieu of taking mandatory rest periods, and by denying Plaintiff and the Aggrieved Employees permission to take a rest period under the conditions required by law. (*Id.*) Accordingly, Defendants' pattern and practice was to not authorize and permit Plaintiff and the Aggrieved Employees to take rest periods in compliance with California law.

Plaintiff maintains that Defendants also did not pay rest break premiums even after it began providing some rest breaks. (Ly Decl. ¶49.) Further, Plaintiff was not compensated with one (1) hour of wages for each compliant rest period as required by Labor Code § 226.7. (Ly Decl. ¶50.)

4. The Risks Associated with the Timely Wages Claim

"Section 204 imposes an obligation of timely payment of wages upon California employers and provides rules for scheduling wage payments. Specifically, for most employees, section 204 requires payment of wages twice during a calendar month, and an employer is subject to penalties for violating section 204." *See's Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889, 904 (2012) (citing to Labor Code §§ 204(a); 210).

Labor Code § 204(a) provides:

> All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month.

Labor Code § 204(d) provides:

> The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than **seven** calendar days following the close of the payroll period (emphasis added).

Here, Plaintiff asserts that Defendants' payroll practices are defective in that they fail to timely pay Plaintiff's wages in accordance with California law. (Ly Decl. ¶51.) Plaintiff contends that Plaintiff was paid on a bi-weekly basis, or every 2 weeks, as stated under Labor Code § 204(a); making Plaintiff's wages due no later than seven days from the closing of each respective pay period. (Ly Decl. ¶52.) Thus, Plaintiff maintains that Defendants are liable for each wage statement issued.

Plaintiff had to consider that Defendants could argue that any error on the timing of payment was the result of a clerical error and that Plaintiff and the Aggrieved Employees were not actually paid wages more than seven days following the close of the pay period. (Ly Decl. ¶53.) If Defendants were able to prove that Plaintiff and the Aggrieved Employees were actually timely paid their wages and that itemized wage statements were simply reflecting an incorrect date of pay, then Plaintiff's counsel had to acknowledge that the likelihood of success on this claim was not strong. (Ly Decl. ¶54.) Based on this acute risk, Plaintiff believed it was appropriate to discount this claim. (Ly Decl. ¶55.)

5. The Risks Associated with the Reimbursement Claim

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

On a regular and consistent basis, Defendants have failed to reimburse Plaintiff and the Aggrieved Employees the cost of using their personal cell phones for business related purposes. (Ly Decl. ¶56.) Plaintiff alleges that Defendants required that Plaintiff and the Aggrieved Employees be available by cell phone while working, and this was necessary to perform their job duties. Plaintiff contends that she used her cell phone to communicate with supervisors and dispatch throughout her shift and sometimes even after hours. (Ly Decl. ¶57.) Despite the constant use of her personal cell phone for business purposes, Plaintiff was never reimbursed for this expense.

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Plaintiff maintains that these cell phones were not provided by Defendants, and Defendants failed to reimburse Plaintiff and the Aggrieved Employees for the costs associated with using these personal cell phones.

One risk that Plaintiff considered was the fact that not all Aggrieved Employees used their cell phones and not all used them for every pay period. (Ly Decl. ¶58.) This meant that the damages were relatively small. (Ly Decl. ¶59.)

6. The Risks Associated with the Wage Statement Claim

Labor Code § 226(a) provides that every employer shall furnish each of his or her employees an accurate itemized wage statement in writing showing nine pieces of information, including: (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. An employee is presumed to suffer an injury if this information is missing. (Labor Code § 226(e)(2)(B)(iii).)

Defendants failed to furnish Plaintiff and the Aggrieved Employees with accurate itemized wage statements showing all applicable hourly rates, and all gross and net wages earned (including correct hours worked, correct wages for meal periods that were not provided in accordance with California law, and correct wages for rest periods that were not authorized and permitted to take in accordance with California law). (Ly Decl. ¶60.)

As this is a derivative claim, the same risks present for the above claims were present for this claim. (Ly Decl. ¶61.)

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7. The Risks Associated with the Waiting Time Penalty

Labor Code section 203 provides that if an employer fails to provide wages at the time of an employee's termination or within 72 hours of his/her resignation, then such employee's wages shall continue as a penalty for up to thirty (30) days. "If an employer willfully fails to pay . . .any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid . . . but the wages shall not continue for more than 30 days." (Lab. Code, § 203, subd. (a).)

Here, many Aggrieved Employees, including Plaintiff, are no longer employed by Defendants. Defendants have failed to pay employees wages immediately or within 72 hours of termination and/or resignation by not paying all wages and overtime owed. (Ly Decl. ¶62.) Therefore, under California Law, "waiting time" penalties would be triggered for each former employee in the class. Labor Code section 203 reflects a public policy concern that favors the full and prompt payment of earned wages. (See, e.g., *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.)

Defendants may attempt to argue that a good-faith belief applies here and that its actions were not willful. However, the well-settled meaning of "willful," as used in Labor Code section 203, is that an employer has intentionally failed or refused to perform an act which was required to be done. (*Amaral v. Cintas Corp.* No. 2 (2008) 163 Cal.App.4th 1157, 1201.) Given that the underlying wage claims were relatively small in value, Defendants' defense was considered when determining a fair settlement value. (Ly Decl. ¶63.)

C. <u>A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty Awarded for Technical Violations of the Labor Code</u>

"PAGA penalties…are mandatory, not discretionary" and must be awarded upon a showing that Defendants violated the Labor Code. *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 section 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, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."

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

> Here, the aggrieved employees suffered no injury due to the erroneous wage statements, and made no complaint of the errors or omissions contained therein prior to filing suit. Also, Defendants were not aware that the wage statements violated the law and took prompt steps to correct all violations 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.

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

Here, as explained above, Plaintiff's counsel anticipated that, at trial, counsel for Defendants would argue that: (1) the Aggrieved Employees were properly paid wages and/or reimbursed in accordance with Defendants' lawful policies and practices, and that any alleged failure to compensate the Aggrieved Employees, or compensate them timely, was the result of inadvertence and clerical error; (2) the Aggrieved Employees were provided with the opportunity to take meal and rest breaks in compliance with California law and Defendants maintained accurate meal records; (3) until this Action was filed, no employees had complaints about any alleged failure to pay wages (including overtime), provide meal and/or rest breaks, reimburse expenses, and issue accurate itemized wage statements; and, (4) none of Defendants' employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff's allegations. All of which, counsel for Defendants would argue, should mitigate in favor of significantly reducing the civil penalty.

In light of all these significant risks, engaging in pertinent informal discovery in this Action, and given that PAGA gives the Court broad discretion to reduce any penalties ultimately awarded, Plaintiff's counsel determined that the Gross Settlement Amount of $318,500.00 was fair and reasonable. (Ly Decl. ¶64.)

D. <u>Based on the Risks Above and the Analysis of the Maximum Penalties Available, Plaintiff Believes this Settlement is Fair and Reasonable</u>

Based on these figures, the maximum potential exposure for the PAGA claims for the Aggrieved Employees is $1,274,000.00 (12,740 pay periods at issue multiplied by $100 a pay period). If the Court permits stacking, given that there are over 10 Labor Code provisions included in the PAGA Notice, the maximum exposure would be as high as 10 times that amount, but in light of the immense discretion available, Plaintiff believes the Settlement is reasonable.

VI. THE REQUEST FOR ATTORNEYS' FEES AND COSTS

As detailed fully in the Settlement, the settlement provides for Defendants to create a Gross Settlement Amount of $318,500.00. (Ly Decl. ¶69; Ex. 1 at ¶3.) From that fund, Plaintiff requests an award of attorneys' fees for Plaintiff's counsel in the amount of $106,166.67, or 33.33% of the Gross Settlement Amount, and $18,815.63 in reimbursement for litigation costs. (*Ibid.*)

A. <u>Plaintiff's Counsel are Entitled to a Fee from the Common Fund</u>

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

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its 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.

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

> The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation [citations]—convince us the percentage method is a valuable tool that should not be denied our trial courts.

(*Id.* at 573.)

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

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

B. <u>The Attorneys' Fees Request Are Well Within the Range of Fees in Comparable Cases</u>

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

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

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

C. <u>Plaintiff's Counsel's Fee Request is Reasonable Under a Lodestar Crosscheck</u>

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

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i. No Multiplier is Requested

The purpose of using the lodestar/multiplier method is to mirror the legal marketplace. Plaintiff's counsel will not handle cases for straight hourly fees payable only if they win; therefore, an enhancement is often awarded so that the fee received is commensurate with what attorneys could expect to be compensated for services in similar circumstances. (*See Tulare Valley Audubon Soc., Inc. v. County of Tulare* (1984) 155 Cal.App.3d 738, 755 [an award must be large enough "to entice competent counsel to undertake difficult public interest cases"].) No specific findings reflecting the court's calculations are required. (*Wershba*, *supra*, 91 Cal.App.4th at 254; *Rebney*, *supra*, 232 Cal.App.3d at p. 1349.) "The record need only show that the attorney fees were awarded according to the 'lodestar' or 'touchstone' approach." (*Ibid.*)

Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Ly Decl. ¶70.) Plaintiff's counsel have an aggregate lodestar in the amount of $107,480.00 which represents 148.60 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiff's instant Motion, and 10 future hours. (*Id.*) As such, Plaintiff's counsel has billed more hours than they are requesting. (Ly Decl. ¶71.)

VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

In addition to their request for fees, Plaintiff's counsel further request reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this litigation, in the amount of $18,815.63. (Ly Decl. ¶111.) To date, Kingsley Szamet & Ly has incurred $10,089.49 in costs and the Wilshire Law Firm has incurred $8,355.24 in costs. (Ly Decl. ¶112; Yslas Decl. ¶8.) Plaintiff's counsel anticipates incurring an additional $370.90 in costs to file and serve this motion. (Ly Decl. ¶113.) As such, Plaintiff's counsel is requesting a cost reimbursement of $18,815.63. (Ly Decl. ¶114.)

All of the requested costs are reasonable in amount and were necessarily incurred by Plaintiff's counsel in prosecuting this litigation. (Ly Decl. ¶115.); Exhibit 5 [Cost Report].) Expenses in this matter to date include costs for filing fees, research, mediation, and additional costs for the prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Liane Katzenstein Ly. All of these costs have been incurred in the course of this litigation, and all costs advanced have already been paid by Plaintiff's counsel, with the exception of the anticipated cost of filing the present motion. (Ly Decl. ¶116.)

Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court should approve the request for reimbursement in the amount of $18,815.63. (Ly Decl. ¶117.)

VIII. ENHANCEMENT TO PLAINTIFF

The Settlement calls for an enhancement payment of $7,500.00 to the named Plaintiff, to be paid from the Gross Settlement Amount. (Ly Decl. ¶118; Ex. 1 at ¶3.2.2.) Incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. "[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

Here, the enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of the Aggrieved Employees. The time spent by Envy Azevedo includes identifying competent counsel, providing information to Plaintiff's counsel regarding Plaintiff's relevant employment experiences, compiling documents, meeting with PAGA Counsel frequently to discuss the status of the case and the theories of liability, reviewing settlement documents, and making himself available for a full day of mediation. (Ly Decl. ¶119.)

Plaintiff's counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶120.) The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of the Aggrieved Employees. (Ly Decl. ¶121.) Accordingly, Plaintiff should be awarded the agreed-upon enhancement of $7,500.00.

IX. CONCLUSION

Plaintiff and Plaintiff's counsel submit that the proposed Settlement as documented in the Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiff respectfully requests that the Court approve the Settlement and Order that the Settlement is carried out according to the terms of the Agreement.

DATED: October 29, 2024

KINGSLEY SZAMET & LY

By: ______________________________

Liane Katzenstein Ly
Jessica Bulaon
Attorneys for Plaintiff and all aggrieved employees

(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 October 29, 2024, 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:

FISHER & PHILLIPS, LLP
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[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 October 29, 2024, at Encino, California.

____
Michelle Tanzer