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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE**

LUKE KOEHLER, an individual; on
behalf of himself and other aggrieved
employees

Plaintiff,

v.

SEA POINTE CONSTRUCTION AND
DEVELOPMENT, INC., a California
corporation; and DOES 1 through 100,
inclusive,

Defendants.

CASE NO. 30-2022-01297787-CU-OE-
CXC

[Assigned for all purposes to the Hon.
Melissa R. McCormick, Dept. CX-104]

RESERVATION ID. # 74144814

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR APPROVAL OF
PRIVATE ATTORNEYS GENERAL
ACT SETTLEMENT AGREEMENT,
FOR ATTORNEYS' FEES AND COSTS
AND ADMINISTRATIVE FEES;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[Declarations of Aaron A. Bartz, Luke
Koehler, and [proposed] Order filed
concurrently herewith]

Date: February 22, 2024

Time: 2 p.m.

Dept.: CX-104

PLEASE TAKE NOTICE that on February 22, 2024, at 2:00 p.m., or as soon thereafter as the matter may be heard before the Honorable Melissa R. McCormick, Dept. CX-104 of the Superior Court of the State of California, County of Orange, Civil Complex Center, 751 W. Santa Ana Blvd., Santa Ana, California 92701, Plaintiff Luke Koehler (“Plaintiff”) will and hereby does move for entry of an order and judgment as follows:

1. Granting approval, pursuant to California Labor Code section 2699, subd. (1)(2) of the proposed settlement between Plaintiff and Defendant Sea Pointe Construction and Development, Inc. (“Defendant”) of the claims brought pursuant to the Private Attorneys General Act of 2004 (“PAGA”) as set forth in the PAGA Settlement Agreement (“Settlement Agreement”), attached as Exhibit 1 to the Declaration of Aaron A. Bartz;

2. Approving the Net Settlement Amount payable to the State of California and Aggrieved Employees as authorized by California Labor Code section 2699, subd. (i);

3. Appointing Phoenix Class Action Administration Solutions as the Settlement Administrator;

4. Directing Defendant to transmit settlement funds to the Settlement Administrator in the total amount of \$135,000 pursuant to the Settlement Agreement;

5. Directing the Settlement Administrator to distribute the settlement funds to the Aggrieved Employees, and distributing funds to the Labor and Workforce Development Agency (“LWDA”), Plaintiff’s Counsel, and for Settlement Administration Costs, in accordance with the terms of the Settlement Agreement;

6. Awarding to Plaintiff’s Counsel the amount of \$45,000 as compensation for reasonable attorneys’ fees (“Attorneys’ Fees Payment”), \$6,478.66 for reimbursement of litigation costs and expenses (“Litigation Costs Payment”), and \$2,750 for Settlement Administration Costs.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Settlement Agreement, the Declarations of Aaron A. Bartz and Luke Koehler, the pleadings and other records on file with the Court in this matter, and such evidence and oral argument as may be presented at the hearing on this Motion.

1 Dated: November 8, 2023

2 BARTZ LAW GROUP, APC

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4 By: /s/Aaron A. Bartz/s/
5 Aaron A. Bartz
6 Attorneys for Plaintiff LUKE KOEHLER
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I.

INTRODUCTION AND SUMMARY OF MOTION

This is an action brought by Plaintiff Luke Koehler (“Plaintiff”), pursuant to the Private Attorneys General Act of 2004 (“PAGA”), to recover civil penalties for themselves, other aggrieved employees and the State of California. Plaintiff and the other aggrieved employees are non-exempt employees who worked for Defendant Sea Pointe Construction and Development, Inc. (“Defendant”), and allege California wage and hour violations including failure to pay wages, failure to authorize and permit meal and rest periods, and related violations.

Plaintiff has agreed to settle the PAGA penalties for a Gross Settlement Fund of **\$135,000**.¹ The Gross Settlement Fund includes all attorneys’ fees and costs, settlement administration expenses, and penalties payments to the aggrieved employees and the Labor and Workforce Development Agency (LWDA). The Net Settlement Amount to be distributed to the aggrieved employees and the LWDA is approximately \$80,771. The Net Settlement Amount will be distributed 75% to the LWDA (\$60,578), and 25% to the aggrieved employees (\$20,193).

The number of aggrieved employees as of the date of the settlement was 42. As such, each of the aggrieved employees will receive, on average, approximately \$481 in penalties. In exchange for such payment, the aggrieved employees are giving up no rights whatsoever to recover for underlying violations of the Labor Code other than for PAGA penalties. Any aggrieved employee may file a claim against Defendant for such violations.

This settlement is fair, reasonable and adequate, and therefore should be approved by this Court.

II.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Defendant owns and operates a construction and remodeling businesses within the State of

¹ In addition to the amount for PAGA penalties, Plaintiff and two other former employees, James Backes and Juan Ortega will be receiving a total amount of \$90,000 to settle their individual wage claims against Defendant. Thus, the total compensation Defendant will be paying is \$225,000. Upon request, Plaintiff will submit the individual, confidential settlement agreements *in camera* to the Court.

1 California. Plaintiff and other aggrieved employees worked for Defendant as non-exempt
2 employees working for Defendant during the applicable time period.

3 Plaintiff served his PAGA letter on the Labor and Workforce Development Agency
4 (LWDA) on October 13, 2022. Plaintiff filed his PAGA Complaint on December 21, 2022, on
5 behalf of himself and other aggrieved employees for Civil Penalties under PAGA based on
6 Defendant's wage and hour violations, including failure to pay all wages, meal period and rest
7 break violations, and other wage violations. (Bartz Decl., ¶ 9, and Ex. 3 thereto).

8 Thereafter, Plaintiff and Defendant agreed to exchange informal discovery, and Defendant
9 produced time, payroll and personnel records, including all payroll and time data for the aggrieved
10 employees. Plaintiff also retained an expert to prepare a penalties exposure analysis. Thereafter,
11 the parties attended Mediation on September 5, 2023 before Laurie Saldana, and after a full day of
12 negotiations, the parties were able to reach a settlement of this case. (Bartz Decl., ¶¶ 10-12.)

13 III.

14 SUMMARY OF SETTLEMENT

15 A. Aggrieved Employees

16 The Settlement covers the following aggrieved employees:

17 Any and all current and former hourly-paid, non-exempt employees who worked for
18 Defendant in the State of California at any time from October 13, 2021 to the date of preliminary
19 approval. (Bartz Decl., ¶ 7, Ex. 1).

20 Based upon Defendant's records, there are 42 aggrieved employees through today's date.
21 (Bartz Decl., ¶ 7).

22 B. Settlement Fund

23 Defendant will pay into a common fund the total amount of \$135,000 within 10 days of
24 the Effective Date. (Bartz Decl., ¶ 3.) Prior to distributing the settlement checks to aggrieved
25 employees, the Settlement Administrator shall review the addresses provided using the National
26 Change of Address database. Should any of the settlement checks be returned as undeliverable,
27 the Settlement Administrator will have seven (7) days after it receives the returned undeliverable
28 mail to search for a more current address for the Aggrieved Employee (via a skip trace or other

reasonable method) and to re-mail the settlement checks to any alternative or updated address obtained by the Settlement Administrator. (Bartz Decl., ¶ 4). The Net Settlement Amount shall be calculated by deducting the PAGA Counsel Fees Payment, PAGA Counsel Litigation Expenses Payment, and the Administration Expenses Payment from the Gross Settlement Amount.

A breakdown of the Gross Settlement Fund of **\$135,000** is provided below:

1. Individual PAGA Payments to Aggrieved Employees: \$20,193;
2. LWDA PAGA Payment to the LWDA: \$60,578;
3. PAGA Counsel Fees Payment: \$45,000;
4. PAGA Counsel Litigation Expenses Payment: \$6,478.66;
5. Administration Expenses Payment: \$2,750.

C. Release

The “Released Parties” are the Defendant and any of its past, present, and future direct or indirect parents, subsidiaries, predecessors, successors, and affiliates, as well as each of their past, present, and future officers, directors, employees, partners, members, shareholders and agents, attorneys, insurers, reinsurers, and any individual or entity which could be jointly liable with Defendant

“Released Claims” include:

All claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts, allegations and claims pled for PAGA penalties contained in the Operative Complaint and the PAGA Notice.

(Exhibit 1 to Bartz Decl., ¶¶ 5.1-5.2).

IV.

LEGAL STANDARD FOR APPROVAL OF PAGA SETTLEMENT

The PAGA statute allows an “aggrieved employee” to bring a civil action on behalf of himself or herself and on behalf of other aggrieved employees and the State to recover civil penalties which are specifically established by PAGA with respect to provisions of the California

1 Labor Code which does not otherwise provide for civil penalties (Lab. Code § 2699(g)), and also,
2 civil penalties which, outside of PAGA, only the LWDA can assess upon and collect from an
3 employer (Lab. Code § 2699(a)). Before bringing a civil action under PAGA, an employee must
4 comply with California Labor Code section 2699.3. *See* Labor Code § 2699(a).

5 The settlement of a PAGA claim requires court approval. *See* Labor Code § 2699, subd.
6 (1)(2) (“The superior court shall review and approve any settlement of any civil action pursuant to
7 this part”). However, “[a] PAGA claim asserted on a non-class representative basis . . . is not
8 considered a class action but a law enforcement action” and therefore one does not have to meet
9 the requirements of a class action. *Casida v. Sears Holding Corp.*, 2012 WL 253217, at *3 (E.D.
10 Cal. Jan. 26, 2012); *Thomas v. Aetna Health of Cal., Inc.*, 2011 WL 2173715, at * 11 (E.D. Cal.
11 June 2, 2011); *Arias v. Superior Court*, 46 Cal.4th 969, 980-88 (2009) (affirming lower court’s
12 holding that “plaintiff need not satisfy class action requirements” to assert a PAGA claim);
13 *Pedroza v. PetSmart, Inc.*, 2013 WL 1490667, at *15 (C.D. Cal. Jan. 28, 2013). As such, a court’s
14 review of a PAGA settlement involves analysis of several unique features that render the approval
15 process distinct from approval of a class action settlement. A court reviewing a PAGA settlement
16 need only “ensur[e] that a negotiated resolution is fair to those affected.” *Williams v. Superior*
17 *Court*, 3 Cal.5th 531, 549 (2017).

18 In a PAGA case, the Court’s focus is not the monetary amount which aggrieved employees
19 or the State are to receive, but instead, whether the total settlement amount achieves the PAGA’s
20 objectives. The purpose of the PAGA is “to incentivize private parties to recover civil penalties
21 for the government that otherwise may not have been assessed and collected by overburdened state
22 enforcement agencies.” *See Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, at *4
23 (N.D. Cal. Apr. 2, 2010) (citing *Arias, supra*, 46 Cal.4th at 986). Penalties recovered under the
24 PAGA are, in part, to “be distributed to the [LWDA] for enforcement of labor laws . . . and for
25 education of employers and employees about their rights and responsibilities under this code, to
26 be continuously appropriated to supplement and not supplant the finding to the agency for those
27 purposes.” *See* Labor Code § 2699(j). The recovery of penalties on behalf of the state, by way of
28 a PAGA claim, is essentially a law enforcement action. *See Amalgamated Transit Union, Local*

1 1756, *AFL-CIO v. Sup. Ct.*, 46 Cal.4th 993, 1003 (2009) (stating that the PAGA is mechanism for
2 “an aggrieved employee to recover civil penalties—for Labor Code violations—that otherwise
3 would be sought by state labor law enforcement agencies”).

4 V.

5 **THE SETTLEMENT IS FAIR, ADEQUATE AND REASONABLE**

6 This Settlement resulted from Plaintiff’s thorough and extensive review of informal
7 discovery, and aggressive negotiating stance to obtain a reasonable recovery. This PAGA
8 settlement should therefore be approved.

9 A. **The Settlement Is Presumed Fair**

10 A representative settlement is presumed fair where: (1) the settlement is reached through
11 arm’s length bargaining, (2) investigation and discovery are sufficient to allow counsel and the
12 court to act intelligently, (3) [and] counsel is experienced in similar litigation. *See Dunk v. Ford*
13 *Motor Company*, 48 Cal. App. 4th 1794, 1802 (1996). Similar to class actions, PAGA settlements
14 are subject to a court’s approval under a fair, adequate and reasonable standard. *See Moniz v.*
15 *Adecco USA, Inc.*, 72 Cal.App.5th 56, 76-77 (2021). A court may also consider relevant factors
16 such as the strength of the plaintiffs’ case, the risk, expense, complexity and likely duration of
17 further litigation, the risk of maintaining class action status through trial, the amount offered in
18 settlement, the extent of discovery completed and the stage of the proceedings, the experience and
19 views of counsel, [and] the presence of a governmental participant. . . . *See Officers of Justice v.*
20 *Civil Service Com’n of City and County of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1995). “This
21 list is not exhaustive and should be tailored to each case. Due regard should be given to what is
22 otherwise a private consensual agreement between the parties.” (*Dunk, supra*, 48 Cal. App. 4th at
23 1801.) Moreover, the trial court has broad powers to determine whether a proposed [representative
24 action] settlement is fair. (*See Mallick v. Superior Court*, 89 Cal. App. 3d 434 (1979).

25 B. **The Settlement Is The Product of Arm’s Length Negotiations**

26 In this action, Defendant produced all time and payroll data for the aggrieved employees,
27 hundreds of pages of personnel and policy documents, detailed data regarding the aggrieved
28 employees’ pay records, and related employment information for aggrieved employees. (Bartz

Decl., ¶ 10). After a thorough review of those records, Plaintiff retained damages expert James Toney to compile a damages summary reflecting the total exposure to PAGA penalties in this case. (Bartz Decl., ¶ 10, and Ex. 4 thereto).

The parties also attended a Mediation for Laurie Saldana, a well-respected and experienced wage and hour neutral. The negotiations in this case were hard fought and spirited, and at all times, the settlement negotiations were non-collusive, and involved considerable disputes over payment terms. (Bartz Decl., ¶ 11). After a full day mediation, the parties were able to reach an agreement in principle.

Plaintiff did not settle this case until he had conducted sufficient investigation into the claims, interviewed other former non-exempt employees, and reviewed sufficient data to make a settlement determination. (Bartz Decl., ¶ 12). Plaintiff believes that this is an excellent settlement of the PAGA claims, which will not affect any aggrieved employee's right to pursue underlying Labor Code violations against Defendant if he or she chooses to do so. (*Ibid*).

C. Plaintiff's Counsel Is Experienced In Similar Litigation And Endorse The Settlement

The view of attorneys in representative litigation is "entitled to significant weight." *Fisher Bros. v. Cambridge-Lee Industries, Inc.*, 630 F.Supp. 482, 488 (E.D. Pa. 1985); *see also Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980). Plaintiff's counsel have significant experience in complex representative and class action wage and hour litigation. (Bartz Decl., ¶¶ 13-15.) As such, they are experienced and qualified to evaluate the claims and defenses in this case, and unequivocally support the settlement reached herein.

D. The Strength of Plaintiff's Case, The Amount Offered In Settlement, and The Risk, Expense, Complexity, and Duration of Further Litigation Favors Settlement

Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Moreover, "[t]he expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *In re Mega Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000).

In this case, Plaintiff seeks PAGA penalties only. The sole PAGA claim that is at issue

1 in this settlement concerns Defendant's failure to: (1) pay all wages owed, including minimum
2 wage, overtime and off-the-clock compensation; (2) provide duty-free meal periods; (3)
3 authorize and permit duty-free rest periods; (4) pay all wages due upon termination; (5) properly
4 maintain and submit accurate itemized wage statements; (6) reimburse employees. (Bartz Decl.,
5 ¶ 16).

6 1. Unpaid wages

7 California Labor Code § 510(a) and the applicable Wage Orders regulating payment of
8 wages in the State of California, provide that eight (8) hours of labor constitutes a day's work
9 and any work in excess of eight (8) hours in one (1) workday and any work in excess of forty
10 (40) hours in any one workweek shall be compensated at the rate of no less than one and one-half
11 times the regular rate of pay for each employee and any work in excess of twelve (12) hours in
12 any one workday shall be compensated at the rate of no less than twice the regular rate of pay for
13 each employee.

14 Labor Code § 1194 states any employee receiving less than the legal minimum wage is
15 entitled to recover the unpaid balance of the full amount of this minimum wage, including interest
16 thereon, reasonable attorney's fees, and costs of suit.

17 Plaintiff contends that Defendant has committed overtime and minimum wage violations
18 in numerous respects. **First**, Plaintiff contends that Defendant unlawfully collected, received
19 and/or paid Plaintiff and the aggrieved employees less than the required minimum wage due based
20 on Defendant's practice of automatically deducting 30 minutes from their time, even though
21 frequently, they did not receive meal periods that were 30 minutes in length, or at all. This resulted
22 in substantially undercompensating Plaintiff and the aggrieved employees.

23 **Second**, Plaintiff contends that he and the aggrieved employees worked substantial off-the-
24 clock overtime based on Defendant's failure and refusal to pay for most overtime hours worked.
25 Plaintiff contends that Defendant had both actual and constructive knowledge of the off-the-clock
26 hours being worked here. *See Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 585 (2000) (work
27 "suffered or permitted is work time," and an employer's actual or constructive knowledge of such
28 work obligates the employer to compensate the employee for such work).

1 Defendant contends that it has numerous defenses to Plaintiff's unpaid wage claims,
2 including that it did pay the overtime premium, strictly enforced off-the-clock policies, and that
3 Plaintiff and the aggrieved employees received at least 30 minutes for meal periods, and
4 therefore it was proper to deduct 30 minutes based thereon.

5 Plaintiff's expert calculates unpaid wage penalties under Labor Code §§ 558, 1174, and
6 1194 of \$408,900. Plaintiff believes this is one of his strongest claims, and therefore believes he
7 had a 60% chance of success on the unpaid wage theory. Nevertheless, Labor Code section
8 2699(e)(2) also gives a trial court broad discretion to reduce PAGA penalties: "[A] court may
9 award a lesser amount than the maximum civil penalty amount specified by this part if, based on
10 the facts and circumstances of the particular case, to do otherwise would result in an award that
11 is unjust, arbitrary and oppressive, or confiscatory." Case law supports a trial court's discretion
12 in downgrading penalties based on these factors. *See Thurman v. Bayshore Transit*
13 *Management, Inc.*, 203 Cal.App.4th 1112, 1135-1136 (2012) (no abuse of discretion by reducing
14 penalty by 30 percent). Thus, Plaintiff believes that the real value of the unpaid wage penalties
15 is \$171,738 (\$408,900 x .6 [chances of success] x .7 [court discretion] = \$171,738). (Bartz Decl.,
16 ¶ 16.a).

17 2. Meal period violations

18 Plaintiff contends that Defendant failed to provide Plaintiff and other aggrieved
19 employees thirty-minute duty-free meal periods for every five hours of work as is required by
20 Labor Code § 512, the applicable wage orders, and in violation of *Brinker Restaurant Corp. v.*
21 *Superior Court*, 53 Cal.4th 1004 (2012). In *Brinker*, the California Supreme Court held that
22 "under ... Labor Code § 512, subdivision (a), an employer must relieve the employee of all duty
23 for the designated period." *Id.* at 1034. Moreover, when time records show short, missed, and
24 late meal periods, there is a presumption that an employer violated California's meal period
25 requirements. *See Donohue v. AMN Services, LLC*, 11 Cal.5th 58, 78 (2021) ("If time records
26 show noncompliant meal periods, then a rebuttable presumption of liability arises.")

27 Plaintiff contends that Defendant's meal period practices are unlawful under California
28 law. **First**, Defendant's time records show that at no time did Plaintiff or any of the aggrieved

employees ever clock out for their meal periods. As such, Plaintiff alleges that there is a presumption that Defendant violated California's meal period requirements.

Second, because Defendant fails to maintain accurate and complete documentation regarding Plaintiff's and the aggrieved employees' meal periods, Plaintiff contends that there is a prima facie violation of the Wage Orders, and that he and the aggrieved employees were not relieved of duty and no meal periods were provided. *See Brinker, supra*, 53 Cal.4th at 1053 (conc. opn. of Werdegar, J.)

In response to such arguments, Defendant contends that it permits all aggrieved employees more than 30-minute meal periods, and whenever meal periods were late, short or missed, it was due to Plaintiff's and the aggrieved employees' voluntary choice. Defendant further argues that individual issues will predominate because of the various scenarios affecting different classes of employees working for Defendant. As such, Defendant claims that PAGA claims must meet a manageability requirement. *See Wesson v. Staples The Office Superstore, LLC*, 68 Cal.App.5th 746 (2021) (holding that courts have inherent authority to ensure the manageability of PAGA claims).

The maximum potential PAGA penalties recoverable for meal period violations are \$267,800, as calculated by Plaintiff's expert. Based on the various issues raised above regarding proving meal period violations, Plaintiff believes that he has a 20% chance of proving all of those penalties. Thus, Plaintiff believes that the real value of the meal period penalties is \$37,492. (\$267,800 x .2 [chances of success] x .7 [court discretion] = \$37,492). (Bartz Decl., ¶ 16.b).

3. Rest period claims

Section 12(A) of the IWC Wage Order(s) states: "Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages."

1 Section 12(B) of the IWC Wage Order(s) states: “If an employer fails to provide an
2 employee a rest period in accordance with the applicable provisions of this order, the employer
3 shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for
4 each workday that the rest period is not provided.”

5 Under *Brinker, supra*, the California Supreme Court found that employers have a “duty
6 to make a good faith effort to authorize and permit rest breaks in the middle of each work period.
7 . . .” *Brinker, supra*, 53 Cal.4th at 1031. Plaintiff alleges that rest periods were not authorized or
8 permitted because Defendant did not have a policy allowing Plaintiff and other aggrieved
9 employees to take rest periods away from their job sites, and Plaintiff and other aggrieved
10 employees were often interrupted with work inquiries and other duties, which is “irreconcilable
11 with employees’ retention of freedom to use rest periods for their own purposes. *See Augustus v.*
12 *ABM Security Services, Inc.*, 2 Cal.5th 257, 270 (2016).

13 Defendant contends that it complied with California’s rest period requirements, and
14 produced a rest period policy that facially complies with California law.

15 Plaintiff’s expert calculates total penalties on the rest period claim of \$268,800. Given
16 Defendant’s facially valid rest period policy, and potential individual issues relating to proving
17 rest break violations, Plaintiff believes he had a 10% chance of recovering all of the above
18 penalties on the rest period claim, in the absence of other mitigating factors. Given that a court
19 has discretion regarding the amount of penalties to be assessed, Plaintiff therefore believes the
20 real exposure of PAGA penalties on the rest period claim is approximately \$18,816. (\$268,800 x
21 .1 [chances of success] x .7 [court discretion] = \$18,816.) (Bartz Decl., ¶ 16.c).

22 4. Failure to pay all wages on termination

23 Plaintiff further alleges that pursuant to Labor Code §203, aggrieved employees terminated
24 from Defendant’s employment are entitled to the default penalty of Labor Code § 2699 because
25 Defendant did not pay them all wages due upon separation. Such a claim is derivative, and for the
26 same reasons as stated above, Defendant contends no wages are due, and thus no penalties owed under
27 PAGA. Defendant further argues that its failure to pay wages upon separation was not “willful,” in
28 that the law is uncertain as to claims asserted in this case or whether the failure to pay is due to a good

1 faith dispute. *See Barnhill v. Robert Saunders & Co.*, 125 Cal.App.3d 1, 8 (1981) (employer's failure
2 to pay is not willful if its failure is due to uncertainty in the law); *Road Sprinkler Fitters Local Union*
3 *No. 669 v. G & G Fire Sprinklers, Inc.*, 102 Cal.App.4th 765, 782 (2002) (willfulness not met if
4 defendant's failure to pay a result of a "good faith mistaken belief that wages are not owed").

5 Plaintiff's expert calculates PAGA penalties on this claim of \$1,200, based on the fact that
6 there are only 12 separated employees, and the default penalty is \$100. Because of the heightened
7 willfulness standard applicable to waiting time penalties, and based on Defendant's defenses,
8 Plaintiff believes that he had a 30% chance of recovering all of the above penalties. Given that a
9 court has discretion regarding the amount of penalties to be assessed, Plaintiff therefore believes
10 the real exposure of PAGA penalties on the waiting time penalties' claim is approximately \$252.
11 (\$1,200 x .3 [chances of success] x .7 [court discretion] = \$252.) (Bartz Decl., ¶ 16.d).

12 5. Improper pay stubs

13 Plaintiff further alleges that Defendant failed to provide proper pay statements that
14 complied with Labor Code § 226.

15 Plaintiff alleges similar theories of liability as above with respect to the paystub claim, i.e.
16 that the wage statements are defective because they do not reflect all wages owed, and fail to show
17 premium payments for missed meal and rest periods. *See Naranjo v. Spectrum Security Servs.,*
18 *Inc.*, 13 Cal.5th 93 (2022). Plaintiff further alleges that to obtain PAGA penalties for pay stub
19 violations, a plaintiff need not satisfy the "injury" or "knowing and intentional" requirements of
20 Labor Code section 226(e)(1). *See Raines v. Coastal Pacific Food Distributors, Inc.*, 23
21 Cal.App.5th 667 (2018).

22 On the other hand, Defendant argues derivative violations of Labor Code § 226 do not give
23 rise to pay stub violations upon which PAGA penalties arise. *See Maldonado v. Epsilon Plastics,*
24 *Inc.*, 22 Cal.App.5th 1308 (2018); *see also Culley v. Lincare Inc.*, 236 F.Supp.3d 1184, 1195-1196
25 (E.D. Cal. 2017). Defendant further argues that any such violations were inadvertent, and therefore
26 not actionable. *See Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement,*
27 192 Cal.App.4th 75 (2011).

1 Plaintiff's expert calculates pay stub penalties to be approximately \$269,800. Plaintiff
2 believes he had a 20% chance of recovering all of the potentially recoverable civil penalties.
3 Moreover, Plaintiff applies the same discounts as set forth above in the analysis as to the court's
4 discretion to reduce penalties. As such, Plaintiff believes the real exposure on this claim to be
5 \$37,772. ($\$269,800 \times .2$ [chances of success] $\times .7$ [court discretion] = \$37,772). (Bartz Decl., ¶
6 16.e).

7 6. Reimbursement of expenses

8 Labor Code § 2802 provides, in pertinent part: "An employer shall indemnify his or her
9 employee for all necessary expenditures or losses incurred by the employee in direct consequence
10 of the discharge of his or her duties, or of his or her obedience to the directions of the employer. .
11 .."

12 Plaintiff contends that Defendant required he and other aggrieved employees to use their
13 personal cell phones to respond to work calls and respond to text messages during their
14 employment, as well as using their personal tools for construction. Defendant contends that
15 Plaintiff and the other aggrieved employees were prohibited from working off the clock, and
16 therefore any use of personal cell phones for work purposes during non-work hours was
17 voluntary and not reimbursable, and that Defendant complied with the wage orders when
18 requiring use of personal tools by paying at least double the minimum wage.

19 Upon further investigation and discussions with witnesses, Plaintiff was unable to
20 substantiate this claim to prove PAGA penalties across all pay periods. At most, therefore, because
21 of proof problems with this claim, Plaintiff values the total reimbursement claim at \$200 per
22 employee, or \$8,400. But given the tenuous nature of this claim, Plaintiff estimates the real value
23 is 20% of that amount, or \$1,680. (Bartz Decl., ¶ 16.f).

24 7. Total exposure to PAGA penalties

25 Based upon the alleged Labor Code violations, Plaintiff believes the total actual PAGA
26 exposure is approximately \$267,750. Based on a settlement value of \$135,000, this amounts to
27 approximately 50% of the total exposure to PAGA penalties. Plaintiff believes this to be an
28 excellent result, given that Defendant has valid defenses to Plaintiff's claims, and there is a

substantial question as to whether a trial court will even award cumulative penalties sought by Plaintiff for alleged multiple Labor Code violations because there is no established precedent for such an award.² Moreover, even to the extent any violations are proven, Defendant argues that any heightened penalties from subsequent violations are not warranted. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1208-1209 (2008) (“Until the employer has been notified that it is violating a Labor Code provision. . . , the employer cannot be presumed to be aware that its continuing underpayment of employees is a ‘violation’ subject to penalties”). (Bartz Decl., ¶ 16.g).

The purpose of the PAGA is to “achieve maximum compliance with [California’s] labor laws.” *See Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 379 (2014). The penalties recovered here on behalf of the State and aggrieved employees achieve that purpose.

VI.

NOTICE OF THE SETTLEMENT

“[A] PAGA action is a statutory action for penalties brought as a proxy for the State,” and as such, “there is no need to protect absent employees’ due process rights[.]” *Williams v. Superior Court*, 3 Cal.5th 531, 546 (2017). “Unnamed employees need not be given notice of the PAGA claim, nor do they have the ability to opt-out of the representative PAGA claim.” *Ochoa-Hernandez v. Cjaders Foods, Inc.*, 2010 WL 1340777, at *5 (N.D. Cal. Apr. 2, 2010). A representative PAGA action need not satisfy class action requirements, and no due process concern arises from the fact that there are “nonparty aggrieved employees who are not given notice if, and an opportunity to be heard in, a representative action that is not brought a class action.” *Arias v. Sup. Ct.*, 46 Cal.4th 969, 984 (2009). “PAGA does not make other potentially aggrieved employees parties” to the action and no “due process concerns arise under PAGA because absent employees do not own a personal claim for PAGA civil penalties and whatever personal claims the absent

² While there are cases allowing for the “stacking” of penalties when it comes to evaluating the “amount in controversy” where a case has been removed to federal court (*see Schiller v. David’s Bridal, Inc.*, 2010 WL 2793650 (E.D. Cal. July 14, 2010)), it appears to be an open question whether such “stacked” penalties may be awarded when they potentially overlap and “double count” remedies for similar violations.

employees might have for a relief are not at stake.” *Williams, supra*, 3 Cal. 5th at 546-547 (internal references omitted, citing *Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct.*, 46th Cal.4th 993, 1003 (2009) and *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 381 (2014).)

Notwithstanding the above, the parties will include a one-page Notice of Settlement with each of the aggrieved employees’ payments, identifying the reason why they are receiving the payment, and advising the aggrieved employees that they are not releasing any of their wage claims. (Bartz Decl., ¶ 20, and Ex. 8 thereto). Plaintiff will also provide notice of the settlement to the LWDA pursuant to Labor Code § 2699, subd. (l)(2). (Bartz Decl., ¶ 21).

VII.

ATTORNEYS’ FEES AND COSTS

A. Fees Can Be Awarded As A Percentage of the Common Fund

When a common fund is created, attorneys who secured the fund are entitled to a percentage of the fund. (*See Laffitte v. Robert Half Int’l, Inc.* (2016) 1 Cal.5th 480, 503 [“the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created”]; *Lealao v. Beneficial Cal., Inc.* (2000) 82 Cal.App.4th 19, 26 [“percentage fees have traditionally been allowed in . . . common fund cases”]). Plaintiff’s request for one-third of the common fund is reasonable, falls within the Ninth Circuit’s historical benchmark for attorneys fees of 25% to 50% of a common fund, and is fair compensation for undertaking complex litigation on a contingent basis. (*See, e.g.,* Rubinstein, Conte and Newberg, Newberg on Class Actions at § 14:6 [surveying cases, and finding that 30-50% of fees awarded in cases in which the common fund is relatively small]; *see also In re Ampicillin Antitrust Litigation* (D.D.C. 1981) 526 F.Supp. 494 [court approved attorney fee award equal to 45% of the settlement fund].)

Under the common fund doctrine, “a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 750, 62 L.Ed.2d 676 (1980). The Supreme Court explained:

1 The doctrine rests on the perception that persons who obtain the benefit of a
2 lawsuit without contributing to its cost are unjustly enriched at the successful
3 litigant's expense. Jurisdiction over the fund involved in litigation allows a court
4 to prevent this inequity by assessing attorney's fees against the entire fund, thus
5 spreading fees proportionately among those benefitted by the suit." (Citations
6 omitted.)

7 (*Id.*; see also *Laffitte, supra*, 1 Cal.5th at 503 ["the percentage method is a valuable tool that
8 should not be denied our trial courts"]; *Serrano v. Priest* (1977) 20 Cal.3d 25, 34 ["one who
9 expends attorneys' fees in winning a suit which creates a fund from which other derive benefits,
10 may require those passive beneficiaries to bear a fair share of the litigation costs"].)

11 Thus, the common fund doctrine ensures that each member of the class contributes
12 proportionately to the payment of attorney's fees recovered from monetary payments that the
13 prevailing party recovered in the lawsuit. "Put another way, in common fund cases, a variant of
14 the usual rule applies and the winning party pays his or her own attorneys fees. . ." *Stanton v.*
15 *Boeing*, 327 F.3d 938, 967 (9th Cir. 2003), citing *Wininger v. SI Mgmt L.P.*, 301 F.3d 1115 (9th
16 Cir. 2002).

17 Because Plaintiff's attorneys secured a fund for Plaintiff and the other aggrieved
18 employees, they are entitled to a reasonable percentage of that fund.

19 **B. Plaintiff's Attorneys Fees Are Also Recoverable Under The Lodestar**
20 **Adjustment Approach**

21 Fees in representative cases are also appropriate under the lodestar method, whereby the
22 number of hours reasonably expended is multiplied by a reasonable hourly rate. See *Lealao,*
23 *supra*, 82 Cal.App.4th at 26. Under PAGA, moreover, attorneys' fees and costs are statutorily
24 recoverable. See Cal. Labor Code § 2699, subd. (g)(1). Once a lodestar has been established, it
25 may "be adjusted, based on consideration of factors specific to the case, in order to fix the fee at
26 the fair market value for the legal services provided." *PLCM Group, Inc. v. Drexler*, 22 Cal.4th
27 1084, 1095 (2000). In evaluating the lodestar, and whether an upward adjustment is appropriate,
28 courts look to the qualifications of counsel, the reasonableness of the rates charged, the novelty
and difficulty of the case, the contingent nature of the case, the results achieved, and related

1 matters. *See, e.g., Serrano, supra*, 20 Cal.3d 25, 49; *see also Press v. Lucky Stores, Inc.*, 34
2 Cal.3d 311, 321-322 (1983). All such factors support the fee award here.

3 **1. Plaintiff's Counsel Are Well-Qualified To Represent The Aggrieved**
4 **Employees And Their Rates Are Reasonable**

5 Plaintiff's counsel are experienced employment lawyers, and have extensive experience
6 in the specific subcategory of wage and hour claims. (Bartz Decl. ¶¶ 13-15). Moreover, counsel
7 for Plaintiff have hourly rates that are reasonable in the relevant market, and below that found
8 with other class action employment lawyers with similar expertise. (Bartz Decl., ¶ 17).

9 **2. Plaintiff's Counsel's Lodestar Is Well Documented**

10 A properly supported motion for attorney's fees is prima facie evidence that the expenses
11 and services were necessarily incurred. *Hadley v. Krepel*, 167 Cal.App.3d 677, 682 (1985).
12 Here, counsel provide appropriately detailed declarations and detailed, contemporaneous billing
13 statements in support of the lodestar amounts. (Bartz Decl., ¶ 17, and Ex. 5 thereto).

14 **3. Novelty And Difficulty Of The Case**

15 Plaintiff and his counsel were able to secure a favorable settlement only after
16 investigating the claims and researching the theories of potential liability in this case. This case
17 presented potentially novel issues, including whether the aggrieved employees' off-the-clock
18 work was compensable when Defendant had strict policies prohibiting such work.

19 **4. Plaintiff's Counsel Worked Efficiently And Skillfully**

20 Plaintiff obtained significant informal discovery, interviewed witnesses, and researched
21 all available claims in investigating the alleged wage and hour violations. Plaintiff and his
22 counsel resolved the case only after an all day Mediation that involved spirited debate about the
23 merits of the case and disputes over settlement terms. Plaintiff's counsel's tenacity produced the
24 highest and best settlement possible from Defendant.

25 **5. Plaintiff's Counsel Worked Entirely On A Contingency Basis**

26 Plaintiff's counsel worked on a complete contingency and advanced all expenses and
27 costs. The contingent risk included liability issues, damage issues, and evolving changes under
28 PAGA. According to the California Supreme Court:

1 A contingent fee must be higher than a fee for the same legal services paid as they
2 are performed. The contingent fee compensates the lawyer not only for the legal
3 services he renders but for the loan of those services. The implicit interest rate on
4 such a loan is higher because the risk of default (the loss of the case, which
5 cancels the debt of the client to the lawyer) is much higher than that of
6 conventional loans.

7 (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132-1133, quoting Posner, *Economic Analysis of*
8 *Law* (4th ed. 1992) pp. 534, 567.)

9 **6. Plaintiff's Counsel Achieved A Good Result**

10 Plaintiff's counsel obtained a \$135,000 settlement, which would not have been achieved
11 but for Plaintiff and his attorneys' ability to efficiently prosecute the case to a successful
12 conclusion.

13 **C. Plaintiff's Counsel's Costs Are Documented and Reasonable**

14 Plaintiff's counsel are also entitled to their reasonable out-of-pocket costs incurred in
15 prosecuting this action, in the amount of \$6,478.66 which includes filing and motion fees, and
16 other costs necessary to the prosecution of this case. (Bartz Decl., ¶ 17, Ex. 6 thereto).
17 Moreover, Phoenix Class Action Administration Solutions has agreed to provide settlement
18 administration services in the amount of \$2,750, including preparing and mailing the notices to
19 the aggrieved employees, distributing the payments, and performing other administration duties
20 for this PAGA settlement. (Bartz Decl., Ex. 7 thereto). All such amounts should be deducted
21 from the common fund created, and Defendant does not oppose Plaintiff's counsel's request for
22 costs and administration expenses.

23 ///

24 ///

25 ///

1 **VIII.**
2 **CONCLUSION**

3 Based on the foregoing, Plaintiff respectfully requests that this Court grant its Motion to
4 Approve the PAGA Settlement.

5 Dated: November 8, 2023

BARTZ LAW GROUP, APC

7 By: /s/Aaron A. Bartz/s/
8 Aaron A. Bartz
9 Attorneys for Plaintiff LUKE KOEHLER