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

JESSE ROBLES, an individual, on behalf of
himself and others similarly situated,

PLAINTIFF,

v.

GEREMIA POOLS; and DOES 1 thru 50,
inclusive,

DEFENDANTS.

Case No. 34-2022-00329920-CU-OE-GDS

[Case Assigned for All Purposes to Hon. Jill
Talley in Dept. 23]

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

*[Filed concurrently with Declarations of
Kelsey M. Szamet, Lisa Mullins of ILYM
Group, Inc., and Plaintiff Jesse Robles in
Support of Plaintiff's Motion for Approval of
Representative Action Settlement; [Proposed]
Order, and [Proposed] Judgment]*

Date: June 14, 2024

Time: 9:00 AM

Dept.: 23

Complaint Filed: November 17, 2022

FAC Filed: January 24, 2023

Trial Date: None Set

Reservation No. #A-3299320-001

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

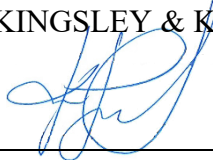
2 **PLEASE TAKE NOTICE** that on June 14, 2024, at 9:00 AM in Department 23 of the
3 above-entitled court, Plaintiff JESSE ROBLES will move the Court for an Order Granting
4 Approval of Representative Action Settlement.

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

7 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
8 and Authorities, the Declaration of Kelsey M. Szamet, the PAGA Settlement Agreement (Exhibit
9 "1" to the concurrently filed Szamet Declaration), all other papers and records on file in this action,
10 and on such oral and documentary evidence as may be presented at the hearing on this Motion.

11
12 DATED: March 1, 2024

KINGSLEY & KINGSLEY, APC

13
14 By: 

15 Kelsey M. Szamet
16 Attorneys for Plaintiff JESSE ROBLES and all
17 aggrieved employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jesse Robles (“Plaintiff”) submits this Memorandum of Points and Authorities in
4 support of Motion for Approval of Representative Action Settlement. Plaintiff and Defendant
5 GEREMIA POOLS (“Defendant”) (collectively, the “Parties”) have reached a proposed settlement
6 documented in the PAGA Settlement Agreement (“Settlement” or “Agreement”), attached to the
7 concurrently-filed declaration of Kelsey M. Szamet.

8 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699,
9 et seq. (“PAGA”). The Gross Settlement Amount is \$150,000.00. After deduction of attorney’s
10 fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration
11 costs as discussed in the Agreement, the remaining amount to be divided between the Labor and
12 Workforce Development Agency (“LWDA”) and the aggrieved employees as required by Labor
13 Code section 2699(i) is \$80,787.31, with \$60,590.48 (or 75%) going to the LWDA and
14 \$20,196.83 (or 25%) distributed to the aggrieved employees.¹

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

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

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

22 On November 19, 2022, and in compliance with Labor Code § 2699.3(a)(1), written notice
23 to Defendant and the Labor and Workforce Development Agency (“LWDA”) was provided
24

25 ¹ Pursuant to PAGA, civil penalties recovered by aggrieved employees shall be distributed 75 percent to the
26 Labor and Workforce Development Agency (“LWDA”) and 25 percent to the aggrieved employee(s). Lab.
Code § 2699(i).

27 ² Plaintiff’s Motion for Approval of Representative Action Settlement will be concurrently uploaded to the
28 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. (Szamet Decl. ¶107.)

1 seeking civil penalties under PAGA for violation of Labor Code §§ 201, 202, 203, 226(a), 510,
2 1194, 1199, 2802. (Declaration of Kelsey M. Szamet (“Szamet Decl.”) ¶5.)

3 On November 19, 2022, Plaintiff JESSE ROBLES filed a putative Class Action Complaint
4 in Sacramento County Superior Court seeking recovery for: (1) failure to pay wages and/or
5 overtime under Labor Code sections 510, 1194, and 1199; (2) failure to reimburse expenses
6 pursuant to Labor Code section 2802; (3) failure to provide accurate itemized wage statements
7 pursuant to Labor Code section 226(a); (4) penalties under Labor Code section 203; and (5)
8 violation of Business & Professions Code section 17200. (Szamet Decl. ¶ 6.)

9 Plaintiff has not received any response from the LWDA to his formal written notice. As
10 Plaintiff has waited more than sixty-five (65) days from the January 5, 2023 postmark date of his
11 written notice before filing his action, Plaintiff has complied with all of the requirements set forth
12 in Labor Code § 2699.3 to commence a representative action under PAGA. (Szamet Decl. ¶ 7.)

13 On January 24, 2023, Plaintiff filed a First Amended Class and Representative Action
14 Complaint adding an additional cause of action for penalties pursuant to Labor Code § 2699, et
15 seq., the Private Attorneys General Act (“PAGA”) based on the underlying Labor Code violations
16 already pled. (Hereafter, the “Action”.) (Szamet Decl. ¶ 8.)

17 Pursuant to the PAGA Settlement Agreement, the Parties agreed that Plaintiff would
18 dismiss his class action claims, and he filed a Request for Dismissal without Prejudice as to the
19 Putative Class on November 28, 2023. (Szamet Decl. ¶ 9.) The Order Granting Dismissal Without
20 Prejudice as to the Putative Class was signed on February 8, 2024. (Szamet Decl. ¶ 10.)

21 B. The Discovery Process and Mediation

22 The Parties engaged in informal pre-mediation discovery. Prior to mediation, Defendant
23 produced Plaintiff’s personnel file and employee data for the aggrieved employees. (Szamet Decl. ¶
24 11.) Based on Defendant’s records, the data reveals that there are an estimated 202 Covered
25 Employees³ (including Plaintiff) who worked a total of 7,000 PAGA Pay Periods. (Szamet Decl. ¶
26 12.; Ex. 1 at ¶4.1) Plaintiff’s counsel retained an expert to analyze this data and assess Defendant’s
27

28 ³ Covered Employees refers to all nonexempt employees who worked in the construction department during the PAGA Period.

1 maximum exposure. (Szamet Decl. ¶ 13.)

2 On June 14, 2023, the Parties participated in an all-day mediation presided over by
3 experienced mediator Brandon McKelvey, which let to this formal agreement to resolve Plaintiff's
4 individual claims and his PAGA claim on behalf of himself and other aggrieved employees, also
5 referred to as "Covered Employees". (Szamet Decl. ¶14.; Ex. 1 at ¶2.3)

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

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

12 **A. The PAGA Statutory Scheme**

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

20 When an aggrieved employee brings a PAGA claim, "the government is always the real
21 party in interest." *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th
22 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) ("[A]
23 PAGA action is a dispute between an employer and the State agency."). Accordingly, a plaintiff
24 that brings a PAGA claim represents "the same legal right and interest as state labor law
25 enforcement agencies," in that the plaintiff is seeking to recover those civil penalties that otherwise
26 would have been assessed and collected by the LWDA. *Arias, supra*, 46 Cal.4th at 986; Lab. Code
27 § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D.
28 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. (Szamet Decl., Ex. 1, ¶2.2.)

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

PAGA provides for penalties in the amount of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2). “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that Defendant violated the Labor Code.⁴ *Amaral v. Cintas Corp. No. 2* 163 Cal. App. 4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3. However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code §2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Here, Defendant denies that it violated any law or that it engaged in any knowing or intentional conduct giving rise to liability, and expressly deny that any employees suffered

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

harm.

C. Standards for Settlement Approval

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

IV. THE SETTLEMENT

Defendant will pay the total sum of \$150,000.00 in full and final settlement of the PAGA claim alleged. (Szamet Decl. ¶16., Exhibit 1, ¶3.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount	\$150,000.00
PAGA Counsel Fees Payment	\$50,000.00
PAGA Counsel Litigation Expenses Payment	\$9,262.69 ⁵
Administrator Expenses Payment	\$4,950.00
Enhancement Payment	\$5,000.00
PAGA Penalties	\$80,787.31 (\$60,590.48 to the LWDA; \$20,196.83 to Aggrieved Employees)

(Szamet Decl. ¶17., Exhibit 1, ¶¶3.1-3.2.)

Each Covered Employee shall receive a pro-rata portion of the remaining amount in PAGA penalties by dividing the amount of the Covered Employees’ 25% share of PAGA Penalties by the

⁵ The Agreement provided for counsel to receive cost reimbursement up to \$10,000.00. However, counsel’s final costs come to \$9,262.69, which includes the anticipated cost of \$600 for filing the instant motion. (Szamet Decl. ¶18, Ex. 5) The Agreement also anticipated for the Administrator Expenses Payment to be \$5,000, but the final administrative costs come to \$4,950.00. The extra \$787.31 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 \$80,000.00 contemplated in the settlement agreement. (See Szamet Decl. ¶19, Ex. 1 ¶3.2.1)

1 total number of PAGA Period Pay Periods worked by all Covered Employees during the PAGA
2 Period⁶, and then multiplying the result by each Covered Employee’s PAGA Pay Periods. (Szamet
3 Decl. ¶20., Exhibit 1, ¶3.2.5.)

4 For settlement purposes, the Aggrieved Employees are defined as: “all non-exempt
5 employees who worked in the construction department during the PAGA Period” (“aggrieved
6 employees” or “Covered Employees”). (Szamet Decl. ¶22., Exhibit 1, ¶1.4.) The PAGA Period
7 runs from November 17, 2021 to June 14, 2023. (*Id.* Decl. ¶21., Exhibit 1, ¶1.20.)

8 **V. ARGUMENT**

9 **A. The Court Should Approve the Agreement**

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

17 **B. The Risks of Moving Forward with Plaintiff’s PAGA Claim**

18 To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation
19 and discount taken follows. (Szamet Decl. ¶23.) Plaintiff believed that Defendant may persuasively
20 argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether
21 waive any penalties under PAGA. (Szamet Decl. ¶24.) Pursuant to Labor Code §226.3, the Labor
22 Commissioner has the discretion to “decide not to penalize an employer for a first violation when
23 that violation was due to a clerical error or inadvertent mistake.” (Szamet Decl. ¶25.) And in
24 accordance with PAGA, the court in a PAGA action has the same discretion “to assess a civil
25 penalty” that the Labor Commissioner would have, as well as complete discretion to “award a
26 lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts

27
28 ⁶ The PAGA Period or Covered Period means the period from November 17, 2021 to June 14, 2023, (Szamet Decl.
¶21, Exhibit 1, ¶1.20)

1 and circumstances of the particular case, to do otherwise would result in an award that is unjust,
2 arbitrary and oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)).

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

15 1. The Risks Associated with the Wages/Overtime Claim

16 “California employees are entitled to compensation for all hours worked, which means “the
17 time during which an employee is subject to the control of an employer, and includes all the time
18 the employee is suffered or permitted to work, whether or not required to do so.” (Title 8 Cal. Code
19 of Regs., § 11080(2)(G); *See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified
20 on denial of reh’g (Aug. 29, 2018).) Time is compensable if an employee is “*subject to the control*
21 *of an employer*” even if not working, or if an employee “*is suffered or permitted to work*” even if
22 not “under the employer’s control, provided the employer has or should have knowledge of the
23 employee’s work.” (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh’g denied (May 13,
24 2020) (citations omitted.) An employer controls an employee if the employer directs an employee
25 and the employee is unable to use their time how they wish. (*Id.* at p. 1047.) Other factors courts
26 may consider include whether the activity is required, “the location of the activity, the degree of
27 the employer’s control, whether the activity primarily benefits the employee or employer, and
28 whether the activity is enforced through disciplinary measures.” (*Id.* at p. 1056; *Cf. Gibbs v. TWC*

1 *Administration, LLC* (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768, at *9
2 (denying Defendant’s motion for summary judgment when plaintiff-employees conducted off-the-
3 clock pre-shift activity in preparation to start work right when they clocked in).)

4 Additionally, California workers are statutorily entitled to overtime compensation, unless
5 they are properly classified as falling within one of the narrow exemption categories. Under
6 California law, “[a]ny work in excess of eight hours in one workday and any work in excess of 40
7 hours in any one workweek...shall be compensated at the rate of no less than one and one-half
8 times the regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).) Furthermore, “[a]ny
9 work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the
10 regular rate of pay for an employee.” (Lab. Code, § 510, subd. (a).)

11 Here, Plaintiff alleged that he and the aggrieved employees were not paid at the proper
12 overtime rate when they were working more than eight (8) hours in one day or forty (40) hours in
13 one week. (Szamet Decl. ¶28.) Specifically, Plaintiff alleged that he and the aggrieved employees
14 were not properly compensated for overtime because when they were paid travel pay, the travel
15 pay was not correctly blended into their regular rate of pay for the purpose of calculating the correct
16 overtime rate. (Szamet Decl. ¶29.) Plaintiff alleged that Defendant’s failure to correctly blend
17 travel pay into the regular rate of pay resulted in the unlawful withholding of wages and/or
18 overtime. (Szamet Decl. ¶30.)

19 However, Defendant vehemently disputes this blending issue and argues that all employees
20 were paid for all hours worked. (Szamet Decl. ¶31.) Defendant maintains that it properly blended
21 travel pay into the regular rate calculation, such that all aggrieved employees were not underpaid
22 as Plaintiff alleged. (Szamet Decl. ¶32.) In fact, the expert’s analysis revealed that despite the
23 paystubs being confusing in terms of the rates displayed, it did not appear that Defendant was
24 actually underpaying the aggrieved employees. This was not a strong claim for liability. (Szamet
25 Decl. ¶33.) Plaintiff considered this a viable risk in pursuing the wage/overtime claim when
26 evaluating this settlement, given that if Defendant is successful in showing that the aggrieved
27 employees were in fact paid correctly for all hours worked, then damages associated with this
28 claim would be minimal to none. (Szamet Decl. ¶34.) Nonetheless, Plaintiff maintains that the

1 rates listed on paystubs were confusing such that the average employee of Defendant would not
2 even be able to determine if they were being paid correctly. (Szamet Decl. ¶35.)

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

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

7 Here, Plaintiff Robles alleges that Defendant failed to reimburse Plaintiff and the aggrieved
8 employees the cost of using their personal cell phones for business related purposes. (Szamet Decl.
9 ¶36.) Defendant required that Plaintiff and the aggrieved employees be available by cell phone,
10 use their cell phones while working to make and receive calls, and to take and send pictures.
11 (Szamet Decl. ¶37.) This was required by Defendant and was necessary to perform their job duties.
12 (*Id.*) Thus, Plaintiff alleged that Defendant failed to reimburse Plaintiff and the aggrieved
13 employees for the costs associated with using their personal cell phones. (*Id.*)

14 Defendant argues that they never required Plaintiff or other employees to use their personal
15 cell phones in order to complete their assigned job duties. (Szamet Decl. ¶38.) Defendant maintains
16 that Plaintiff did not need a cell phone to perform his job duties as a laborer and that construction
17 crew leads were provided company cell phones should the need arise. (*Id.*) Accordingly, Plaintiff
18 had to acknowledge the risk that Defendant could not defeat this claim and, even if Plaintiff were
19 to prevail, the potential damages were relatively small and a court may not award a large civil
20 penalty. (Szamet Decl. ¶39.)

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

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

26 Defendant issued wage statements that violate Labor Code §§ 226(a)(2), (8) and (9).
27 (Szamet Decl. ¶40.) Labor Code § 226(a) specifically requires that the employer shall,
28 semimonthly or at the time of each payment of wages, furnish each of his or her employees, an

1 accurate itemized statement in writing showing all applicable hourly rates in effect during the pay
2 period and the corresponding number of hours worked at each hourly rate by the employee.

3 As mentioned above, Plaintiff alleges that the rates listed on the aggrieved employees'
4 wage statements were not accurate and were confusing such that the aggrieved employees were
5 unable to determine if they were paid correctly. (Szamet Decl. ¶41.) Plaintiff contends that this
6 was the strongest claim alleged because the paystubs are confusing on their face and difficulty to
7 verify if an employee is being paid correctly. (Szamet Decl. ¶42.). In addition, Plaintiff alleged
8 that the wage statements that do not include the complete name and address of the legal entity that
9 is the employer. (Szamet Decl. ¶43.) Specifically, Defendant failed to include the city, state and
10 zip code of the legal entity on the wage statements issued to Plaintiff and the aggrieved employees
11 in violation of Labor Code § 226(a)(8). (*Id.*)

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

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

19 Here, Plaintiff and numerous aggrieved employees are no longer employed by Defendant
20 and Plaintiff alleged that Defendant failed to pay all wages owed and due upon their termination
21 and/or resignation. (Szamet Decl. ¶44.) Plaintiff alleged that Defendant's actions were willful, as
22 they have intentionally failed or refused to perform an act which was required to be done. (See
23 *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201.) "The failure to pay is willful
24 if the employer 'knows what [it] is doing [and] intends to do what [it] is doing', and does not also
25 require proof that the employer acted with "a deliberate evil purpose to defraud work[ers] of wages
26 which the employer knows to be due.'" (*Diaz v. Grill Concepts Services, Inc.* (2018) 23
27 Cal.App.5th 859, 868.) This is a derivative claim that flows from the unpaid wages analysis above.
28 (Szamet Decl. ¶45.) If Plaintiff were not able to prevail on that claim, it is unlikely a court would

award PAGA penalties in connection with the Section 203 claim. (Szamet Decl. ¶46.) Further, Plaintiff factored in the risk of establishing that any violation was “willful” and the fact that this claim is derivative. (Szamet Decl. ¶47.)

In light of all these significant risks and given that PAGA gives the Court broad discretion to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement Amount of \$150,000.00 was fair and reasonable (Szamet Decl. ¶48., Exhibit 1, ¶3.1.)

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

As stated above, “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing that Defendant 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.

Because PAGA provides the Court with discretion when it awards these penalties “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.” (Labor Code section 2699(e)(2).)

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 Starbucks’ “good faith attempts” to comply and because the violations were minimal).

Here, as explained above, Plaintiff’s counsel anticipated that, at trial, Defendant would argue that: (1) all Aggrieved Employees were properly paid and/or reimbursed in accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate Aggrieved Employees was the result of inadvertence and clerical error; (2) until this Action was filed, no employees had complaints about any alleged failure to pay wages, reimburse expenses, issue accurate itemized wage statements; (3) none of Defendant’s employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff’s allegations. Furthermore, Defendant strongly argues that it correctly blended travel pay into the regular rate of pay when calculating overtime and that all aggrieved employees were correctly and fully paid for all hours worked. Defendant would thus argue that this should mitigate in favor of significantly reducing the civil penalty. After engaging in pertinent informal discovery in this Action and conducting their own analysis of the time and pay data provided by Defendant, Plaintiff’s counsel determined that a settlement of \$150,000.00 is reasonable given the above risks.

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

Based on these figures, the maximum potential exposure for the PAGA claims for Aggrieved Employees is \$700,000.00 (7,000 pay periods at issue multiplied by \$100 a pay period). (Szamet Decl. ¶49.) However, Plaintiff also considered the fact that Defendant is a small, family-owned pool building company that has scaled back its business recently. (Szamet Decl. ¶50.) If the Court were determine that the law allows it to “stack” civil penalties (meaning multiple

penalties per pay period), the full value could balloon up to over \$1,000,000.00,⁷ but in light of the immense discretion available and potential ability to pay issues, Plaintiff believes the Settlement is reasonable. Given that this Settlement is for \$150,000.00, and the assessment of viable risks in litigating Plaintiff's claims, Plaintiff believes this is a very fair and reasonable settlement. (Szamet Decl. ¶52.)

VI. THE REQUEST FOR ATTORNEYS' FEES AND COSTS

As detailed fully in the Agreement, the settlement provides for Defendant to create a Gross Settlement Amount of \$150,000.00. (Szamet Decl. ¶57; Ex. 1 at ¶¶1.11; 3.1.) From that fund, Plaintiff requests an award of attorneys' fees for PAGA Counsel in the amount of \$50,000.00, or 33.33% of the Gross Settlement Amount, and \$9,262.69 in reimbursement for litigation costs. (*Id.*; Ex. 1 at ¶3.2.1.)

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

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

⁷ Plaintiff's expert determined Defendant's maximum exposure of stacked penalties to be \$1,526,785. (Szamet Decl. ¶51.)

1 should not be denied our trial courts.
2 (*Id.* at 573.)

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

11 This doctrine rests on the understanding that attorneys should normally be paid by their
12 clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from
13 the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979)
14 23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent
15 this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees against
16 the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano*
17 *III*, 20 Cal.3d at p. 35.) “A court, in the exercise of its equitable discretion, may decree that those
18 receiving the benefit should contribute to the costs of its production.” (*Save El Toro Assn., supra*,
19 98 Cal.App.3d at 548.) As this approach “better approximates the workings of the marketplace
20 than the lodestar approach,” there is “a greater judicial willingness to evaluate a fee award as a
21 percentage of the recovery” in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82
22 Cal.App.4th 19, 31, 48.)

23 B. The Attorneys’ Fees Request Are Well Within the Range of Fees in Comparable
24 Cases

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

27 No general rule can be articulated on what is a reasonable percentage
28 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, PAGA 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. PAGA Counsel’s Fee Request is Reasonable Under a Lodestar Crosscheck

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.)

i. Requested Multiplier

The purpose of using the lodestar/multiplier method is to mirror the legal marketplace. 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. (Szamet

Decl. ¶66.) PAGA Counsel have an aggregate lodestar in the amount of \$34,800.00 which represents 42.6 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiff's instant Motion, and ten future hours. (*Id.*) As such, PAGA Counsel is asking for a lodestar multiplier of 1.44. (Szamet Decl. ¶67.) Typically, the lodestar is merely the starting point of the calculation of a reasonable fee, and courts often multiply the lodestar by a factor to account for the risk of non-payment, delay in payment, the quality of work, and the novelty and difficulty of the issues involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253; *Beasley v. Wells Fargo Bank*, (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of Supervisors*, (1997) 76 Cal.App.3d 24 1, 251.)

This case dealt with difficult legal and factual questions. (Szamet Decl. ¶88.) Significantly, the risk attendant to the underlying claims in this matter was great considering Defendant's defenses as discussed in detail above. (*Ibid.*) Were this case to proceed, Defendant would have a strong incentive to litigate tenaciously. (*Ibid.*) There are genuine issues in dispute. (*Ibid.*)

As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades of experience who diligently prepared and litigated this matter. (Szamet Decl. ¶¶53-56; ¶89.) To achieve the ultimate result in this case, my firm had to incur substantial risk and expense, and were precluded from taking other fee generating employment for 42.6 hours of attorney time. (Szamet Decl. ¶90.) This matter had been handled purely on a contingency fee basis and my firm has advanced many thousands of dollars in costs while deferring all payment of fees, with no guarantee that any of the fees incurred or costs advanced would ever be recovered, and diverting significant firm resources to prosecution of this matter. (Szamet Decl. ¶91.) PAGA Counsel believe this is an exceptional result that has been well received by the Aggrieved Employees. (Szamet Decl. ¶92.)

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

In addition to their request for fees, PAGA 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 \$10,000.00. (Szamet Decl. ¶93.) To date, Kingsley and Kingsley has incurred \$8,662.69 in costs. (Szamet Decl. ¶94.) PAGA Counsel anticipates incurring an

1 additional \$600 in costs to file and serve this motion. (Szamet Decl. ¶95.) As such, counsel is
2 requesting a cost reimbursement of \$9,262.69. (Szamet Decl. ¶96.)

3 All of the requested costs are reasonable in amount and were necessarily incurred by PAGA
4 Counsel in prosecuting this litigation. (Szamet Decl. ¶97; Exhibit 5 [Cost Report].) Expenses in
5 this matter to date include costs for filing fees, research, mediation, and additional costs for the
6 prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Kelsey
7 M. Szamet. All of these costs have been incurred in the course of this litigation, and all costs
8 advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of
9 filing the present motion. (Szamet Decl. ¶98.)

10 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
11 advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court
12 should approve the request for reimbursement in the amount of \$9,262.69. (Szamet Decl. ¶99.)

13 **VIII. ENHANCEMENT TO PLAINTIFF**

14 The Agreement calls for an enhancement payment of \$5,000.00 to the named Plaintiff, to
15 be paid from the Gross Settlement Amount. (Szamet Decl. ¶100; Ex. 1 at ¶3.2.2.) Incentive awards
16 “are intended to compensate class representatives for work done on behalf of the class, to make up
17 for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize
18 their willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.* (9th
19 Cir. 2009) 563 F.3d 948, 958-59. “[I]t is established that named plaintiffs are eligible for
20 reasonable incentive payments to compensate them for the expense or risk they have incurred in
21 conferring a benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los*
22 *Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC*
23 (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

24 The claims of the Plaintiff, Jesse Robles, are typical of the aggrieved employees’ claims.
25 (Szamet Decl. ¶ 101.) Jesse Robles is an adequate Plaintiff because he has diligently, adequately
26 and fairly represented the Class and has not placed his interests above any of the aggrieved
27 employees. (Szamet Decl. ¶ 102; Robles Decl. ¶¶ 3-7.)

28 The Plaintiff requests an enhancement for his valiant effort and time expended in this

1 matter. The time spent by Jesse Robles include identifying competent counsel, providing
2 information to PAGA Counsel regarding relevant employment experiences, compiling documents,
3 conducting several telephone conferences with attorneys to discuss the status of the case and the
4 theories of liability, making himself available by telephone for a full day of mediation, and
5 reviewing settlement documents. (Szamet Decl. ¶ 103; Robles Decl. ¶¶ 5-8.) Thus, in addition to
6 the sums paid to aggrieved employees, Defendant has agreed not to oppose a request by PAGA
7 Counsel for an enhancement payment to the Plaintiff of \$5,000.00, to be paid from the Gross
8 Settlement Amount.

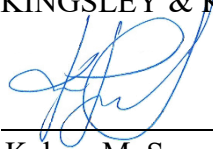
9 PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶
10 104.) The enhancement takes into consideration the time, effort, and expenses incurred by Jesse
11 Robles in coming forward to litigate this matter on behalf of all aggrieved employees. (Szamet
12 Decl. ¶ 105.) Additionally, the Plaintiff were at risk for paying Defendant's legal fees and costs in
13 the event that Defendant prevailed at trial. (Szamet Decl. ¶ 106.) Accordingly, Plaintiff should be
14 awarded the agreed-upon enhancement of \$5,000.00.

15 **IX. CONCLUSION**

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

20
21 DATED: March 1, 2024

KINGSLEY & KINGSLEY, APC

22
23 By: 

24 Kelsey M. Szamet
25 Attorneys for Plaintiff JESSE ROBLES and All
26 Aggrieved Employees
27
28

(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 March 1, 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:

CDF LABOR LAW LLP

Cory J. Cabral
ccabral@cdflaborlaw.com
Elizabeth Scott
escott@cdflaborlaw.com
Gisele Mitsuk
gmitsuk@cdflaborlaw.com
900 University Avenue, Suite 200
Sacramento, CA 95825

[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 March 1, 2024, at Woodland Hills, California.



Michelle Tanzer