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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

(UNLIMITED JURISDICTION)

JOSE ANGEL LOPEZ,

Plaintiff,

vs.

MORENO & ASSOCIATES, INC.;

J ERNESTO MORENO; and

DOES 1 to 25, inclusive,

Defendants.

Case no.: 23CV422622

**NOTICE OF PLAINTIFF'S MOTION AND
MOTION FOR APPROVAL OF PAGA
SETTLEMENT**

Action filed: September 11, 2023
Hearing Date: July 17, 2024
Hearing Time: 1:30 p.m.
Hearing Dept: 19, Hon. Theodore C.
Zayner

Submitted Herewith Under Separate Cover:

1. Memorandum of Point and Authorities;
2. Declaration of Harout Messrelian;
3. Declaration of Maralle Messrelian;
4. Declaration of Jose Angel Lopez;
5. Declaration of Michael Bui; and
6. [Proposed] Order and Judgment Approving PAGA Settlement.

1 TO ALL PARTIES, THE CALIFORNIA LABOR AND WORKFORCE DEVELOPMENT
2 AGENCY, AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on July 17, 2024 at 1:30 p.m., or as soon thereafter as the
4 matter may be heard, in Department 19 of the Santa Clara County Superior Court, located at 191
5 N. First St., San Jose, CA 95113, Plaintiff Jose Angel Lopez ("Plaintiff" or "Lopez") will and
6 hereby does move this Court for an order approving the Private Attorneys General Act (Labor
7 Code § 2698 *et seq.*) Settlement Agreement (the "Agreement" or "PAGA Settlement") and
8 entering the [Proposed] Order and Judgment Approving PAGA Settlement.

9 The PAGA Settlement is on behalf of Lopez and all persons within the State of California
10 who are or were employed by Defendants Moreno & Associates, Inc, and J Ernesto Moreno
11 ("Defendants" or "Moreno") from December 15, 2021 through Court approval of the Settlement
12 Agreement (the "PAGA Employees"). Plaintiff alleges that Defendants are liable to him and other
13 PAGA Employees for (1) failure to compensate for all hours worked, including minimum and
14 overtime wages; (2) failure to provide accurate, itemized wage statements; (3) failure to pay all
15 wages owed during and at the end of employment; (4) failure to maintain accurate records; (5)
16 failure to give rest breaks and meal breaks; and (6) failure to reimburse for business expenses.

17 The Motion is based on this Notice of Motion and Motion, the attached Memorandum of
18 Points and Authorities, the declarations of Harout Messrelian, Maralle Messrelian, Jose Angel
19 Lopez, and Michael Bui, the PAGA Settlement, all papers and pleadings on file with the Court in
20 this action, all matters judicially noticeable, and on such oral and documentary evidence as may
21 be presented in connection with the hearing on the Motion.

22 Respectfully submitted,

23 MESSRELIAN LAW INC.

24 Dated: June 24, 2024

25 By: Maralle Messrelian
26 Harout Messrelian
27 Maralle Messrelian (Of Counsel)
28 Attorneys for Plaintiff, Jose Angel Lopez

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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **FOR THE COUNTY OF SANTA CLARA**

13 **(UNLIMITED JURISDICTION)**

14 JOSE ANGEL LOPEZ,

15 *Plaintiff,*

16 vs.

17 MORENO & ASSOCIATES, INC.;

18 J ERNESTO MORENO; and

19 DOES 1 to 25, inclusive,

20 *Defendants.*

Case No.: 23CV422622

21 **MEMORANDUM OF POINTS AND**

22 **AUTHORITIES IN SUPPORT OF**

23 **PLAINTIFF'S MOTION FOR APPROVAL**

24 **OF PAGA SETTLEMENT**

25 Action filed: September 11, 2023

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28 Hearing Dept: 19, Hon. Theodore C. Zayner

TABLE OF CONTENTS

1		
2	TABLE OF AUTHORITIES	iv
3	I. INTRODUCTION	1
4	II. FACTUAL AND PROCEDURAL BACKGROUND	1
5	A. Plaintiff’s Written Notice to the State of California.....	1
6	B. Plaintiff’s Lawsuit... ..	2
7	C. Mediation With Hon. Brian Walsh(Ret.)	2
8	III. OVERVIEW OF SETTLEMENT	2
9	A. “PAGA Employee” Definition	2
10	B. Monetary Terms Of The Settlement.....	3
11	C. Funding and Distribution of the Settlement	3
12	D. Individual PAGA Payments and Uncashed Checks	4
13	E. Release of Claims For PAGA Employees Limited To Those That Could Reasonably 14 Arise From the Facts Alleged In The 15 Action.....	4
16	IV. ARGUMENT	5
17	A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT.....	5
18	B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF PAGA	6
19	C. THIS COURT SHOULD APPROVE THE PAGA SETTLEMENT BECAUSE IT IS 20 FAIR, REASONABLE AND ADEQUATE	6
21	1. The PAGA Settlement Is A Result of Extensive, Non-Collusive Arm’s Length 22 Negotiations Between The Parties.....	7
23	2. The Parties Conducted Sufficient Investigation And Discovery To Allow Counsel 24 And The Court To Act Intelligently	8
25	3. The Settlement Is Fair and Reasonable Based on the Risks and Costs of Further 26 Litigation	9
27	4. Each PAGA Employee Will Be Paid Based on the Potential Extent of His or Her 28 Injury Compared to Other PAGA Employees.....	13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. Counsel For Parties Are Experienced in Similar Litigation	13
6. The Proposed Attorneys’ Fees and Costs Are Fair, Adequate, and Reasonable and Should Be Approved.	14
7. The Proposed Settlement Administration Costs Are Fair and Reasonable and Should Be Approved.....	15
V. CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Austin v. Foodliner, Inc.</i> (N.D.Cal. May 10, 2019) 2019 U.S. Dist. LEXIS 79638	14
<i>Brinker Restaurant Corp. v. Superior Court</i> (2012) 53 Cal.4th 1004	10
<i>Carrington v. Starbucks</i> (2018) 30 Cal.App.5th 504	11-12
<i>Chavez v. Netflix, Inc.</i> (2008) 162 Cal.App.4th 43	15
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794	7
<i>Farm Raised Salmon Cases</i> (2008) 42 Cal.4th 1077	15
<i>Gutilla v. Aerotek, Inc.</i> (E.D.Cal. Mar. 21, 2017) 2017 U.S. Dist. LEXIS 41655	6, 7
<i>Hanlon v. Chrysler Corp.</i> (9th Cir. 1998) 150 F.3d 1011	6
<i>In re Executive Life Ins. Co.</i> (1995) 32 Cal.App.4th 344	6
<i>In re Synacor ERISA Litigation,</i> (9th Cir. 2008) 516 F.3d 1095.....	6
<i>Juarez v. Villafan</i> (E.D.Cal. Aug. 24, 2017) 2017 U.S. Dist. LEXIS 137205	6,7
<i>Laffitte v. Robert Half Internat. Inc.</i> (2016) 1 Cal.5th 480	14,15
<i>Lealao v. Beneficial California, Inc.</i> (2000) 82 Cal.App.4th 19	14
<i>Lopez v. Mgmt. & Training Corp.</i> (S.D.Cal. Apr. 20, 2020) 2020 U.S. Dist. LEXIS 70029	14

1	<i>Moorer v. Noble L.A. Events, Inc.</i>	
2	(2019) 32 Cal.App.5th 736	7
3	<i>Neary v. Regents of University of California</i>	
4	(1992) 3 Cal.4th 273	6
5	<i>Officers for Justice v. Civil Service Com.</i>	
6	(9th Cir. 1982) 688 F.2d 615	6
7	<i>Principe v. Ukropina (In re Pacific Enter. Sec. Litig.)</i>	
8	(9th Cir. 1995) 47 F.3d 373	15
9	<i>Ramirez v. Benito Valley Farms, LLC</i>	
10	(N.D.Cal. Aug. 25, 2017) 2017 U.S. Dist. LEXIS 137272	6
11	<i>Rincon v. West Coast Tomato Growers, LLC</i>	
12	(S.D.Cal. Feb. 12, 2018) 2018 U.S. Dist. LEXIS 22886	6, 7
13	<i>Salazar v. Sysco Cent. Cal., Inc.</i>	
14	(E.D.Cal. Feb. 2, 2017) 2017 U.S. Dist. LEXIS 14971	5
15	<i>Serrano v. Priest</i>	
16	(1977) 20 Cal.3d 25	14
17	<i>Smith v. H.F.D. No. 55, Inc.</i>	
18	(E.D.Cal. Apr. 19, 2018) 2018 U.S. Dist. LEXIS 67192	6, 7
19	<i>Thurman v. Bayshore Transit Management, Inc.</i>	
20	(2012) 203 Cal.App.4th 1112	11
21	<i>Washington v. Joe's Crab Shack</i>	
22	(N.D.Cal. 2010) 271 F.R.D. 629	10
23	<i>Wershba v. Apple Computer, Inc.</i>	
24	(2001) 91 Cal.App.4th 224	14
25	<i>Western Heritage Ins. Co. v. Frances Todd, Inc.</i>	
26	(2019) 33 Cal.App.5th 976	15
27	<i>Williams v. MGM-Pathe Communs. Co.</i>	
28	(9th Cir. 1997) 129 F.3d 1026	15
	Statutes	
	Lab. Code, section 201	5

1	Lab. Code, section 202	5
2	Lab. Code, section 203	5
3	Lab. Code, section 204	5
4	Lab. Code, section 210	5
5	Lab. Code, section 226	5
6	Lab. Code, section 226.3	5
7	Lab. Code, section 226.7	5
8	Lab. Code, section 233	5
9	Lab. Code, section 246	5
10	Lab. Code, section 510	5
11	Lab. Code, section 512	5
12	Lab. Code, section 558	5
13	Lab. Code, section 1174	5
14	Lab. Code, section 1194	5
15	Lab. Code, section 1197	5
16	Lab. Code, section 1197.1	5
17	Lab. Code, section 1198	5
18	Lab. Code, section 2698 et seq.	5
19	Lab. Code, section 2699	<i>passim</i>
20	Lab. Code, section 2699.3	1
21	Lab. Code, section 2802	5
22		
23		
24		
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Jose Angel Lopez (“Plaintiff” or “Lopez”) submits this memorandum of points
4 and authorities in support of his motion for approval of the PAGA (Private Attorneys General
5 Act, Labor Code § 2698 *et seq.*) Settlement Agreement (the “Agreement” or “PAGA
6 Settlement”)¹ for the civil penalties claim he brought against Defendants Moreno & Associates,
7 Inc. and J Ernesto Moreno (“Defendants” or “Moreno”) under the Labor Code Private Attorneys
8 General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). Plaintiff brings this motion because
9 Labor Code section 2699(l) of the PAGA requires Court-approval of any civil penalties sought as
10 part of a proposed settlement agreement. Through this motion, Plaintiff respectfully requests for
11 this Court to approve the PAGA Settlement.

12 **II. FACTUAL AND PROCEDURAL BACKGROUND**

13 Moreno & Associates, Inc. is a family-owned full-service building maintenance company
14 that has served clients throughout the San Francisco Bay Area since 1993. The company provides
15 janitorial services, cleanroom maintenance, painting, floor cleaning, and window washing, among
16 other services, to its clients. Plaintiff started working for Defendants on or around April 30, 2016.
17 Plaintiff’s employment ended in or around November 2022. During his employment tenure,
18 Plaintiff was classified as an hourly, non-exempt employee and his latest rate of pay was \$23.00
19 per hour. Plaintiff was part of the night utility crew and his job duties included cleaning wooden
20 floors by removing old wax and putting new wax and also washing carpets. HM, ¶ 5.

21 **A. Plaintiff’s Written Notice to the State of California**

22 Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under the
23 Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* (“PAGA”). On
24 December 15, 2022, Plaintiff, on behalf of himself and Defendants’ other California non-exempt
25 hourly employees (hereafter collectively the “PAGA Employees”) gave written notice by
26 electronic service to the California Labor and Workforce Development Agency (“LWDA”) and
27

28 ¹ The PAGA Settlement is attached as Exhibit (“Ex.”) 1 to the Declaration of Harout Messrelian
 (“HM”), which is submitted herewith under a separate cover.

1 via certified mail to Defendants of the specific provisions of the California Labor Code alleged
2 to have been violated, including the facts and theories to support the alleged violations. HM, ¶ 6,
3 Ex. 3.

4 **B. Plaintiff's Lawsuit**

5 On September 11, 2023, Plaintiff filed a lawsuit in Santa Clara County Superior Court
6 (the "Lawsuit") against Defendants. Plaintiff asserted the following causes of action against
7 Defendants: (1) failure to compensate for all hours worked, (2) failure to pay minimum wages,
8 (3) failure to pay overtime, (4) failure to provide accurate itemized wage statements, (5) failure
9 to pay wages when employment ends, (6) failure to pay wages owed every pay period, (7) failure
10 to give rest breaks, (8) failure to give meal breaks, (9) penalties pursuant to the Private Attorneys
11 General Act ("PAGA"), (10) failure to reimburse business expenses, (11) discrimination on the
12 basis of physical disability, (12) failure to accommodate physical disability, (13) failure to engage
13 in the interactive process, (14) retaliation in violation of the FEHA, (15) failure to prevent
14 discrimination and retaliation, (16) wrongful termination in violation of public policy, and (17)
15 violation of Business & Professions Code section 17200. By Order dated September 26, 2023,
16 the Court stayed discovery and Defendants' responsive pleading deadline. HM, ¶ 7, Ex. 4.

17 **C. Mediation With Hon. Brian Walsh (Ret.)**

18 The parties met and conferred and agreed that it may be in their mutual interests to discuss
19 Plaintiff's allegations informally, rather than through litigation, and scheduled private mediation.
20 HM, ¶ 8. On February 27, 2024, the parties attended a full day mediation session with Hon. Brian
21 Walsh (Ret.). At the mediation, the parties agreed to settle Plaintiff's PAGA Claim for violation
22 of Labor Code § 2698, et seq. Before agreeing to the terms of the Settlement, the Parties engaged
23 in informal discovery regarding Defendants' policies, practices, operations, time and payroll
24 information and other topics. In advance of mediation, Defendants produced Plaintiff's personnel
25 file, including time and payroll data through data sampling. Moreover, prior to the mediation,
26 Defense counsel provided Plaintiff's counsel with information and documents relating to other
27 PAGA Employees, including time and payroll data. Through extensive arm's length negotiations
28 at the mediation and only after discovery and investigation were performed, the parties agreed to

1 settlement terms. Now that the parties have finalized the PAGA Settlement, Plaintiff submits it
2 to this Court for approval. HM, ¶ 9.

3 Defendants deny any liability or wrongdoing of any kind whatsoever associated with the
4 lawsuit. It is the desire of the parties to fully, finally, and forever compromise, and discharge all
5 claims known or unknown related to those alleged in Plaintiff's lawsuit. HM, ¶ 10.

6 **III. OVERVIEW OF SETTLEMENT**

7 **A. "PAGA Employees" Definition**

8 The PAGA Employees are all persons within the State of California who are or were
9 employed by Defendants Moreno & Associates, Inc. and J Ernesto Moreno during the PAGA
10 Settlement Period. Agreement, ¶ 2. The PAGA Settlement Period means the period of time from
11 December 15, 2021 through Court approval of the Settlement Agreement. Agreement, ¶ 14.

12 **B. Monetary Terms Of The Settlement**

13 Defendants have agreed to pay a total of \$380,000.00 ("Gross Settlement Amount" or
14 "GSA") to settle the PAGA lawsuit. In consideration for the release of all claims of Plaintiff and
15 the PAGA Employees against Defendants (described more fully below), Defendants agreed to
16 pay \$380,000.00 toward the GSA from which all settlement payments for the PAGA Employees,
17 Court approved attorneys' fees and costs, and Settlement Administration Costs shall be paid. Each
18 PAGA Employee will receive a portion of the civil penalties on a pro-rata basis calculated based
19 on the total number of pay periods each PAGA Employee worked as a non-exempt hourly
20 employee in California during the Settlement Period. Agreement, ¶¶ 15, 17. The GSA will be
21 divided as follows:

- 22 1. PAGA Counsel's Fees amounting to \$133,000 (35% of the GSA), and
23 PAGA Counsel's Litigation costs in the amount of \$10,132.04 (the
24 Agreement provides up to \$10,500);
- 25 2. "Settlement Administration Costs" of \$5,000.00 to Simpluris, Inc.
26 ("Simpluris" or "Settlement Administrator") to administer the Settlement;
- 27 3. Approximately \$231,867.96 ("PAGA Penalties Fund"), divided as
28 follows:
 - a. \$ 173,900.97 to the LWDA (75%); and
 - b. \$ 57,966.99 to the PAGA Employees (25%)

1 Agreement, ¶¶ 15, 17-19.

2 **C. Funding and Distribution of the Settlement**

3 Within twenty-one (21) calendar days after the Effective Date², Defendants shall deposit
4 the Gross Settlement Amount with the Settlement Administrator. Agreement, ¶ 22.

5 Within twenty-one (21) calendar days of the Effective Date, Defendants shall provide the
6 Settlement Administrator with the PAGA Employee List, which states each PAGA Employee's
7 full name, last known mailing address, social security number, and number of PAGA pay periods.
8 Agreement, ¶ 21.

9 Within 14 calendar days after Defendants fund the Gross Settlement Amount, the
10 Settlement Administrator will mail checks to each PAGA Employee for his or her share of the
11 PAGA Penalties Fund, the LWDA payment, PAGA Counsel's attorneys' fees and costs, and the
12 Settlement Administration costs. Agreement, ¶ 22.

13 The Settlement Administrator will issue each PAGA Employee a check for his or her
14 share of the PAGA Penalties Fund along with the Notice of PAGA Settlement (Exhibit 2 to HM
15 Declaration) by First-Class United States mail, postage prepaid, with directions to the Postmaster
16 to forward the Notice of PAGA Settlement and return all undeliverable Notices to the Settlement
17 Administrator. The Settlement Administrator will promptly skip trace return mail and perform a
18 single re-mailing. Agreement, ¶ 23.

19 **D. Individual PAGA Payments and Uncashed Checks**

20 The settlement checks issued to PAGA Employees will remain valid for one hundred
21 eighty (180) days. Any settlement checks remaining uncashed for more than one hundred eighty
22 (180) days after issuance will be distributed to the California State Controller's Office Unclaimed
23 Property Fund with an identification of the amount of unclaimed funds attributable to each PAGA
24 Employee. All settlement payments to PAGA Employees will be treated as miscellaneous income
25 for which an IRS Form 1099 will be issued by the Settlement Administrator if required by law.
26 Agreement, ¶ 23.

27
28 _____
² "Effective Date" means the date of entry of the order of the court approving the Settlement.

1 **E. Release of Claims For PAGA Employees Limited To Those That Could**
2 **Reasonably Arise From the Facts Alleged In The Action.**

3 Upon the Effective Date of this Settlement, Plaintiff, the State of California (including,
4 but not limited to, the LWDA), and the PAGA Employees will be deemed to have fully, finally,
5 and forever released, settled, compromised, relinquished, and discharged the Settled PAGA
6 Claims with respect to Defendant Moreno & Associates, Inc., each of its officers, directors,
7 members, partners, owners, shareholders, employees (excluding PAGA Employees), former
8 employees, agents, servants, attorneys, assigns, affiliates, independent contractors, volunteers,
9 predecessors, successors, parent companies and organizations, and J. Ernesto Moreno (the
10 “Released Parties”). The Settled PAGA Claims means:

11 all claims, charges, complaints, liens, demands, causes of action, obligations, and
12 liabilities, whether known or unknown, against the Released Parties for civil penalties
13 predicated on any of the alleged violations of the California Labor Code, Industrial
14 Welfare Commission Wage Orders, regulations, and/or other provisions of law that were
15 alleged or asserted in the Action or any PAGA notice(s) filed by the Plaintiff, or that
16 could have been asserted in the Action or any PAGA notice(s) filed by the Plaintiffs based
17 on any facts or allegations therein, with respect to PAGA Employees during the PAGA
18 Settlement Period, including California Labor Code Sections 201, 202, 203, 204 and/or
19 204b, 210, 226, 226.3, 226.7, 233, 246, 510, 512, 558, 558.1, 1174, 1174.5, 1194, 1197,
20 1198, 2802, and 3700.5.

21 Agreement, ¶¶ 10, 13.

22 **IV. ARGUMENT**

23 **A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT**

24 The Settlement of a PAGA claim requires court approval. Lab. Code §2699(l)(2). The
25 Court necessarily has broad discretion in making the decision to approve or reject a settlement
26 for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain
27 circumstances, penalties should be assessed and, if so assessed, the appropriate amount of
28 penalties based on the facts and circumstances of the particular case. *See id.* at § 2699(e)(1)-(2).
Although the PAGA does not set forth the particular standards against which a PAGA settlement
should be evaluated, the LWDA has provided guidance for approval that mirrors the standards
for evaluating class action settlements. HM, ¶ 12; *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*,
2017 U.S. Dist. LEXIS 14971, *6, n.4-5 (E.D. Cal. 2017) (stating, based on the LWDA’s

1 guidance, that approval of PAGA settlements may be had where the statutory requirements of
2 the PAGA are met and the terms of the settlement are fundamentally fair, reasonable, and
3 adequate). The established standards for evaluating whether class action settlements are fair,
4 reasonable, and adequate provide a familiar, useful framework for the Court to evaluate PAGA
5 settlements and have been adopted by several courts. *Id.*, See *Juarez v. Villafan*, 2017 U.S. Dist.
6 LEXIS 137205, *5 n.4 (E.D. Cal. 2017) (citing *Officers for Justice v. Civil Serv. Comm'n of City*
7 *& Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms,*
8 *LLC*, 2017 U.S. Dist. LEXIS 137272, *8-9 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*,
9 150 F.3d 1011, 1026 (9th Cir. 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7,
10 n.4 (E.D. Cal. 2017); *Smith v. H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal.
11 2018); *Rincon v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal.
12 2018).

13 In making the determination whether a settlement taken as a whole is fair, reasonable,
14 and adequate, the Court should be careful to still give “proper deference to the private consensual
15 decision of the parties,” since “the court’s intrusion upon what is otherwise a private consensual
16 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
17 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
18 collusion between, the negotiating parties” *Hanlon*, 150 F.3d at, 1027. The law favors
19 settlement of lawsuits, particularly complex litigation cases where substantial resources can be
20 conserved by avoiding the time, expense, and rigors of formal litigation. See *Neary v. Regents*
21 *of Univ. of Cal.*, 3 Cal. 4th 273, 277-81 (1992); *In re Synacor ERISA Litigation*, 516 F.3d 1095,
22 1101 (9th Cir. 2008); *In re Exec. Life Ins. Co.*, 32 Cal.App.4th 344, 382 (1995).

23 **B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF**
24 **PAGA**

25 PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here.
26 First, any civil penalties recovered, whether by judgment or settlement, must be distributed as
27 follows: 75 percent to the LWDA, and the remaining 25 percent to the PAGA Employees. See
28 *Moorer v. Noble L.A. Events, Inc.* (2019) 32 Cal.App.5th 736, 742; Cal. Lab. Code, § 2699(i).

1 The parties' Settlement so provides. HM, ¶ 13, Ex. 1. Second, the LWDA must be given notice
2 of the settlement so that it may be heard before the Court decides whether to grant approval. Cal.
3 Lab. Code § 2699(l)(2). Here, notice is being given to the LWDA concurrently with the filing of
4 this motion. HM, ¶¶ 13, 40, Ex. 11. As a result, Plaintiff has met all procedural statutory
5 requirements for settling a PAGA action.

6 **C. THIS COURT SHOULD APPROVE THE PAGA SETTLEMENT BECAUSE**
7 **IT IS FAIR, REASONABLE AND ADEQUATE**

8 To make its determination that the PAGA settlement is fair, reasonable, and adequate, the
9 Court may consider several factors, including:

10 the strength of the Plaintiff's case, the risk, expense, complexity and
11 likely duration of further litigation, the risk of maintaining class
12 action status through trial, the amount offered in settlement, the
extent of discovery completed and the stage of the proceedings, and
the experience and views of counsel.

13 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *Juarez*, 2017 U.S. Dist. LEXIS
14 137205, *5 n.4; *Ramirez*, 2017 U.S. Dist. LEXIS 137272, *8-9; *Gutilla*, 2017 U.S. Dist. LEXIS
15 41655, *7, n.4; *Smith*, 2018 U.S. Dist. LEXIS 67192, *6; *Rincon*, 2018 U.S. Dist. LEXIS 22886,
16 *6. However, this Court should begin its analysis with a presumption that the proposed
17 settlement is fair. "A presumption of fairness exists where: (1) the settlement is reached through
18 arm's length bargaining; (2) investigation and discovery are sufficient to allow counsel and the
19 court to act intelligently; (3) counsel is experienced in similar litigation" *Dunk*, 48 Cal.
20 App. 4th at 1802.

21 The PAGA Settlement warrants a presumption of fairness for several reasons: (1) The
22 parties reached the Settlement through arm's-length bargaining with the aid of a respected
23 mediator; (2) The parties conducted sufficient investigation and discovery to allow Counsel and
24 the Court to act intelligently. Plaintiff requested and Defendants provided the number PAGA
25 Employees, the total number of pay periods during the PAGA Period, all policies in effect during
26 the PAGA Period, and a sampling of time records; and (3) Counsel for the Parties are experienced
27 with PAGA cases. HM, ¶ 14. Moreover, neither Plaintiff nor Plaintiff's Counsel have any
28 conflicts of interest with the absent PAGA Employees and there are no issues of ascertainability.

1 HM, ¶ 14. For the reasons discussed below, this Court should approve the PAGA Settlement.

2 **1. The PAGA Settlement Is A Result of Extensive, Non-Collusive Arm's Length**
3 **Negotiations Between The Parties.**

4 The PAGA Settlement was reached only after litigation and arms' length negotiations
5 between experienced attorneys, which included a full day mediation with Hon. Brian Walsh
6 (Ret.). At all times, the negotiations were adversarial and contentious, although still professional
7 in nature. HM, ¶ 9.

8 Counsel for the Parties have further investigated the applicable law as applied to the facts
9 discovered regarding Plaintiff's claims, the defenses thereto, and the Labor Code violations
10 claimed by Plaintiff. Plaintiff's counsel is experienced in prosecuting PAGA lawsuits. Counsel
11 for the Defendants are experienced in defending PAGA cases. Based on the parties' own
12 independent investigations and evaluations, the parties and their respective counsel are of the
13 opinion that the Settlement for the consideration and on the terms set forth in the Agreement are
14 fair, reasonable and adequate and are in the best interests of Plaintiff, the PAGA Employees, the
15 State, and Defendants in light of all known facts and circumstances and the risks inherent in
16 litigation, especially in this post pandemic era, where businesses are struggling to remain afloat,
17 much less prosper and make a large profit. HM, ¶ 11.

18 **2. The Extent of Investigation and Discovery Completed Provided Ample**
19 **Information to Enter into an Informed and Reasonable Settlement**

20 Plaintiff considered various sources of information in the lead-up to and during the
21 mediation of February 27, 2024 that enabled him to achieve the PAGA Settlement at issue. HM,
22 ¶ 15. Among other things, Plaintiff considered the following:

- 23 • Defendants produced and Plaintiff's counsel reviewed Plaintiff's personnel file.
- 24 • Plaintiff's counsel requested that Defendants provide any and all policies regarding
25 overtime and double-time wages, off the clock work, expense reimbursement, meal
26 periods, rest breaks, meal period waivers and agreements, compensation plans, and
27 complaints about working conditions in effect during the relevant time period beginning
28 in December of 2021. Defendants produced those policies as part of their employee
handbook.
- Plaintiff's counsel requested that Defendants provide the total number of employees,
paychecks, and the pay cycles during the relevant period. Defendants provided the

answers to each of these questions.

- Plaintiff's counsel requested a 20% sample of time and payroll records for the relevant time period. Defendants provided a sampling of time and pay records for 58 of its employees. This represents 20% of the total employees IDs provided to Plaintiff based on data available at the time.
- Plaintiff's counsel then retained a professional data analyst, James Toney, to examine the records and determine the meal period violation rates, if there was any pay discrepancy in timesheet hours versus paid hours, and if there was any rounding/time shaving issues. Plaintiff is prepared to provide the Court with the data analysis for *in camera* inspection upon its request.
- Plaintiff's counsel analyzed the state of caselaw on PAGA claims, meal and rest break violations, claims for "off the clock" work and business expense reimbursement, especially as it relates to "manageability" arguments brought up by the defense.

HM, ¶ 15.

3. The Settlement Is Fair and Reasonable Based on the Risks and Costs of Further Litigation

Defendants estimated for purposes of mediation that as of February 27, 2024, there were approximately 309 PAGA Employees and 11,100 pay periods for all PAGA Employees during the relevant period. Based on this information, Plaintiff's counsel prepared an estimate of the maximum possible civil penalties under the PAGA. HM, ¶ 16. The maximum possible civil penalties under the PAGA is the total number of pay periods with one or more violations multiplied by the maximum possible civil penalty amount per pay period.

Under the civil penalty formulas applicable under PAGA, Plaintiff's counsel estimated a maximum possible exposure of approximately \$635,700 for civil penalties for Plaintiff's strongest disputed claims of failure to provide meal and rest periods. Plaintiff's analysis, which Defendants vehemently dispute, revealed a 52.3% violation rate for either late, short, or interrupted meal periods for shifts over 5 hours. Since the total number of pay periods in the PAGA period was 11,100 and since approximately 73% of the shifts in the sample analysis were over 5 hours, the total number of pay periods to consider for potential meal break violations was 8,103 (73% x 11,100 pay periods). As such, with the 52.3% violation rate, the maximum exposure would be \$211,900, which is calculated as \$50 penalty multiplied by 4238 pay periods

(52.3% of the 8,103 pay periods). Plaintiff extrapolated the same 52.3% rate for rest break violations, which would equate to a maximum exposure of \$423,800 (\$100 penalty per pay period multiplied by 4238 pay periods, which is 52.3% x 8,103 pay periods). As such, the aggregate maximum exposure for meal break and rest break claims would be \$635,700. Assuming that Plaintiff's calculations and analysis are accurate, the maximum exposure presumes that the Court will not reduce the penalty award as unjust, arbitrary, oppressive, or confiscatory. For the rest period violations, it also presumes that the meal and rest period violation rates were identical. HM, ¶ 17.

There are risks to Plaintiff's meal and rest period claims. HM, ¶ 18. Defendants contend that, to establish a violation for missed meal periods, a plaintiff must do more than show that a meal break was not taken. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. So long as an employer provides employees with a "reasonable opportunity" to take a duty-free meal period, it has no further duty to "police meal breaks and ensure no work thereafter is performed." *Id.* at 1040-41. Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the employee from taking a proper break, or otherwise failed to release the employee of all control. *Id.* "Thus, the crucial issue with regard to the meal break claim is the reason that a particular employee may have failed to take a meal break." *Washington v. Joe's Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. Determining by a review of Defendants' time records the exact reasons why a meal period appears to be short or late would be difficult and pinpointing those days in which Plaintiff and the PAGA Employees worked during their meal periods will be a challenge. Additionally, Defendants provided evidence that they provide employees with the opportunity to take meal and rest breaks. Moreno's Handbook contains legally compliant meal period and rest break policies and the employees who worked most often with the Plaintiff confirmed to a third-party investigator that they were able to take complaint meal periods at their discretion, and did so routinely. HM, ¶ 18.

Defendants contend they provided their non-exempt employees with the opportunity to take rest periods in accordance with California law, and, accordingly, Plaintiff's rest break claim has no support. Additionally, there are other risks to Plaintiff's rest period claim. Employers are

1 not required to record rest periods and such periods are paid. Unlike meal periods, where there
2 are often records showing whether an employee clocked out or not, there is no such evidence to
3 prove a missed rest period or that the employer refused to authorize and permit one. HM, ¶ 19.

4 There are risks to Plaintiff's claim for unreimbursed expenses. Plaintiff alleges that
5 Defendants did not reimburse him or the other PAGA Employees for mobile phones, mileage,
6 and uniform expenses. Defendants provided evidence at mediation that Plaintiff drove in a
7 company vehicle with other employees to their job locations, Plaintiff and the other employees
8 were issued company phones, and Moreno provided its employees with uniforms without charge.
9 Moreover, there is a risk that the Court may consider Plaintiff's claims as to Defendants' alleged
10 failure to indemnify for business expenses to be individual in nature. As such, Plaintiff's Counsel
11 had to significantly discount the value of this claim during settlement negotiations. HM, ¶ 20.

12 Moreover, Plaintiff's counsel is unaware of any California State court decision awarding
13 a plaintiff and the other PAGA Employees she represents multiple civil penalties for the same
14 pay period under different Labor Code provisions. As such, one of the risks Plaintiff faces is that
15 the Court would refuse to "stack" civil penalties arising under the various Labor Code statutes.
16 Plaintiff's counsel had to substantially discount the value of these claims in the settlement
17 negotiations for this and a variety of other reasons. At best, Plaintiff could hope to recover one
18 penalty for each pay period (regardless of the different Labor Code violations that potentially
19 occurred for the same employee, during the same pay periods). HM, ¶ 21.

20 Additionally, PAGA states a court has discretion to award a lesser amount than the
21 maximum penalty. See Lab. Code § 2699(e)(2) ("...a court may award a lesser amount than the
22 maximum civil penalty amount specified by this part if, based on the facts and circumstances of
23 the particular case, to do otherwise would result in an award that is unjust, arbitrary and
24 oppressive, or confiscatory."); see also *Thurman v. Bayshore Transit Management, Inc.* (2012)
25 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the Court
26 could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's evidence
27 of willful and intentional conduct. HM, ¶ 22. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504
28 ("*Carrington*") illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily

1 discounted award of only \$5 per violation because it was within the Court's discretion to
2 significantly reduce PAGA penalties even when there is a finding that a violation of the
3 California Labor Code occurred. The plaintiff in *Carrington* had requested penalties in excess of
4 \$70 million and was successful in proving the PAGA claim during a bench trial. However, the
5 trial court reduced the total award after trial to only \$150,000 (30,000 violations x \$5) and stated
6 that this reduction was warranted because imposing the maximum penalty would be "unjust,
7 arbitrary, and oppressive", based on Starbucks's "good faith attempts" to comply with meal break
8 obligations and because the Court found the violations were minimal. Applying the same formula
9 here and assuming there was one violation during each pay period, the award of civil penalties
10 could not exceed \$55,500 in PAGA penalties (11,100 violations x \$5). As such, this Settlement
11 is a great result based solely on the risk the Court chooses to apply the *Carrington* formula.
12 Defendants have also posed formidable defenses to the Labor Code claims underlying Plaintiff's
13 allegations. Thus, the chance of Plaintiff recovering a higher amount than the Gross Settlement
14 Amount is uncertain. HM, ¶ 22.

15 The Parties further recognize that the issues presented in the representative PAGA claim
16 are likely only to be resolved with extensive and costly pretrial and trial proceedings, and that
17 further litigation will cause inconvenience, distraction, disruption, delay, and expense
18 disproportionate to the maximum potential benefits to the PAGA Employees and Plaintiff from
19 continued litigation, especially in the post pandemic era where further and extensive litigation
20 may cause businesses to shut down, resulting in no monetary compensation to Plaintiff,
21 Plaintiff's attorneys, other PAGA Employees, and the State of California. HM, ¶ 23.

22 The settlement of the representative PAGA claim involves monetary relief to all PAGA
23 Employees, Plaintiff, his attorneys, and the State of California. The Settlement is reasonable
24 given the uncertainties this lawsuit entails. It is also reasonable given the structure and purpose
25 of the PAGA, since the PAGA is not a restitution statute. Rather, it is essentially a punishment
26 statute. It provides for civil penalties only. Within the PAGA framework he is bound by, Plaintiff,
27 considering the evidence he faced, achieved a great result for the employees concerned.
28 Furthermore, any employees who are dissatisfied with the amount they received in civil penalties

1 can pursue any damages they believe they are owed by the Defendants. The Settlement does not
2 require them to opt out to do so. HM, ¶ 24.

3 Furthermore, Plaintiff recognizes that continued litigation presents significant risks that
4 support a significant downward departure from Plaintiff's estimated civil penalties amount. In
5 view of the risks, the Settlement represents a fair, adequate, and reasonable compromise amount
6 for these claims and is in the best interest of Plaintiff and PAGA Employees and thus, warrants
7 approval. *See Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014
8 WL 2465049, * 3. The PAGA settlement and its terms are fair, just, reasonable, adequate, and
9 equitable to Defendants, Plaintiff, and the State, especially in light of the current economic
10 climate, and are the product of good faith, and informed arms-length negotiations between the
11 Parties consistent with public policy and fully comply with applicable provisions of law. HM, ¶
12 25.

13 As such, the settlement of PAGA penalties in the gross sum of \$380,000.00, of which
14 75% of the net amount after attorney's fees, litigation costs, and settlement administration costs
15 (\$173,900.97) will be paid to the LWDA and 25% (\$57,966.99) will be distributed to the PAGA
16 Employees, is reasonable and appropriate under the circumstances. HM, ¶ 26.

17 **4. Each PAGA Employee Will Be Paid Based on the Potential Extent of His or Her**
18 **Injury Compared to Other PAGA Employees**

19 Each PAGA Employee will receive a portion of the civil penalties on a pro-rata basis
20 depending on the number of pay periods Defendants employed them for during the PAGA Period.
21 Agreement, ¶ 17. With a total of 309 PAGA Employees, the average estimated individual PAGA
22 payment for each PAGA Employee is approximately \$187.60 (25% of the estimated PAGA
23 Penalties Fund of \$57,966.99) / 309 PAGA Employees). This is a great result given the
24 uncertainties this lawsuit entails. HM, ¶ 27.

25 **5. Counsel for the Parties Are Experienced in Similar Litigation**

26 Plaintiff's counsel has considerable experience in wage and hour litigation and is
27 qualified to evaluate the PAGA claims, the value of settlement versus moving forward with
28 litigation, and viability of possible affirmative defenses. Similarly, Defendant's counsel, Daniel

1 F. Pyne, Esq. of Hopkins & Carley, has vast experience in handling employment matters and
2 wage and hour litigation. See HM, ¶¶ 2, 36; Declaration of Maralle Messrelian (“MM”), ¶ 7.

3 **6. The Proposed Attorneys’ Fees and Costs Are Fair, Adequate, and Reasonable**
4 **and Should Be Approved.**

5 Of the \$380,000.00 allocated towards the GSA, Plaintiff’s counsel requests \$133,000.00
6 (35% of the GSA) in attorney’s fees and \$10,132.04 in litigation costs, which is fair and
7 reasonable. HM, ¶ 31.

8 It is an accepted practice in wage and hour class action settlements to award attorneys’
9 fees to Plaintiff’s counsel based on a percentage of the total settlement value agreed upon by the
10 parties. California courts have long recognized that an appropriate method for awarding
11 attorneys’ fees in class actions is to award a percentage of the common fund. (*Serrano v. Priest*
12 (1977) 20 Cal.3d 25, 48-49 [“when a number of persons are entitled in common to a specific
13 fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation
14 or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney’s fees out of the
15 fund”]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254; *Lealao v. Beneficial*
16 *California, Inc.* (2000) 82 Cal.App.4th 19, 26-30.)

17 California courts have the discretion to employ (or decline to employ) a “lodestar cross-
18 check” on a request for a percentage of the fund award. *Laffitte v. Robert Half Intern, Inc.* (2016)
19 1 Cal. 5th 480, 505 (“*Laffitte*”). However, the California Supreme Court in *Laffitte* has now made
20 clear that this cross-check is not required and approved one-third of the class action settlement
21 fund as reasonable attorney fees as “[t]he percentage of the fund method survives in California
22 class action cases....” *Id.* at 574. As other courts have acknowledged since *Laffitte*, “California
23 courts routinely award attorneys’ fees of one-third of the common fund.” *Lopez v. Mgmt. &*
24 *Training Corp.*, 2020 U.S. Dist. LEXIS 70029. The *Lopez* court explained that it need not “engage
25 in a full-blown lodestar analysis when the primary basis remains the percentage method...” The
26 lodestar calculation is merely a “useful perspective on the reasonableness of a given percentage
27 award.” *Id.* See also *Austin v. Foodliner, Inc.*, 2019 U.S. Dist. LEXIS 79638 (“Trial courts ‘also
28 retain the discretion to forgo a lodestar cross-check and use other means to evaluate the

1 reasonableness of a requested percentage fee.”³ *Id.* (citing *Laffitte*)).

2 “[R]egardless whether the percentage method or the lodestar method is used, fee awards
3 in class actions average around one-third of the recovery.” (See *Chavez v. Netflix, Inc.* (2008)
4 162 Cal.App.4th 43, 66, fn.11 (“*Chavez*”)); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d
5 373, 379 (“*Pacific*”) [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.*
6 (9th Cir. 1997) 129 F.3d 1026, 1027 (“*MGM*”) (awarding 33% of total fund amount).) This is
7 also consistent with Plaintiff’s Counsel’s experience in wage and hour class and PAGA
8 settlements. HM, ¶ 31.

9 Should the Court elect to use Plaintiff’s Counsel’s lodestar as the method for awarding
10 fees, notwithstanding courts’ clear preference for the percentage method, Plaintiff’s Counsel’s
11 fee request of \$133,000 (35% of GSA) is fair and reasonable based on their lodestar as cross-
12 checked against the percentage of the recovery. HM, ¶¶ 32-34, Ex. 5. Plaintiff’s counsel’s
13 previous experience in litigating wage and hour class and representative actions and the caliber
14 of opposing counsel also support the reasonableness of the fee request. HM, ¶ 36, MM, ¶ 7. The
15 award of attorneys’ fees sought is also justified by the contingency nature of the attorney-client
16 relationship, the risks of non-payment and non-reimbursement, the delay in payment and cost
17 reimbursement, and the great results Plaintiff’s Counsel has achieved for the PAGA Employees.
18 HM, ¶ 37.

19 In addition, Plaintiff’s Counsel incurred substantial costs, \$10,132.04 to date, including
20 the costs of a mediator, to aid in the representation of the PAGA Employees. HM, ¶ 35, Ex.6. As
21 the evidence submitted herewith shows, all of these costs are documented and reasonably
22 incurred. *Id.* Accordingly, they warrant the Court’s approval.

23 **7. The Proposed Settlement Administration Costs Are Fair and Reasonable and**
24 **Should Be Approved.**

25 With regard to the settlement administration costs provision, it is reasonable. Before
26

27 ³ The prohibition on citing unpublished California decisions (Cal. Rules of Court, rule 8.1115(a)) does not apply to
28 unpublished decisions from the lower federal courts. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn.
18 [“Citing unpublished federal opinions does not violate our rules.”].) Like published decisions of the lower federal
courts, unpublished decisions are not binding on us even on questions of federal law, but they are persuasive
authority. (*Western Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 989, fn. 6.)

1 agreeing to Simpluris, Inc., the Parties sought and reviewed bids from other reputable third-party
2 administrators which provided higher bids. HM, ¶ 38, Exs. 7-10. *See generally* Declaration of
3 Michael Bui. Thus, the settlement administration costs provision should be given approval.

4 **V. CONCLUSION**

5 For the reasons stated above, this Court should grant the Plaintiff’ Motion in its entirety
6 and adopt the proposed order submitted concurrently herewith.

7 Respectfully submitted,
8

9 MESSRELIAN LAW INC.

10 Dated: June 24, 2024

11 By: Maralle Messrelian
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