

KINGSLEY SZAMET & LY
ERIC B. KINGSLEY, Esq. (SBN 185123)
eric@kingsleylawyers.com
KELSEY M. SZAMET, Esq. (SBN 260264)
kelsey@kingsleylawyers.com
JESSICA BULAON, Esq. (SBN 340749)
jessi@kingsleylawyers.com
16133 Ventura Blvd., Suite 1200
Encino, CA 91436
Telephone: (818) 990-8300
Fax: (818) 990-2903

Attorneys for Plaintiff and the aggrieved employees

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

CARLOS BARRAZA, an individual, on behalf
of the State of California, as a private attorney
general,

PLAINTIFF,

v.

ALTA NEWPORT HOSPITAL, LLC DBA
FOOTHILL REGIONAL MEDICAL
CENTER; and DOES 1 thru 50, inclusive,

DEFENDANTS.

Case No. 30-2023-01304199-CU-OE-CXC

[Case Assigned for All Purposes to Hon. Lon
Hurwitz in Dept. CX-103]

**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, Julie Green of CPT Group,
and Plaintiff Carlos Barraza in Support of
Plaintiff's Motion for Approval of
Representative Action Settlement; [Proposed]
Order, and Judgment]*

Date: February 28, 2025

Time: 1:30 P.M.

Dept.: CX-103

Complaint Filed: January 26, 2023

FAC Filed: April 3, 2023

SAC Filed: September 16, 2024

Trial Date: None Set

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

2 **PLEASE TAKE NOTICE** that on February 28, 2025 at 1:30 P.M. in Department CX-103
3 of the above-entitled court, Plaintiff CARLOS BARRAZA will move the Court for an Order
4 Granting 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: January 8, 2025

KINGSLEY SZAMET & LY

13
14 By: 

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

2 **I. INTRODUCTION**

3 Plaintiff Carlos Barraza (“Plaintiff”) submits this Memorandum of Points and Authorities
4 in support of Motion for Approval of Representative Action Settlement. Plaintiff and Defendant
5 ALTA NEWPORT HOSPITAL, LLC DBA FOOTHILL REGIONAL MEDICAL CENTER
6 (“Defendant”) (collectively, the “Parties”) have reached a proposed settlement documented in the
7 PAGA Settlement Agreement (“Settlement” or “Agreement”), attached to the concurrently-filed
8 declaration of Kelsey M. Szamet.¹

9 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699,
10 et seq. (“PAGA”). The Gross Settlement Amount is \$359,679.00. After deduction of attorney’s
11 fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration
12 costs as discussed in the Agreement, the remaining amount to be divided between the Labor and
13 Workforce Development Agency (“LWDA”) and PAGA Employees as required by Labor Code
14 section 2699(i) is \$214,603.57 with \$160,952.68 (or 75%) going to the LWDA and \$53,650.89
15 (or 25%) distributed to PAGA Employees.²

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

21 ///

22 ///

23 ///

24 _____
25 ¹ The Parties also entered into a separate confidential settlement for Plaintiff Carlos Barraza’s individual claims. Plaintiff individually asserted additional claims for wage and hour violations as part of the Complaint in this Action.

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

27 ³ Plaintiff’s Motion for Approval of Representative Action Settlement will be concurrently uploaded to the LWDA’s website on the date this Motion is filed. Proof of submission of Plaintiff’s Motion for Approval of 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. ¶119.)

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Litigation Overview and Procedural History

Defendant Alta Newport Hospital, LLC dba Foothill Regional Medical Center (hereafter referred to as “Defendant”) is a fully accredited acute care hospital. Plaintiff worked for Defendant as a non-exempt employee. Plaintiff worked for Defendant as a Registered Nurse employee from approximately November 10, 2015 to October 21, 2024, during which he went on a leave of absence starting on March 4, 2021 until the end of his employment. (Declaration of Kelsey M. Szamet ¶5.) (“Szamet Decl.”)

On January 26, 2023, in compliance with Labor Code § 2699.3(a)(1), Plaintiff gave written notice by online filing to the LWDA, setting forth the facts and theories of the violations alleged against Defendant, paid the filing fee, and received an e-filing confirmation. (Szamet Decl. ¶6.) Plaintiff also mailed notice to Defendant by certified mailing, return receipt requested, to the address listed on the California’s Secretary of State’s website as the entity address for Defendant ALTA NEWPORT HOSPITAL, LLC DBA FOOTHILL REGIONAL MEDICAL CENTER. (Szamet Decl. ¶7.)

On January 26, 2023, Plaintiff Carlos Barraza filed a lawsuit *Carlos Barraza v. Alta Newport Hospital, LLC dba Foothill Regional Medical Center*) as a proposed class action complaint in the Orange County Superior Court on behalf of himself and all others similarly situated, alleging causes of action for: (1) failure to provide meal breaks pursuant to Labor Code sections 226.7 and 512; (2) failure to provide rest breaks pursuant to Labor Code section 226.7; (3) violation of Labor Code section 226(a); (4) failure to provide employment records pursuant to Labor Code section 226 and 1198.5; (5) penalties under Labor Code sections 201-203; and (6) violation of Business & Professions Code section 17200. (Szamet Decl. ¶8.)

On April 3, 2023, Plaintiff Carlos Barraza filed a First Amended Class and Representative Complaint adding an additional cause of action for penalties pursuant to Labor Code § 2699, et seq., the Private Attorneys General Act (“PAGA”) based on the underlying Labor Code violations already pled (the “PAGA Claim”). (Szamet Decl. ¶9.) On August 7, 2023, the Parties agreed to dismiss Plaintiff’s class action claims in light of a signed arbitration agreement. (Szamet Decl.

¶10.)

On June 11, 2024, the Parties participated in a mediation before Brandon McKelvey, Esq. of M Resolution. (Szamet Decl. ¶11). The Parties were able to reach a settlement at the Mediation, after several rounds of ongoing discussions and negotiation aided by Mr. McKelvey. (*Id.* at ¶11.)

On July 11, 2024, Plaintiff submitted an amended notice letter to the LWDA and Defendant (“Amended PAGA Notice”), adding additional factual allegations raised at mediation and setting forth the alleged additional underlying violations of Labor Code §§ 201, 202, 203, 204, 210, 221, 223, 226, 226.3, 226.7, 227.3, 245-249, 510, 512, 551-552, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 2699, 2800, 2802, and 2810.5, and the applicable IWC Wage Orders. (Szamet Decl. ¶12.) Shortly thereafter, the Parties formalized the PAGA Settlement Agreement. (Szamet Decl. ¶13.)

With Court approval, on September 25, 2024, Plaintiff Carlos Barraza filed his Second Amended Representative Action Complaint, alleging a single cause of action for PAGA penalties pursuant to Lab. Code § 2699, which added the additional allegations in the Amended PAGA Notice to the Plaintiff’s PAGA Claim.

B. The Discovery Process

The Parties have not engaged in formal discovery to date. (Szamet Decl. ¶14.) In preparation for and confirmed after mediation, Plaintiff learned that the number of Aggrieved Employees is no more than 734 (including Plaintiff) and a maximum of 24,500 pay periods at issue during the PAGA period. (Szamet Decl. ¶15.) The Parties have agreed that the relevant PAGA period is January 26, 2022, through September 21, 2024. (*Id.*)

As such, Parties engaged in good faith, arms-length negotiations with Defendant concerning possible resolution of the claims asserted in the Litigation. (Szamet Decl. ¶16.). The Parties were able to reach a tentative settlement subject to finalization of a formal PAGA Settlement Agreement and the approval of the Court. (*Id.*) The Parties negotiated the terms and conditions of the Settlement and now present the agreed-upon Settlement to the Court for Approval. (Szamet Decl. ¶17.)

Although Defendant denies that it violated any pertinent law, it recognized the risks and

1 attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to
2 finalization of a formal PAGA Settlement Agreement and the approval of the Court. (Szamet Decl.
3 ¶18.) The Parties negotiated the terms and conditions of the Agreement and now present the
4 agreed-upon Settlement to the Court for Approval. (*Id.*)

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

6 **A. The PAGA Statutory Scheme**

7 PAGA creates a means of “deputizing” citizens as private attorney generals to enforce the
8 Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489,
9 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A
10 plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own
11 behalf as an individual claim, but “as the proxy or agent of the state’s labor law enforcement
12 agencies.” *Id.*, at 986; *see also Reyes v. Macy’s, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011);
13 *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380).

14 When an aggrieved employee brings a PAGA claim, “the government is always the real
15 party in interest.” *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th
16 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) (“[A]
17 PAGA action is a dispute between an employer and the State agency.”). Accordingly, a plaintiff
18 that brings a PAGA claim represents “the same legal right and interest as state labor law
19 enforcement agencies,” in that the plaintiff is seeking to recover those civil penalties that otherwise
20 would have been assessed and collected by the LWDA. *Arias, supra*, 46 Cal.4th at 986; Lab. Code
21 § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D.
22 Cal. 2015) 523 B.R. 820, 825 (holding “PAGA plaintiffs do not have property rights in their
23 cases.”). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties
24 recovered; thus, recoveries are principally for the state and only secondarily for aggrieved
25 employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a PAGA claim, he or she is
26 properly conceived of as a private attorney general prosecuting violations of California’s labor
27 laws on behalf of the state.

28 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. (Ex. 1, ¶ 2.1.)

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 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

⁴ See also *Willner v. Manpower Inc.*, *supra*. 35 F. Supp. 3d at 1136; *McKenzie v. Federal Exp. Corp.*, *supra*, 765 F.Supp.2d at 1232.

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 \$359,679.00 in full and final settlement of the PAGA claims alleged. (Szamet Decl. ¶19, Exhibit 1, ¶3.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount:	\$359,679.00
PAGA Counsel Fees Payment:	\$119,893.00
PAGA Counsel Litigation Expenses Payment:	\$15,000.00
Administrator Expenses Payment:	\$7,000.00
Plaintiff Enhancement:	\$5,000.00
PAGA Penalties:	\$212,786.00 (\$159,589.50 to the LWDA; \$53,196.50 to remain in the Net Settlement Amount)

(Szamet Decl. ¶20, Exhibit 1, ¶3.)

Each aggrieved employee shall receive a pro-rata portion of the remaining amount in PAGA penalties based by dividing the amount of the PAGA Employees’ 25% share of PAGA Penalties (\$53,650.89) by the total number of PAGA Period Pay Periods worked by all PAGA Employees during the PAGA Period, and (b) multiplying the result by each PAGA Employee’s PAGA Period Pay Periods. (Szamet Decl. ¶21, Exhibit 1, ¶3, §3.2.4.1.)

For settlement purposes, the aggrieved employees are defined as: “all non-exempt employees who worked at Alta Newport at any time during the PAGA Period” (“PAGA Employees”). (Szamet Decl. ¶22, Exhibit 1, ¶1, §1.21.) A part of the Settlement, the Parties agreed that the PAGA period is January 26, 2022, through to September 21, 2024. (Szamet Decl. ¶23, Exhibit 1, ¶1, §1.24.) Defendant’s expert analyzed PAGA Employees’ actual time and pay data to determine that there are 24,500 pay periods during the PAGA Period. (Szamet Decl. ¶24.)

1 **V. ARGUMENT**

2 A. The Court Should Approve the Agreement

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

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

11 To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation
12 and discount taken follows. (Szamet Decl. ¶25.) Plaintiff believed that Defendant may
13 persuasively argue that the Court should exercise its discretion under PAGA to significantly reduce
14 or altogether waive any penalties under PAGA. (Szamet Decl. ¶26.) Pursuant to Labor Code
15 §226.3, the Labor Commissioner has the discretion to “decide not to penalize an employer for a
16 first violation when that violation was due to a clerical error or inadvertent mistake.” (Szamet Decl.
17 ¶27.) And in accordance with PAGA, the court in a PAGA action has the same discretion “to
18 assess a civil penalty” that the Labor Commissioner would have, as well as complete discretion to
19 “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on
20 the facts and circumstances of the particular case, to do otherwise would result in an award that is
21 unjust, arbitrary and oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)). (Szamet
22 Decl. ¶28, Exhibit.)

23 PAGA Counsel anticipated that, at trial, Counsel for Defendant could make a potentially
24 persuasive argument that: (1) the PAGA Employees were properly paid and/or reimbursed in
25 accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate
26 the PAGA Employees was the result of inadvertence or clerical error; (2) the PAGA Employees were
27 provided with the opportunity to take meal and rest breaks in compliance with California law; (3)
28 until this Action was filed, no employees had complaints about any alleged failure to pay wages,

1 provide meal and/or rest breaks, reimburse expenses, issue accurate itemized wage statements; (4)
2 none of Defendant’s employees suffered any harm from or actual damage as a result of the conduct
3 that forms the basis for Plaintiff’s allegations. (Szamet Decl. ¶29.) All of which, Counsel for
4 Defendant would argue, should mitigate in factor of significantly reducing or waiving any PAGA
5 penalties. (*Id.*) While Plaintiff disagrees that this analysis is legal correct or persuasive, PAGA
6 Counsel had to consider the foregoing facts and arguments and how they might impact any judgment
7 ultimately awarded to PAGA Employees if the Court were persuaded by them. (Szamet Decl. ¶30.)

8 **1. The Risks Associated with the Wages/Overtime Claim**

9 “California employees are entitled to compensation for all hours worked, which means “the
10 time during which an employee is subject to the control of an employer, and includes all the time
11 the employee is suffered or permitted to work, whether or not required to do so.” (Title 8 Cal. Code
12 of Regs., § 11080(2)(G); *See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified
13 on denial of reh'g (Aug. 29, 2018).) Time is compensable if an employee is “*subject to the control*
14 *of an employer*” even if not working, or if an employee “*is suffered or permitted to work*” even if
15 not “under the employer’s control, provided the employer has or should have knowledge of the
16 employee’s work.” (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh'g denied (May 13,
17 2020) (citations omitted.) An employer controls an employee if the employer directs an employee
18 and the employee is unable to use their time how they wish. (*Id.* at p. 1047.) Other factors courts
19 may consider include whether the activity is required, “the location of the activity, the degree of
20 the employer’s control, whether the activity primarily benefits the employee or employer, and
21 whether the activity is enforced through disciplinary measures.” (*Id.* at p. 1056; *Cf. Gibbs v. TWC*
22 *Administration, LLC* (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768, at *9
23 (denying Defendant’s motion for summary judgment when plaintiff-employees conducted off-the-
24 clock pre-shift activity in preparation to start work right when they clocked in).)

25 In *Troester*, employees spent four to ten minutes completing tasks to close up the store,
26 such as setting the alarm and locking the door. (*Troester*, 5 Cal.5th 829 at p. 843.) The Court held
27 that California law prohibits employers from requiring employees to work off the clock, even for
28 minutes, without compensation. (*Id.* at p. 848.) The Court explained:

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

5 (*Id.* at p. 847.)

6 Labor Code § 1198 provides that “The employment of any employee . . . under conditions
7 of labor prohibited by the [Industrial Wage Orders] is unlawful.” Industrial Welfare Commission
8 (“IWC”) Wage Orders 4-2001 and 5-2001 requires that an employer pay an employee for half the
9 usual or scheduled day’s work, but in no event for less than two (2) hours nor more than four (4)
10 hours, at the employee’s regular rate of pay for each workday an employee is required to report
11 for work and does report, but is not put to work or is furnished less than half said employee’s usual
12 or scheduled day’s work. This compensation shall not be less than the minimum wage. Further, if
13 an employee is required to report for work a second time in any one workday and is furnished less
14 than two (2) hours of work on the second reporting, said employee shall be paid for two (2) hours
15 at the employee’s regular rate of pay.

16 Here, Plaintiff alleges that he and the PAGA Employees were not properly compensated
17 for all hours worked. (Szamet Decl. ¶31.) Specifically, Plaintiff alleges that Defendant had a
18 consistent policy of failing to pay wages and/or overtime to Plaintiff and all aggrieved employees.
19 (*Id.*) Plaintiff alleges he and all aggrieved employees were forced to work on a regular and
20 consistent basis without receiving compensation for all hours worked at the proper rate, including
21 performing work before scheduled shifts or after scheduled shifts without compensation for this
22 time, such as responding to work-related inquiries. (*Id.*)

23 Plaintiff further alleges that Defendant has had a consistent policy of requiring Plaintiff
24 and PAGA Employees to report to work but failing to furnish them with work constituting half of
25 their usual shift. (Szamet Decl. ¶32.) Plaintiff alleges Defendant failed to pay Plaintiff and PAGA
26 Employees half the usual or scheduled day’s work in an amount no less than two (2) hours nor
27 more than four (4) hours at the employee’s regular rate of pay for workdays in which Plaintiff and
28 PAGA Employees reported to work and were furnished less than half the usual or scheduled days
work. (*Id.*) Plaintiff alleges Defendant failed to pay Plaintiff and the aggrieved employees for two

(2) hours at the employee's regular rate of pay on days in which Plaintiff and the aggrieved employees were required to report for work a second time in one workday and were furnished less than two (2) hours of work upon the second reporting. (*Id.*) As such, Plaintiff alleges that Defendant failed to pay reporting time pay in violation of California law. (*Id.*)

Plaintiff also alleges that he and PAGA Employees earned nondiscretionary remuneration, including, but not limited to, shift and other differentials, nondiscretionary bonuses, and performance pay. (Szamet Decl. ¶33.) However, Plaintiff alleges Defendant, on occasion, failed to include such nondiscretionary remuneration in the regular rate calculation, thereby allegedly underpaying Plaintiff and PAGA Employees when they worked overtime or double-time. (*Id.*)

However, at mediation, Defendant argued that it paid Plaintiff and PAGA Employees for all hours worked. (Szamet Decl. ¶34.) Defendant further contends that its written policies are facially compliant and are properly enforced, including the calculation of an employee's regular rate and the accurate recording of hours worked. (*Id.*) Defendant also maintains, that at all relevant times, it kept written policies that prohibited Plaintiff and PAGA Employees from performing any compensable activities off the clock. (*Id.*)

Furthermore, Defendant would argue that Plaintiff's theories of liability would each be extremely difficult to prove on a representative basis. (Szamet Decl. ¶35.) Defendant would argue that the time records cannot substantiate this claim on a representative basis because this practice could be due to one or two rogue managers, and that this case would devolve into a series of mini-trials wherein Defendant would have the right to question each and every allegedly Aggrieved Employees as to whether they contended that they worked any unpaid time and, if so, why they contend the time was not properly paid. (*Id.*)

While Plaintiff disagrees that these arguments are legally correct or persuasive, Plaintiff acknowledges this risk. (Szamet Decl. ¶36.) As such, PAGA Counsel determined that in light of these risks, the settlement reached is both fair and reasonable. (*Id.*)

2. The Risks Associated with the Meal Period Claim

Under California Labor Code section 512 and IWC Wage Order No. 7, no employer shall employ any person for a work period of more than five hours without providing a meal period of

1 not less than thirty minutes. The first meal period must be permitted to commence no later than
2 after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker*
3 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be
4 permitted to commence no later than after ten hours of work, or the start of the eleventh hour of
5 work (10.0 hours on the clock). (*Ibid.*) The California Supreme Court succinctly described Section
6 512's mandate: "Employers must afford employees uninterrupted half-hour periods in which they
7 are relieved of any duty or employer control and are free to come and go as they please." (*Brinker*
8 *Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.)

9 Furthermore, Labor Code §§ 226.7 and 512 require an employer to pay an additional hour of
10 compensation for each meal period the employer fails to provide. In *Ferra v. Loews Hollywood Hotel,*
11 *LLC*, 11 Cal.5th 858 (2021), the California Supreme Court set forth the formula for calculating the
12 one extra hour of bonus pay that employees are owed if an employer fails to provide a compliant
13 meal period or rest break. (*Id.*) Specifically, the Court held that those bonus payments must include
14 the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonus, commissions,
15 etc.), and cannot simply be paid at an employee's base hourly rate. (*Id.*)

16 Here, Plaintiff alleges that he and PAGA Employees were regularly denied lawful first and
17 second meal periods. (Szamet Decl. ¶37.) Specifically, Plaintiff contends that he was never able
18 to take second meal periods and regularly worked over 10 hours per shift. (*Id.*) Plaintiff also
19 contend that Defendant had a consistent policy of: (1) requiring Plaintiff and PAGA Employees to
20 take short meal breaks; (2) requiring Plaintiff and PAGA Employees to take late meal breaks that
21 occurred after the first five hours of each shift; (3) failing to provide meal periods entirely on some
22 shifts; (4) requiring Plaintiff and PAGA Employees, on occasion, to perform work during their off
23 duty meal periods; (5) requiring Plaintiff and PAGA Employees to work shifts over ten (10) hours
24 without providing a second meal period of thirty minutes in length altogether; and (6) failing to
25 pay such employees one (1) hour of pay at the employees regular rate of compensation for each
26 workday that a meal period was not provided within the first (5) hours of the shift, was short, or
27 was not provided at all. Plaintiff also alleges that Defendant also required aggrieved employees to
28 stay on work premises during meal periods. (*Id.*)

1 Here, Plaintiff contends when meal premiums were paid, Defendant paid meal period
2 premiums at the base rate and not the appropriate blended rate in violation of Labor Code §§ 226.7
3 and 512. (Szamet Decl. ¶38.) Plaintiff further contends that Defendant, on occasion, failed to
4 include nondiscretionary remuneration, including, but not limited to, shift and other differentials,
5 in the regular rate calculation, thereby underpaying Plaintiff and other aggrieved employees when
6 they were paid meal period premiums. (*Id.*)

7 However, Defendant would argue that under the applicable Wage Order, a health care
8 employee can waive either their first or their second meal period and Defendant allowed Patient
9 Care employees to waive their second meal periods for shifts greater than 10 hours such that if
10 Plaintiff and PAGA Employees did not take a second meal period, it was by their own volition as
11 could be confirmed by end-of-shift attestations. (Szamet Decl. ¶39.) Again, Plaintiff anticipates
12 Defendant would argue that it would be entitled to inquire of each and every PAGA Employee
13 whether his/her meal periods were provided and, if not, why not. (*Id.*) Plaintiff expects Defendant
14 to maintain that this type of inquiry would foreclose Plaintiff's ability to pursue the meal period
15 claims on a representative basis. (*Id.*) Plaintiff had to acknowledge that there are certainly some
16 risks associated with the meal period claim and did consider them when evaluating this settlement.
17 (*Id.*)

18 3. The Risks Associated with the Rest Period Claim

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

23 The California Supreme Court has held: "Employees are entitled to 10 minutes' rest for
24 shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours
25 up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." (*Brinker*
26 *Rest. Corp. v. Superior Court*, supra, 53 Cal.4th at 1029.) In an eight-hour workday, being denied
27 the two paid rest breaks in a day is "essentially perform[ing] 20 minutes of 'free' work." (*Murphy*
28 *v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104.)

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

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

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

8 Employers must authorize and permit a net ten-minute paid rest period for every four hours,
9 or major fraction thereof, of work for its employees. If an employer does not, then the employer
10 must pay the employee one hour of pay at the employee’s regular rate of pay for each workday
11 that the rest period is not provided. (Cal. Code Regs., tit. 8, § 11070, subd. 12(B).)

12 Here, Plaintiff contends that he was never able to take compliant first, second or third rest
13 breaks because the hospital was not staffed well enough to provide rest break coverage. (Szamet Decl.
14 ¶40.) Plaintiff also alleges Defendant failed to maintain an accurate policy informing Plaintiff and
15 the Aggrieved Employees of their rights with respect to rest periods. Plaintiff further alleges
16 Defendant failed to provide Plaintiff and the Aggrieved Employees with rest breaks of not less
17 than ten (10) minutes per four (4) hour work period as required by the Labor Code during the
18 relevant time period. (Szamet Decl. ¶41.)

19 In addition, Plaintiff alleges that Defendant maintains an unlawful policy of requiring
20 Plaintiffs and PAGA Employees to remain on the premises during rest periods in violation of
21 *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257, 269 (2016) (an employer that limits where
22 an employee can take a break does not “relinquish control over how employees spend their time”).
23 (Szamet Decl. ¶42.) As such, Plaintiff allege that Defendant failed to provide Plaintiff and PAGA
24 Employees with compliant rest periods, and also failed to compensate them with one (1) hour of
25 wages for each compliant rest period as required by Labor Code § 226.7. (*Id.*)

26 However, Defendant again raised the defense that employees did actually receive their rest
27 breaks. (Szamet Decl. ¶43.) Defendant would likely present evidence at trial regarding end-of-shift
28 attestations and from other employees and argue that other employees would testify as such.

(Szamet Decl. ¶44.) Defendant informally produced a sample of attestation records, showing that it took reasonable measures to ensure that its employees were receiving proper breaks. (*Id.*) Given that the rest period policy was facially valid, Plaintiff considered this a viable risk. (Szamet Decl. ¶45.)

Defendant also argued that Plaintiffs’ rest period claim cannot readily be proven as to all PAGA Employees because California law does not require employees to record rest periods. (Szamet Decl. ¶46.) Absent a shift-by-shift, break-by-break, employee-by-employee inquiry, taking into consideration end-of-shift attestations, Defendant would have argued that there was simply no way to know (1) whether a break was taken on any given day; and (2) if not, why not. (*Id.*) For each instance where an employee contends that she did not take a 10-minute rest period by the end of the fourth hour of work, the trier of fact would still have to determine why that particular employee had less than their full allotment of rest time. (*Id.*) Defendant accordingly would have argued that rest break claims are inherently individualized in nature because employers only need to “authorize and permit” breaks; they need not ensure that rest breaks are taken. (*Id.*; *Brinker, supra*, 53 Cal. 4th at 1004.) To succeed, “[a]n employee must show that the employer prevented the employee from taking breaks; mere proof of knowledge that the employee was forgoing breaks is insufficient.” As such, Plaintiffs had to acknowledge that it could potentially be easy for Defendant to defeat this claim if it was able to gather testimonial evidence from aggrieved employees indicating that they were provided the opportunity to take all required rest breaks each day and if the end-of-shift attestation evidence were presented. (*Id.*)

Though Plaintiff does not believe this was the case, Plaintiff must acknowledge it poses serious risks as to establishing liability. (Szamet Decl. ¶47.) Just as with meal periods, there is risk as to both sides as to what declarations and depositions of aggrieved employees might reveal. (*Id.*)

4. The Risks Associated with the Reimbursement Claim

Labor Code section 2802 provides that an employer must “indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties” (Lab. Code, § 2802, subd. (a).) Labor Code § 2800 provides,

1 in pertinent part, that “[a]n employer shall in all cases indemnify his employee for losses caused
2 by the employer’s want of ordinary care.”

3 Plaintiff alleges that Defendant failed to reimburse Plaintiff and PAGA Employees for the
4 cost of using their personal cell phones for business related purposes, the purchasing and
5 maintenance of supplies, and COVID-related expenses. (Szamet Decl. ¶48.) In particular, Plaintiff
6 alleges that Defendant required that Plaintiff and PAGA Employees be available by cell phone and
7 answer/use their cell phones while working and this was necessary to perform their job duties. (*Id.*)
8 Plaintiff also alleges these cell phones and vehicles were not provided by Defendant, and
9 Defendant failed to reimburse Plaintiff and the PAGA Employees for the costs associated with
10 using these personal cell phones for business related purposes. (*Id.*) Plaintiff alleges Defendant
11 also required Plaintiff and PAGA Employees to travel between job sites to perform work tasks.
12 (*Id.*) Plaintiff alleges that because Defendant did not provide transportation to workers so that they
13 could travel from job sites to job sites in the middle of their shifts, Plaintiff and PAGA Employees
14 used their own vehicles to travel from job site to job site. (*Id.*) Plaintiff further alleges Defendant
15 did not reimburse Plaintiff and PAGA Employees for their vehicle use for travel between
16 Defendant’s job sites during the course of a work shift, in violation of California law. (*Id.*)

17 The main risk that Plaintiff considered was the fact that not all PAGA Employees used
18 their cell phones and vehicles for every pay period. (Szamet Decl. ¶49.) Defendant contends that
19 it does not require PAGA Employees to use personal cell phones at work. (*Id.*) Therefore, even if
20 Plaintiff could establish liability, Plaintiff had to consider that the violations under Labor Code §
21 2802 may have been relatively low as they were not triggered for every pay period. (*Id.*) Plaintiff
22 also anticipated that Defendant could argue primarily that it provided all necessary supplies and
23 equipment, but to the extent it did not, any exposure was limited to a very small group of PAGA
24 Employees for a short window of time who may have chosen to use their personal cellphones for
25 work-related purposes out of convenience. (*Id.*) If Defendant were able to establish such, there
26 could be no recovery at all for this claim. (*Id.*)

27 Based on these risks, Plaintiff determined that discounting this claim for settlement
28 purposes was fair and reasonable. (Szamet Decl. ¶49.)

1 **5. The Risks Associated with the Wage Statement Claims**

2 California Labor Code §226(a) requires Defendant to provide its employees with an
3 accurate, itemized written wage statement that shows, in relevant part, total hours worked by the
4 employee, their name and address of the legal entity that is the employer, and all applicable hourly
5 rates and the corresponding number of hours worked. Specifically, Labor Code §226(a) requires
6 employers to furnish accurate itemized wage statements in writing that show total hours worked
7 by the employee and all applicable hourly rates in effect during the pay period and the
8 corresponding number of hours worked at each hourly rate by the employee. (Labor Code §§
9 226(a)(2) and (9) respectively.)

10 Here, Plaintiff alleges that Defendant furnishes Plaintiff and the PAGA Employees with
11 itemized wage statements that do not accurately show total hours worked. (Szamet Decl. ¶50.)
12 Plaintiff alleges Defendant furnishes Plaintiff and the PAGA Employees with itemized wage
13 statements that do not accurately show all applicable hourly rates in effect during the pay period
14 and the corresponding number of hours worked at each hourly rate because Plaintiff and the PAGA
15 Employees performed work while off the clock and during meal and rest periods. (Szamet Decl.
16 ¶51.) Plaintiff alleges the work performed off the clock was not recorded and thus was not reflected
17 in the PAGA Employees' wages and wage statements. (*Id.*)

18 Further, Plaintiff alleges that he and PAGA Employees were issued wage statements that
19 do not include accurate meal and rest premiums as a result of the claims alleged above. (Szamet
20 Decl. ¶52.) Plaintiff alleges Defendant's failure to provide accurate itemized wages statements
21 according to Labor Code § 226(a) was all done on a regular and consistent basis. (*Id.*) Thus,
22 Plaintiff alleges Defendant owes the PAGA Employees penalties under PAGA for failing to
23 provide accurate and itemized wage statements.

24 As this is a derivative claim, the same risks present for the above claims were present for
25 this claim. (Szamet Decl. ¶53.)

26 **6. The Risks Associated with the Payroll Records Claim**

27 Under Labor Code § 1174, employers are required to maintain a record showing the names
28 and addresses of all employees and payroll records showing the hours worked daily by and the

1 wages paid to, and the number of piece-rate units earned by, and any applicable piece rate paid to,
2 employees employed at the respective plants or establishments for a minimum period of three
3 years.

4 Here, Plaintiff alleges that Defendant failed to maintain accurate records for Plaintiff and
5 PAGA Employees as required by Labor Code §§ 1174, 1174.5, and 1175. (Szamet Decl. ¶54.)
6 Plaintiff alleges Defendant failed to maintain accurate payroll records that maintain the actual daily
7 hours worked and the wages paid for Plaintiff and PAGA Employees, including earned and unpaid
8 minimum, overtime, and premium wages as discussed above. (Szamet Decl. ¶55.) However, the
9 main risk taken into account is payroll records claims, like wage statement claims, are vulnerable
10 to an argument that PAGA Employees did not suffer any harm. (*Id.*) Defendants commonly argue
11 that, without more, these are nothing but technical violations for which a court should award a
12 dramatically reduced civil penalty, if anything at all. (*Id.*)

13 **7. The Risks Associated with the Sick Leave Claims**

14 Labor Code § 245, 246, and Labor Code §245, 246, and 247-249 provide that “[a]n
15 employer shall provide an employee with written notice that sets forth the amount of paid sick
16 leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either
17 the employee’s itemized wage statement described in Section 226 or in a separate writing provided
18 on the designated pay date with the employee’s payment of wages.”

19 Here, Plaintiff alleges that Defendant failed to set forth the amount of sick leave available,
20 or paid time off leave an employer provides in lieu of sick leave, on the itemized wage statements
21 described in Section 226 that it issues to Plaintiff and PAGA employees. (Szamet Decl. ¶56.)
22 Plaintiff also alleges that Defendant also underpaid sick pay wages by failing to pay such wages
23 at the regular rate of pay in violation of Cal. Lab. Code Section 246. (*Id.*) Specifically, Plaintiff
24 and other non-exempt employees earn nondiscretionary remuneration. Plaintiff alleges that rather
25 than pay sick pay at the regular rate of pay, Defendant underpaid sick pay to Plaintiff and PAGA
26 Employees at their base rates of pay. (*Id.*) Labor Code Section 246(1)(2) requires that paid sick
27 time for nonexempt employees be calculated by dividing the employee’s total wages, not including
28 overtime premium pay, by the employee’s total hours worked in the full pay periods of the prior

1 90 days of employment. However, Plaintiff alleges when sick pay was paid, it was paid at the base
2 rate of pay for Plaintiff and PAGA Employees, as opposed to the correct, higher regular rate of
3 pay, as required under Cal. Lab. Code Section 246. (*Id.*)

4 As this is a derivative claim, the same risks present for the wage statement and failure to
5 blend allegations were also present for this claim. (Szamet Decl. ¶57.)

6 **8. The Risks Associated with the Wage Deduction Claim**

7 Under California Labor Code section 221, it is “unlawful for any employer to collect or
8 receive from an employee any part of wages.” Moreover, Labor Code § 226.3 provides for
9 heightened penalties where “the employer fails to provide the employee a wage deduction
10 statement or fails to keep [required] records.”

11 Plaintiff alleges that Defendant maintains a consistent policy of unlawfully deducting
12 wages from Plaintiff and all aggrieved employees in violation of Labor Code § 221. (Szamet Decl.
13 ¶58.) By making these unauthorized deductions from Plaintiff and all aggrieved employees’ earned
14 wages, Plaintiff contends that he and all aggrieved employees were paid less than the applicable
15 minimum wage required under California law. (*Id.*) Defendant denies that any unlawful
16 deductions were made.

17 **9. The Risks Associated with the Lower Wage Scale Claim**

18 Under Labor Code § 223, employers are required to maintain a designated wage scale and
19 that “it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated
20 by statute or by contract.” Plaintiff alleges that Defendant violated Labor Code § 223 maintaining
21 wages lower than the lawful wage scale according to California law. (Szamet Decl. ¶59.)
22 Defendant denies these allegations.

23 **10. The Risks Associated with the Rest Day Claim**

24 Labor Code § 551 states: “Every person employed in any occupation of labor is entitled to
25 one day's rest therefrom in seven. Moreover, Labor Code § 552 states: “No employer of labor shall
26 cause his employees to work more than six days in seven.”

27 Here, Plaintiff alleges that Defendant failed to provide Plaintiff and PAGA Employees with
28 one (1) day of rest in seven (7), as Plaintiff and PAGA Employees worked seven days a week on

1 a regular and consistent basis with no day off. (Szamet Decl. ¶60.) Defendant denies Plaintiff's
2 contention.

3 **11. The Risks Associated with the Written Notice Claim**

4 Labor Code § 2810.5(a) requires that employers provide employees at the time of hire a
5 written notice, in the language the employer normally uses to communicate employment-related
6 information, that contains the following information: (A) The rate or rates of pay and basis thereof,
7 whether paid by the hour, shift, day, week, salary, piece, commission, or otherwise, including any
8 rates for overtime, as applicable; (B) Allowances, if any, claimed as part of the minimum wage,
9 including meal or lodging allowances; (C) The regular payday designated by the employer in
10 accordance with the requirements of this code; (D) The name of the employer, including any
11 “doing business as” names used by the employer; (E) The physical address of the employer's main
12 office or principal place of business, and a mailing address, if different; (F) The telephone number
13 of the employer; (G) The name, address, and telephone number of the employer's workers'
14 compensation insurance carrier; (H) That an employee: may accrue and use sick leave; has a right
15 to request and use accrued paid sick leave; may not be terminated or retaliated against for using or
16 requesting the use of accrued paid sick leave; and has the right to file a complaint against an
17 employer who retaliates; (I) Any other information the Labor Commissioner deems material and
18 necessary.

19 Here, Plaintiff contends that Defendant failed to provide Plaintiff and PAGA Employees
20 notice of material terms of employment in violation of Labor Code § 2810.5. (Szamet Decl. ¶61.)
21 Defendant contends there was no such failure.

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

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

1 Here, Plaintiff and numerous PAGA Employees are no longer employed by Defendant.
2 Plaintiff alleges Defendant failed to pay all wages owed and due upon their termination and/or
3 resignation. (Szamet Decl. ¶62.) Defendant’s actions were willful, as they have intentionally failed
4 or refused to perform an act which was required to be done. (See *Amaral v. Cintas Corp. No. 2*
5 (2008) 163 Cal.App.4th 1157, 1201.) “The failure to pay is willful if the employer ‘knows what
6 [it] is doing [and] intends to do what [it] is doing’, and does not also require proof that the employer
7 acted with “a deliberate evil purpose to defraud work[ers] of wages which the employer knows to
8 be due.’” (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 868.)

9 Plaintiff factored in the risk of establishing that any violation was “willful” and the fact
10 that this claim is derivative. (Szamet Decl. ¶63.)

11 In light of all these significant risks and given that PAGA gives the Court broad discretion to
12 reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement
13 Amount of \$359,679.00 was fair and reasonable. (Szamet Decl. ¶64, Exhibit 1, ¶3.)

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

16 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a
17 showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp. No. 2* 163 Cal. App 4th
18 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007
19 WL 1650942, at *3.

20 However, PAGA does provide the Court with discretion when it awards these penalties.
21 Labor Code section 2699(e)(2) states that “a court may award a lesser amount than the maximum
22 civil penalty amount specified by this part if, based on the facts and circumstances of the particular
23 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
24 confiscatory.” (See *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL
25 7563047 [court awarded \$18 per wage statement, reflecting 18% of the potential exposure];
26 *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 529 [awarding 10% of maximum civil
27 penalty for meal break claims in light of Starbucks’ “good faith attempts” to comply and because
28 the violations were minimal]; *Thurman v. Bayshore Transit Management, Inc.* (2012) 203

Cal.App.4th 1112, 1135–1136, disapproved on another ground in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 196, fn. 8 [considering the defendant’s inability to pay as a factor in reducing the penalties imposed]; see also *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 681 [noting that a court should consider whether a violation was inadvertent when assessing penalties].)⁵

In *Fleming*, 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, Defendant 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.

Here, as explained above, Plaintiff’s counsel anticipated that, at trial, Counsel for Defendant would argue that: (1) the PAGA Employees were properly paid and/or reimbursed in accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate the PAGA Employees was the result of inadvertence or clerical error; (2) the PAGA

⁵ On May 11, 2016, following a bench trial, Los Angeles Superior Court Judge John Wiley reduced PAGA penalties from \$409,950 to \$53,294 after finding the maximum statutory penalty amount to be unjust, arbitrary, oppressive, and/or confiscatory. (*Kaanaana et al. v. Barrett Business Serv.s Inc., et al.*, L.A. Super. Ct., Case No. BC 496090.))

1 Employees were provided with the opportunity to take meal and rest breaks in compliance with
2 California law; (3) until this Action was filed, no employees had complaints about any alleged
3 failure to pay wages, provide meal and/or rest breaks, reimburse expenses, issue accurate itemized
4 wage statements; (4) none of Defendant's employees suffered any harm from or actual damage as
5 a result of the conduct that forms the basis for Plaintiff's allegations. All of which, Counsel for
6 Defendant would argue, should mitigate in favor of significantly reducing the civil penalty.

7 After engaging in pertinent informal discovery in this Action, Plaintiff's counsel determined
8 that a settlement of \$359,679 is reasonable given the above risks.

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

11 Based on these figures, the maximum potential exposure for the PAGA claims for the
12 PAGA Employees is \$2,450,000 (24,500 pay periods at issue multiplied by \$100 a pay period).
13 While there is no authority available on this issue, a court could conceivably "stack" per pay period
14 violations as Plaintiff has done above. However, the main risk taken into account with PAGA is
15 the discretionary nature of the penalty award. (Szamet Decl. ¶65.) For example, if a court were to
16 disallow the "stacking" of PAGA penalties (given the lack of caselaw doing so), then Defendant's
17 maximum exposure at trial would actually be \$2,450,000. From there, a court has further discretion
18 to reduce the amount accordingly.

19 The settlement here represents approximately 14% of the maximum exposure at trial, or a
20 \$14.68 penalty per pay period (\$359,679 divided by 24,500 pay periods = \$14.68 per pay period),
21 which is in line with judgments reached in other PAGA cases. (See e.g. See e.g., Carrington, supra,
22 30 Cal.App.5th 504, 529 [affirming the trial court's reduction from the maximum penalty of \$50
23 per initial violation to only \$5]; *Thurman, supra*, at 203 Cal.App.4th at 1135–1136, [affirming trial
24 court's decision to reduce penalties by 30%.])

25 Given that this settlement is for \$359,679.00, Plaintiff believes this is an exceptional
26 settlement.

27 ///

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

1 As detailed fully in the Settlement, the settlement provides for Defendant to create a Gross
2 Settlement Amount of \$359,679.00. (Szamet Decl. ¶70; Ex. 1 at ¶3, §3.1.) From that fund, Plaintiff
3 requests an award of attorneys' fees for PAGA Counsel in the amount of \$119,893.00, or 33.33%
4 of the Gross Settlement Amount, and \$15,000 in reimbursement for litigation costs. (*Id.* Ex. 1 at
5 ¶3, §3.2.2.)

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

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

12 We join the overwhelming majority of federal and state courts in
13 holding that when class action litigation establishes a monetary fund
14 for the benefit of the class members, and the trial court in its
15 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.

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

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

22 (*Id.* at 573.)

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

1 members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th
2 563, 578.)

3 This doctrine rests on the understanding that attorneys should normally be paid by their
4 clients, and that unless attorneys' fees are paid out of the common fund, those who benefitted from
5 the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979)
6 23 Cal.3d 917, 943; *Save El Toro Ass'n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent
7 this unfair result, courts exercise their inherent equitable powers to assess attorneys' fees against
8 the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano*
9 *III*, 20 Cal.3d at p. 35.) "A court, in the exercise of its equitable discretion, may decree that those
10 receiving the benefit should contribute to the costs of its production." (*Save El Toro Assn., supra*,
11 98 Cal.App.3d at 548.) As this approach "better approximates the workings of the marketplace
12 than the lodestar approach," there is "a greater judicial willingness to evaluate a fee award as a
13 percentage of the recovery" in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82
14 Cal.App.4th 19, 31, 48.)

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

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

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

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

1 C. PAGA Counsel's Fee Request is Reasonable Under a Lodestar Crosscheck

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

10 **1. Requested Multiplier**

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

20 Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Szamet
21 Decl. ¶79.) PAGA Counsel have an aggregate lodestar in the amount of \$66,840.00 which
22 represents 82.2 hours of attorney work on this litigation from its inception through the date of this
23 filing of Plaintiff’s instant Motion, and 10 future hours. (*Id.*) As such, PAGA Counsel is asking
24 for a lodestar multiplier of 1.79. (Szamet Decl. ¶80.) Typically, the lodestar is merely the starting
25 point of the calculation of a reasonable fee, and courts often multiply the lodestar by a factor to
26 account for the risk of non-payment, delay in payment, the quality of work, and the novelty and
27 difficulty of the issues involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253; *Beasley v.*
28 *Wells Fargo Bank*, (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of*

1 *Supervisors*, (1997) 76 Cal.App.3d 24 1, 251.)

2 This case dealt with difficult legal and factual questions. (Szamet Decl. ¶81.) Significantly,
3 the risk attendant to the underlying claims in this matter was great considering Defendant's
4 defenses as discussed in detail above. (*Ibid.*) Were this case to proceed, Defendant would have a
5 strong incentive to litigate tenaciously. (*Ibid.*) There are genuine issues in dispute. (*Ibid.*)
6 Furthermore, PAGA Counsel was able to obtain close to the full value for this case. (Szamet Decl.
7 ¶82.)

8 As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades
9 of experience who diligently prepared and litigated this matter. (Szamet Decl. ¶83.) To achieve
10 the ultimate result in this case, PAGA Counsel had to incur substantial risk and expense, and were
11 precluded from taking other fee generating employment for 82.2 hours of attorney time. (Szamet
12 Decl. ¶84.) This matter had been handled purely on a contingency fee basis and PAGA Counsel
13 has advanced many thousands of dollars in costs while deferring all payment of fees, with no
14 guarantee that any of the fees incurred or costs advanced would ever be recovered and diverting
15 significant firm resources to prosecution of this matter. (Szamet Decl. ¶85.) PAGA Counsel
16 believe this is an exceptional result that has been well received by the PAGA Employees. (Szamet
17 Decl. ¶86.)

18 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF** 19 **COSTS**

20 In addition to their request for fees, PAGA Counsel further request reimbursement of the
21 reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this
22 litigation, in the amount of \$15,000.00. (Szamet Decl. ¶108.) To date, PAGA Counsel has incurred
23 \$17,582.43 in costs. (Szamet Decl. ¶109.) PAGA Counsel anticipates incurring an additional
24 \$600.00 in costs to file and serve this motion, but the Settlement provides for a reimbursement of
25 litigation costs of up to \$15,000.00. (Szamet Decl. ¶110.) As such, counsel is requesting a cost
26 reimbursement of \$15,000.00, as provided for by the Parties' Agreement. (Szamet Decl. ¶111.)

27 All of the requested costs are reasonable in amount and were necessarily incurred by PAGA
28 Counsel in prosecuting this litigation. (Szamet Decl. ¶112; Exhibit 2 [Cost Report].) Expenses in

1 this matter to date include costs for filing fees, research, mediation, and additional costs for the
2 prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Kelsey
3 M. Szamet. All of these costs have been incurred in the course of this litigation, and all costs
4 advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of
5 filing the present motion. (Szamet Decl. ¶113.)

6 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
7 advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court
8 should approve the request for reimbursement in the amount of \$15,000.00. (Szamet Decl. ¶114.)

9 **VIII. ENHANCEMENT TO PLAINTIFF**

10 The Settlement calls for an enhancement payment of \$5,000.00 to the named Plaintiff, to
11 be paid from the Gross Settlement Amount. (Szamet Decl. ¶115; Ex. 1 at ¶3.2.1.) Incentive awards
12 “are intended to compensate class representatives for work done on behalf of the class, to make up
13 for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize
14 their willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.* (9th
15 Cir. 2009) 563 F.3d 948, 958-59. “[I]t is established that named plaintiffs are eligible for
16 reasonable incentive payments to compensate them for the expense or risk they have incurred in
17 conferring a benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los*
18 *Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC*
19 (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

20 Here, the enhancement takes into consideration the time, effort, and expense incurred by
21 Plaintiff in coming forward to litigate this matter on behalf of the PAGA Employees. The time
22 spent by Carlos Barraza includes identifying competent counsel, providing information to PAGA
23 Counsel regarding Plaintiff’s relevant employment experiences, compiling documents, meeting
24 with PAGA Counsel frequently to discuss the status of the case and the theories of liability,
25 reviewing settlement documents, and making himself available for a full day of mediation. (Szamet
26 Decl. ¶116; Declaration of Carlos Barraza.)

27 PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl.
28 ¶117.) The enhancement takes into consideration the time, effort, risks, and expense incurred by

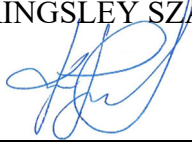
1 Plaintiff in coming forward to litigate this matter on behalf of the PAGA Employees. (Szamet
2 Decl. ¶118.) Accordingly, Plaintiff should be awarded the agreed-upon enhancement of \$5,000.

3 **IX. CONCLUSION**

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

8
9 DATED: January 8, 2025

KINGSLEY SZAMET & LY

10
11 By: 

Kelsey M. Szamet

12 Attorneys for Plaintiff CARLOS BARRAZA and all
13 aggrieved employees
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(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On January 8, 2025, 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:

RUTAN & TUCKER

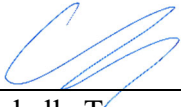
Peter Hering
phering@rutan.com
Adrianna A. Rubino
arubino@rutan.com
Vicky Huang
vhuang@rutan.com
18575 Jamboree Road, 9th Floor
Irvine, CA 92612

[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.govfa.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 January 8, 2025, at Woodland Hills, California.



Michelle Tanzer