Richard Kim (SBN 272184)
LAW OFFICES OF RICHARD KIM PC
6131 Orangethorpe Ave., Suite 370
Buena Park, CA 90620
Telephone: (714) 276-1122
Facsimile: (714) 276-1120
rkim@richkimlaw.com
Attorneys for Plaintiff
EFREN LOPEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

EFREN LOPEZ, individually and on behalf of all others of the public similarly situated Plaintiff, v. THE FISHEL COMPANY, a business entity, form unknown; and DOES 1 to 50, inclusive, Defendants.	Case No.: 30-2023-01305726-CU-OE-CXC Hon. Lon F. Hurwitz Dept. CX-103 **SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR APPROVAL OF SETTLEMENT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT OF 2004; MEMORANDUM OF POINTS AND AUTHORITIES** Filed: 02/03/2023 Dept: CX103 Judge: Hon. Lon Hurwitz **Motion:** Date: October 18, 2024 Time: 1:30 p.m. Dept: CX 103

I. INTRODUCTION

This supplemental brief is submitted by Plaintiff Efren Lopez ("Plaintiff") to obtain Court approval of the settlement reached by the parties after mediation of this wage and hour case brought under the Private Attorneys General Act of 2004, Labor Code section 2698, *et seq*. ("PAGA"). PAGA requires that the Court review and approve any settlement reached by the parties to resolve a claim made under PAGA. (See Labor Code section 2699(l)(2).) The proposed settlement will result in Defendant's payment of substantial penalties in the amount of $200,000, which represents a fair, reasonable, and adequate settlement that will serve the public interests promoted by PAGA. This supplemental briefing is submitted to address the issues that were identified by the Court in its August 23, 2024 Ruling.

II. PAGA SETTLEMENT

A. Notice to the LWDA

On January 20, 2023, the LWDA was given notice to the California Labor and Workforce Development Agency ("LWDA") seeking PAGA penalties for the following Labor Code violations:

1. Failure to compensate employees at the minimum wage and the prevailing wage in violation of *Cal. Labor Code* §§1197, 1182.12, 1194, 1194.2, 1197.1, and 1199, *et. seq.,* §1720, *et. seq.*, and *Cal. Code Regs* §11160(4),

2. Failure to timely pay wages at the appropriate rate of pay in violation of *Cal. Labor Code* §§ 510, 511, 558, 1182, 1182.12, 1194, 1194.2, 1198, 204.3, & 1194; 8 *Cal Code Regs* §11160(3), *et. seq.*

3. Failure to provide meal periods as mandated by *Cal. Labor Code* §§226.7 and 512, and 8 *Cal. Code Regs* §11160(10), *et. seq.*

4. Failure to provide rest periods as mandated by *Cal. Labor Code* §226.7 and 8 *Cal. Code Regs* §11160(11), et. seq.

5. Failure to provide employee adequate supply of potable water, soap, or other suitable cleansing agent and single use towels for hand washing in violation of 8 *Cal. Code Regs* §11160(10)(D).

6. Failure to compensate for missed rest periods at his regular rate of pay as mandated by *Cal. Labor Code* §226.7 and 8 *Cal. Code Regs* §11160(11), et. seq.

7. Failure to provide prompt payment of wages to employees upon termination and resignation in violation of *Cal. Labor Code* §§201, 202, and 203

8. Failure to provide accurate itemized wage statements to employees in violation of *Cal. Labor Code* §§226 and 226.3 and 8 *Cal. Code Regs* §11160(6), et. seq.

9. Failure to comply with payroll reporting requirements for public works projects in violation of *Cal. Labor Code* §1776 and 8 *Cal. Code Regs* §11160(6), et. seq.

10. Failure to Reimburse for Work-Related Expenses in violation of *Cal. Labor Code* §2802, *et. seq.* and 8 *Cal. Code Regs* §11160(8), et. seq.

(*Kim Supplemental Decl.*, ¶3, Ex. A).

Plaintiff filed his Complaint in this matter against Defendant the Fishel Company ("Defendant") on February 3, 2023 and filed an Amended Company to include PAGA allegations on May 22, 2023. (*Kim Supplemental Decl.*, ¶4, Ex. B, C). Plaintiff's Complaint and Amended Complaint included class action allegations. (Id.) On August 23, 2023, the Amended Complaint with the PAGA allegations were uploaded on the LWDA website. (*Kim Supplemental Decl.*, ¶5). On May 4, 2024, the LWDA received notice of the settlement, when a copy of the PAGA settlement agreement was uploaded on the LWDA website. (*Kim Supplemental Decl.*, ¶14). To date, the LWDA has not objected to the settlement. On October 4, 2024, a copy of the initial Motion for PAGA approval and supporting documents were uploaded onto the LWDA PAGA Website. (*Kim Supplemental Decl.*, ¶20, Ex. K). On October 4, 2024, a copy of the Supplemental Brief in Support of Motion for PAGA Approval and supporting documents were uploaded onto the LWDA PAGA website. (*Kim Supplemental Decl.*, ¶21, Ex. L).

B. <u>"Rounding" as Evidence of Unpaid Overtime, Unpaid Wages, Meal Break Violations</u>

Plaintiff asserted claims for unpaid overtime, unpaid wages, and meal break violations. The off the clock work claims are in the context of the unpaid overtime and unpaid wages claims. Defendant contends that it does not have an official rounding policy in place and Plaintiff was not aware of any official rounding policy. Any reference to rounding was from Plaintiff's counsel's review of the information and documents provided to Plaintiff. Plaintiff, when reviewing the time records, time sheets, and other documents, discovered that 90% of the punch in and punch outs were on the hour or half hour. (*Kim Supplemental Decl.*, ¶8-10). Further, all of the meal breaks were exactly 30 minutes. (*Id.*) This corroborated Plaintiff's contention that he had to work through lunch periods and that the time-cards were altered to reflect compliance with the labor code. (*Id.*) Based upon this, it appeared that Plaintiff and aggrieved employees were not paid their wages, overtime, and were not provided their meal breaks. Defendant contends that there was no official rounding policy and Plaintiff was not aware of one. Thus, Plaintiff is unsure if the time was rounded up or down and does not believe there was an official rounding policy, but the rounding likely occurred at the beginning of the shifts, at meal breaks, and at the end of shifts. More than an actual rounding policy, Plaintiff identified the "rounding" in the time records to the half hour and hour for each punch in and punch out as evidence of Labor Code violations and PAGA penalties for Unpaid Wages, Unpaid Overtime, and Failure to Provide Meal and Rest Breaks.

C. Aggrieved Employees, Pay Periods, and Awards to Employees

The parties agreed to a PAGA Period from January 20, 2022 to July 6, 2024. The gross settlement amount is $200,000.00 and Plaintiff's Counsel will reduce his request for attorney's fees from 40% or $80,000.00 to 33.33% or $66,666.67. Plaintiff's will request reimbursement for costs in the amount of $21,395.00. (*Kim Supplemental Decl.*, ¶16, Ex. G). Further, Plaintiff's Counsel will seek a $5,000.00 enhancement award for his assistance in this claim. The administrator will require a cost not to exceed $10,000.00 for administering the settlement.

If the Court approves these provisions, the Plaintiff estimates that the remainder will be $101,938.33, which will be distributed to the aggrieved employees and the LWDA pursuant to Labor Code section 2699(i), with 75 percent going to the LWDA and 25 percent going to the aggrieved employees. (*Kim Supplemental Decl.*, ¶14(d).) As a result, of this estimated $101,938.33, 75% ($76,453.75) will be made payable to the LWDA, and 25% ($25,484.58) will be apportioned to Defendant's current and former employees on a pro rata basis based on the number of pay periods worked during the PAGA period of January 20, 2022 to July 6, 2024. (*Kim Supplemental Decl.*, ¶15.)

/ / /

D. <u>Service Award to Plaintiff Lopez</u>

Plaintiff was employed by Defendant, a company that builds and maintains power, telecommunications, electric, and gas lines, as a general laborer building and constructing lines. This Action alleges that Defendant violated provisions in the Labor Code with respect to Plaintiff and other employees by failing to pay the minimum wage (Lab. Code §§ 1182, 1182.12, 1194, 1194.2, 1197.1, 1199 *et seq*., 1720; Cal. Code Regs., tit. 8, § 11160(4)), failing to pay overtime and double time compensation (Lab. Code § 510, 1194, 1198; Cal. Code Regs., tit. 8, § 11160(3)), failing to provide meal and rest breaks (Lab. Code § 226.7, 512; Cal. Code Regs., tit. 8, § 11160(10-11), failing to provide accurate itemized wage statements (Lab. Code § 226, 226.3; Cal. Code Regs., tit. 8, § 11160(6)), failing to pay all compensation owed upon separation (Lab. Code § 203), failing to reimburse work-related expenses (Lab. Code § 2802, *et seq*.; Cal. Code Regs., tit. 8, § 11160(8), *et seq.*), and failing to furnish payroll records (Lab. Code §§ 226(b), 226(c), 226(f), 1198.5, 1198.5(a), 1198.5(b), and 1198.5(k)). (See Declaration of Richard Kim (the "Kim Decl."), ¶ 4.)

E. Revisions in the Settlement Agreement and Aggrieved Employee Notice

On August 23, 2024, the Court in its order requested clarification on numerous issues in the settlement agreement. Pursuant to the Court order, parties worked together to revise the settlement agreement and on May 3, 2024, Parties signed a revised settlement agreement for the PAGA claims. The parties made the following revisions to the settlement agreement:

a. Parties met and conferred on the end date of the PAGA Period and decided on July 6, 2024 as the end of the PAGA Period. This date was determined by Parties' negotiated agreement at the mediation that Defendant may elect to cut off the PAGA period at a certain pay period amount (5,222) or trigger a proportional percentage increase in the Gross Settlement Amount. This is reflected in Section 1.21 of the settlement agreement. (*Kim Supplemental Decl.*, ¶18, Ex. E).

b. Parties negotiated a potential service award for Plaintiff for the PAGA claims. This was inadvertently left out of the settlement agreement. Parties included it in the revised settlement agreement in section 3.2.2. (*Kim Supplemental Decl.*, ¶18, Ex. E).

c. Parties revised the settlement agreement to take out the PAGA Penalties definition (section 1.23 of the original settlement agreement) because it is the same thing as Net Settlement Amount and parties will use the term Net Settlement Amount where they intended to use PAGA Penalties. (*Kim Supplemental Decl.*, ¶18, Ex. E).

d. Parties met and conferred regarding Plaintiff's Counsel's request for 40% of the Gross Settlement Amount. Plaintiff's Counsel agreed to reduce his attorney fee request to 33.33%. This is reflected in Section 3.2.1 of the settlement agreement. (*Kim Supplemental Decl.*, ¶18, Ex. E).

e. Parties included in their settlement agreement that the administrator will post the operative complaint, notice packet, and final order and judgment on its website for at least 90 days after approval in Section 7.5. (*Kim Supplemental Decl.*, ¶18, Ex. E).

f. Parties included in the settlement agreement that the Court will have continuing jurisdiction pursuant to *CCP* §664.6. (*Kim Supplemental Decl.*, ¶18, Ex. E).

(*Kim Supplemental Declaration*, ¶9, ¶10, Ex. F).

Further, a Notice to Aggrieved Employees is attached to the Settlement Agreement as Exhibit A. (*Kim Supplemental Declaration*, ¶11, Ex. G). In the Notice to Aggrieved Employees, the following changes were made:

1. The PAGA period end date was updated to July 6, 2024. This is reflected in the heading and in Section 4.
2. In Section 5, the phrase "Current Employees will not be retaliated against for cashing this check" was added.
3. In section 6, the phrase, "No non-PAGA individual California wage and hour claims are released by this settlement" was added.

4. In Section 8, the phrase "A complete copy of the operative Complaint, this Notice, and the Court's order granting final approval of the Settlement and Judgment are available at www.ilymgroup.com" was added.
5. Also, in Section 8, the settlement administrator's contact information was added.

III. ARGUMENT

A. The Maximum Exposure Amount Should be the Unstacked Total of $515,100.00

Cal. Labor Code §2699(g)(1) states that "an aggrieved employee may recover *the* civil penalty described in subdivision (f)…on behalf of himself or herself and other current or former employees against whom *one or more of the alleged violations* was committed" (emphasis added). Further, this year new bills, the PAGA reform bills (AB 2288 and SB92) were passed. These bills do not permit stacking for derivative violations involving waiting time penalties, frequency of pay violations that are neither willful nor intentional.

Here, Plaintiff's initial valuation offered of $2,345,047.00 was premised on the six PAGA violations alleged (1. Meal Break Violations, 2. Rest Break Violations, 3. Failure to Pay Overtime due to Rounding, 4. Failure to pay Wages at the Prevailing Wage, 5. Wage statement violations, and Waiting Time Penalties). These PAGA violations derive from the same violation of unpaid wages due to rounding. Specifically, Plaintiff and Aggrieved Employees were not paid for all of their meal and rest breaks and subsequently did not receive all of their overtime.

As the Court is well aware, however, there no controlling case law regarding the assessment of multiple PAGA penalties in the same pay period ("stacking"). Without stacking penalties, the maximum exposure is reduced significantly to $515,100.00. In order to properly apply discounts to its case and evaluate settlement, Plaintiff had to work under presumption that there was significant risk that penalties would not be stacked, and thus that a maximum valuation of this case fell significantly closer to the unstacked maximum exposure of $515,100.00. Even before other important discounts are applied, the $200,000 settlement represents nearly 40% of the unstacked maximum exposure in this case.

B. Significant Discounts Were Appropriate to Account for the Difficulty of Proving Violations on a Collective Bases.

As Plaintiff explained in its motion, the claims in this action are premised on the fact that each of the time-cards had clock in and clock outs to the half hour or to the full hour. Thus, the claims are based upon unpaid overtime, unpaid wages, and meal break violations due to off the clock work. And while Plaintiff maintains the veracity of those claims, they do pose significant hurdles in the context of a representative PAGA claim. Although, Plaintiff can point to the time records to show that there were in fact violations, there is a challenge in the ability to offer representative evidence of the particular violations that stems from the lack of documentation of off-the-clock work that differs from claims where violations may otherwise be documented in a way that is broadly applicable to an entire group.

Although, the Court may not strike the PAGA claim altogether on manageability grounds, they are not precluded "from limiting the types of evidence a plaintiff may present or using other tools to assure that a PAGA claim can be effectively tried." *Estrada v. Royalty Carpet Mills, Inc.*, 15 Cal.5th 582, 619 (2024); See *Estrada, supra,* 76 Cal.App.5th at p. 713 ("courts may, where appropriate and within reason, limit witness testimony and other forms of evidence when determining the number of violations that occurred and the amount of penalties to assess"). Manageability of the PAGA action becomes a concern when "every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the "class judgment"' on common issues." *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28 (quoting *City of San Jose v. Sup. Ct.* (1974) 12 Cal.3d 447, 459). This includes individual issues arising from affirmative defenses. *Duran*, 59 Cal.4th at 29 ("In wage and hour cases where a party seeks class certification based on allegations that the employer consistently imposed a uniform policy or de facto practice on class members, the party must still demonstrate that the illegal effects of this conduct can be proven efficiently and manageably within a class setting." (citing *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033)). Relevant here, an employer asserting that an employee voluntarily chose to take a late, short, or no break at all is a separate affirmative defense that must be pled and proved. *Donahue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 74 (citing with approval *Brinker*, 53 Cal.4th at 1052-53 (Werdegar, J., concurring)). Further, courts have approved PAGA settlements for only a fraction of the potential PAGA civil penalties, particularly where counsel have presented compelling reasons why recovery of penalties was unlikely. (See, e.g., *Viceral v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11, 2016, 2016 WL 5907869 at *9 [preliminarily approving class action settlement that included a PAGA set-aside of just 0.15 percent of the PAGA claim's full potential value, where "Plaintiffs face[d] a substantial risk of recovering nothing on either the class or PAGA claims"]; *Cotter v. Lyft, Inc.* (N.D. Cal. 2016) 193 F.Supp.3d 1030, 1037 [preliminarily approving class action settlement allocating a PAGA set-aside worth a fraction of the PAGA claim's potential value, where the defendant's obligations were "genuinely unclear" and there was no evidence the defendant acted deliberately or negligently failed to learn about its obligations]; See *Magadia v. Wal-Mart Associates, Inc.*, (2019) F.Supp.3d 1058 [Court reduced the PAGA penalties by 67% based on the potential risk]; *Bernstein v. Virgin America, Inc.*, (2019) 365 F.Supp.3d. 980 [the Court reduced penalties by 25%].

Plaintiff's PAGA penalties are based on claims that the time sheets, schedules, and other documentation do not accurately reflect all hours worked. There is no way to know the exact number of employees who were not paid overtime wages or regular wages or not provided their full lunch breaks. Defendant asserts that it maintains compliant policies for the payment of minimum wages, overtime wages, the tracking of time, and the provision of meal periods and rest breaks. In light of these compliant policies, Defendant asserts that no violations occurred, and that Plaintiff would be unable to prove any alleged violations for each allegedly aggrieved employee and in each pay period as he is required to do. *See, e.g.*, *Estrada v. Royalty Carpet Mills, Inc.*, 15 Cal. 5th 582, 619 (2024) (explaining that a plaintiff has the burden of proof on a PAGA claim and must establish each violation). Therefore, in order to prove PAGA violations and penalties, each employee's testimony as to the off the clock work and inaccurate time-cards would be required.

/ / /

1. Rest Breaks are Inherently Difficult to Prove

There is no requirement that employers need to track or document rest breaks. In this case, Defendant did not document or track rest breaks. Defendant cites its meal and rest break policy and asserts that all employees are permitted to take rest breaks. In order to prove that Defendant failed to provide rest breaks, Plaintiff would need testimony from numerous employees that they were not permitted to take their rest breaks. This creates a similar issue of proof as exists for Plaintiff's other off-the-clock theories. As held by the California Supreme Court in the *Estrada* decision, Plaintiff may only collect PAGA penalties that he is able to prove. As such, absent a mechanism for representative proof, Plaintiff may be limited to the employees he is ultimately able to get to testify at trial. Moreover, subjecting these employees to cross-examination may further underscore the individualized nature of their work experience—again making it more challenging to prove claims on behalf of others. In a case where Plaintiff is seeking to represent 418 different employes, there is significant risk that he would be unable to prove violations for the vast majority of them. This merited a significant discount when evaluating the settlement value of this claim.

2. Wage Statement Violations

Here, it would be difficult for the Aggrieved employees to prove wage statement violations. The wage statements accurately reflect what the employee was paid, permitting him to determine whether an error was made. *E.g.*, *Betancourt v. OS Rest. Servs., LLC*, 49 Cal. App. 5th 240, 248 (2020), *reh'g denied* (May 18, 2020) ("A plaintiff is not entitled to recover penalties for waiting time and wage statement violations based on claims of nonprovision of rest or meal periods, and likewise cannot obtain attorney fees based on those claims."). Defendant claims that they did not have any labor code violations and that there were no intentional violations. Plaintiff and aggrieved employees would have to prove that the violations were knowing, intentional, and willfull since "penalties can only be recovered under Labor Code §§ 203 and 226(e) for knowing, intentional, and willful violations, not mere recklessness." *Pedroza v. PetSmart, Inc.*, 2012 WL 9506073. *5 (C.D. Cal. 2012). (emphasis added). In this regard, "[t]he fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." 8 C.C.R. § 13520 (2006) (emphasis added.) Further, whether this good faith question is cast as an element of the claim, or a defense to it, it renders these claims improper for collective treatment. *See In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 268 F.R.D. 604, 612 (N.D. Cal. 2010) ("if the adjudication of a defense...would necessitate individual inquiries, and those inquiries would predominate over inquiries into common questions, certification should be denied.")

3. Discounts to the Maximum PAGA Penalty Exposure

Thus, if the PAGA claims were to proceed forward, there was a significant risk that the Court would have limited the witness testimonies that were required to prove this type of case. As Due Process, and the *Estrada* decision hold that Plaintiff can only collect PAGA penalties that he can specifically prove, these barriers to representative evidence and testimony created a significant likelihood that Plaintiff would only be able to prove a small fraction of the violations across the PAGA period. This merited a significant discount to the total settlement value of this action. A 65% discount in the total settlement value for meal break violations, unpaid wages/unpaid overtime due to rounding, unpaid prevailing wages is appropriate, and waiting time penalties are appropriate. Further, for the reasons listed above, higher discount of 85% for wage statement violations and for rest break violations are appropriate. This would put the total overall settlement value of **stacked PAGA penalties** at $571,568.00. (*Kim Supplemental Decl.*, ¶36-37). The unstacked PAGA penalty would be maximum $181,965.00. (*Id.*)

Thus, based on the above, the proposed of $200,000.00 is fair and reasonable based upon that range.

C. Payment of Attorney Fees and Costs to Plaintiff's Counsel and Service Award to Plaintiff

Plaintiff's counsel spent significant time and resources in this lawsuit. (*Kim Supplemental Decl.*, ¶47). Despite this, after some consideration Plaintiff's counsel is willing to seek a reduced attorney fee of 33.33% of the Gross Settlement Amount. The new amount is reflected in the revised settlement agreement. (*Kim Supplemental Decl.*, ¶18, Ex. E, Ex. F). Plaintiff's counsel seeks $21,395.00 for reimbursement for costs expended in this action. (*Kim*

Supplemental Decl., ¶23, Ex. I). Next, Plaintiff spent significant time and resources to bring this PAGA action. Plaintiff also brought this PAGA action at significant risk to his professional reputation. Plaintiff spent significant time meeting with Plaintiff's counsel regarding the claims of this case, reviewing documents provided in this case, including the arbitration agreement, and documents provided by Defendant. Thus, the service award request is appropriate.

V. CONCLUSION

For the foregoing reasons, the Plaintiff requests that the Court approve the proposed settlement and adopt the Proposed Order concurrently filed with this motion.

Dated: October 4, 2024

LAW OFFICES OF RICHARD KIM PC

By: *Richard Kim*
RICHARD KIM
Attorneys for Plaintiff,
EFREN LOPEZ

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the county of Orange, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 6131 Orangethorpe Ave., Suite 370, Buena Park, CA 90620

Supplemental Brief in Support of Motion for PAGA Approval; Declaration of Richard Kim

On the following person(s) in this action:

LITTLER MENDELSON, P.C. 18565 Jamboree Road Suite 800 Irvine, California 92612 P. Dustin Bodaghi, Esq. Email: dbodaghi@littler.com;

[] BY MAIL: By sealing the envelope and placing it for collection and mailing with postage fully prepared in accordance with ordinary business practices.

[x] BY EMAIL: Based on a Court order or an agreement of the parties to accept service by email or electronic transmission, I caused the document to be sent from email address rkim@richkimlaw.com to the persons at the email addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[] BY FACSIMILE: By transmitting the document listed above by facsimile to the offices of the persons listed above, at the above facsimile number, and having received confirmation that said documents were transmitted to said facsimile number.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: October 4, 2024

/s/ Richard Kim
RICHARD KIM