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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

RONNIE WALDON, JR., an individual, on
behalf of himself and other similarly situated,

PLAINTIFF,

v.

NOBU SAN DIEGO, LLC; and DOES 1 thru
50, inclusive,

DEFENDANTS.

Case No. 37-2023-00001244-CU-OE-CTL

[Case Assigned for All Purposes to Hon.
Katherine Bacal in Dept. C-69]

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

*[Filed concurrently with Declarations of Liane
Katzenstein Ly, Sean Hartranft of Apex Claims
Administration, and Plaintiff Ronnie Waldon
in Support of Plaintiff's Motion for Approval
of Representative Action Settlement;
[Proposed] Order, and [Proposed] Judgment]*

Date: May 10, 2024
Time: 11:00 AM
Dept.: C-69

Complaint Filed: January 5, 2023
Trial Date: June 14, 2024

Reservation No. 3059300

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

2 **PLEASE TAKE NOTICE** that on May 10, 2024 at 11:00 AM in Department C-69 of the
3 above-entitled court, Plaintiff RONNIE WALDON, JR. will move the Court for an Order Granting
4 Approval of Representative Action Settlement.

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

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

12
13 DATED: November 29, 2023

KINGSLEY & KINGSLEY, APC

14
15 By: 

16 Liane Katzenstein Ly
17 Attorneys for Plaintiff RONNIE WALDON, JR. and
18 All Aggrieved Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **II. INTRODUCTION**

3 Plaintiff Ronnie Waldon, Jr. (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiff and
5 Defendant NOBU SAN DIEGO, LLC (“Defendant”) (collectively, the “Parties”) have reached a
6 proposed settlement documented in the PAGA Settlement Agreement (“Settlement” or
7 “Agreement”), attached to the concurrently-filed declaration of Liane Katzenstein Ly.¹

8 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699,
9 et seq. (“PAGA”). The Gross Settlement Amount is \$110,000.00. After deduction of attorney’s
10 fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration
11 costs as discussed in the Agreement, the remaining amount to be divided between the Labor and
12 Workforce Development Agency (“LWDA”) and the aggrieved employees as required by Labor
13 Code section 2699(i) is \$47,833.33, with \$35,875.00 (or 75%) going to the LWDA and
14 \$11,958.33 (or 25%) distributed to the aggrieved employees.²

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

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

21 A. Litigation Overview and Procedural History

22 On January 5, 2023, and in compliance with Labor Code § 2699.3(a)(1), written notice to
23 Defendant and the Labor and Workforce Development Agency (“LWDA”) was provided seeking
24 civil penalties under PAGA for violation of Labor Code §§ 201, 202, 203, 226(a), 226.7, 510, 512,

25

1 The Parties also entered into a separate confidential settlement for Plaintiff’s individual claims.

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

28 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.

1 1194, 1194.2, 1199, and 2802. (Declaration of Liane Katzenstein Ly (“Ly Decl.”) ¶5.)

2 On January 5, 2023, Plaintiff Ronnie Waldon, Jr. filed a putative class action complaint
3 against Defendant in in San Diego County Superior Court, Case No. 37-2023-00001244-CU- OE-
4 CTL, entitled *RONNIE WALDRON JR., an individual, on behalf of himself and others similarly*
5 *situated v. NOBU SAN DIEGO, LLC; and DOES 1 thru 50, inclusive.* (the “Action”, alleging
6 Defendant’s violation of causes of action or: 1) Failure to Pay Wages and/or Overtime Under Labor
7 Code §§ 510, 1194, 1194.2, 1199; 2) Failure to Provide Meal Breaks Pursuant to Labor Code §§
8 226.7 and 512; 3) Failure to Provide Rest Breaks Pursuant to Labor Code § 226.7; 4) Failure to
9 Reimburse Expenses Pursuant to Labor Code § 2802; 5) Violation of Labor Code 226(a); 6)
10 Penalties Pursuant to Labor Code § 203; and 7) Violation of Business Professions Code § 17200.
11 (Ly Decl. ¶6.)

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

16 On March 13, 2023, Plaintiff filed a First Amended Class and Representative Action
17 Complaint (“FAC”), adding a cause of action for penalties pursuant to Labor Code §2699, et seq.
18 based upon the alleged Labor Code violations enumerated in his original complaint. (Ly Decl. ¶
19 8.) After the filing of the FAC and meeting and conferring with Defendant’s Counsel, Plaintiff’s
20 Counsel was provided with a copy of an arbitration agreement signed by Plaintiff that includes a
21 class action waiver. (Ly Decl. ¶ 9.)

22 On May 5, 2023, Plaintiff filed a Second Amended Representative Action Complaint,
23 removing the class allegations and leaving a single cause of action for penalties pursuant to Labor
24 Code §2699, et seq., based upon the alleged Labor Code violations enumerated in the operative
25 complaint. (Ly Decl. ¶10.) The Second Amended Representative Action Complaint is the operative
26 complaint in the Action (the “Operative Complaint”). (*Id.*)

27 B. The Discovery Process and Mediation

28 The Parties engaged in extensive informal pre-mediation discovery. Prior to mediation,

1 Defendant produced sample time and pay data for the Aggrieved Employees, as well as Plaintiff's
2 personnel records. (Ly Decl. ¶ 11.) Based on Defendant's records, the data reveals that there are an
3 estimated 129 Aggrieved Employees (including Plaintiff) who worked a total of 2,483 PAGA Pay
4 Periods at issue. (Ly Decl. ¶ 12.)

5 On September 12, 2023, the Parties participated in an all-day mediation presided over by
6 experienced mediator Steven Pearl, which led to this formal PAGA Settlement Agreement that is
7 subject to the approval of the Court. (Ly Decl. ¶ 13.)

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

13 **IV. PAGA ACTIONS AND THE REQUIREMENTS**

14 **A. The PAGA Statutory Scheme**

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

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

§ 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 (holding “PAGA plaintiffs do not have property rights in their cases.”). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties recovered; thus, recoveries are principally for the state and only secondarily for aggrieved employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a PAGA claim, he or she is properly conceived of as a private attorney general prosecuting violations of California’s labor laws on behalf of the state.

An employee may commence a PAGA action by fulfilling the requirements of Cal. Lab. Code § 2699.3 (a)(1), which simply states:

“The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.”

Lab. Code § 2699.3 (a)(1)

As explained above, Plaintiff has complied with the notice requirements and has properly pled a PAGA cause of action.

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,

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.

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 denies 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 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.

V. THE SETTLEMENT

Defendant will pay the total sum of \$110,000.00 in full and final settlement of the PAGA claims alleged. (Ly Decl. ¶15., Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount	\$110,000.00
PAGA Counsel Fees Payment	\$36,666.67
PAGA Counsel Litigation Expenses Payment	\$13,500.00 ⁵
Administrator Expenses Payment	\$7,000.00
Enhancement Payment	\$5,000.00
PAGA Penalties	\$47,833.33 (\$35,875.00 to the LWDA; \$11,958.33 to Aggrieved Employees)

(Ly Decl. ¶16., Exhibit 1, ¶¶3.1-3.2.)

Each aggrieved employee shall receive a pro-rata portion of the remaining amount in PAGA

⁵ The Agreement provided for counsel to receive cost reimbursement up to \$13,500.00. However, counsel’s final costs come to \$11,174.21. (Ly Decl. ¶17, Ex. 5) The extra \$2325.79 will remain in the net settlement fund, causing the net amount for distribution to the LWDA and Aggrieved Employees to be slightly higher than the \$47,833.33 contemplated in the settlement agreement. (See Ly Decl., Ex. 1 ¶3.2.1)

penalties by dividing the amount of the Aggrieved Employees’ 25% share of PAGA Penalties by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period⁶, and then multiplying the result by each Aggrieved Employee’s PAGA Period Pay Periods. Ly Decl. ¶18., Exhibit 1, ¶3.2.4.1.)

For settlement purposes, the Aggrieved Employees are defined as “all non-exempt employees who are employed or have been employed by NOBU SAN DIEGO, LLC, in the State of California who worked one or more pay periods during the Release Period.” (Ly Decl. ¶20., Exhibit 1, ¶1.4.)

VI. ARGUMENT

A. The Court Should Approve the Agreement

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

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

To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation and discount taken follows. (Ly Decl. ¶21.) Plaintiff believed that Defendant may persuasively argue that the Court should exercise its discretion to significantly reduce or altogether waive any penalties under PAGA. (Ly Decl. ¶22.) The court in a PAGA action has the same discretion “to assess a civil penalty” that the Labor Commissioner would have, as well as complete discretion to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” (Labor Code § 2699(e)(1) and (e)(2)).

⁶ The PAGA Period or Release Period means the period from January 5, 2022 to September 12, 2023, (Ly Decl. ¶19, Exhibit 1, ¶1.20)

PAGA Counsel anticipated that, at trial, Counsel for Defendant could make a potentially persuasive argument that Defendant: (1) all Aggrieved Employees were properly paid and/or reimbursed in accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate Aggrieved Employees was the result of inadvertence and clerical error; (2) all Aggrieved Employees were provided with the opportunity to take meal and rest breaks in compliance with California law; (3) until this Action was filed, no employees had complaints about any alleged failure to pay wages, provide meal and/or rest breaks, reimburse expenses, issue accurate itemized wage statements; (4) none of Defendant’s employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff’s allegations. (Ly Decl. ¶23.) All of which, Counsel for Defendant would argue, should mitigate in factor of significantly reducing or waiving any PAGA penalties. (*Id.*) While Plaintiff disagrees that this analysis is legally correct or persuasive, PAGA Counsel had to consider the foregoing facts and arguments and how they might impact any judgment ultimately awarded to Aggrieved Employees if the Court were persuaded by them. (Ly Decl. ¶24.)

1. The Risks Associated with the Wages/Overtime Claim

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

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

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

8 An employer that requires its employees to work minutes off the clock on a regular
9 basis or as a regular feature of the job may not evade the obligation to compensate
10 the employee for that time by invoking the de minimis doctrine. As the facts here
11 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.

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

13 Here, Plaintiff and the aggrieved employees were not properly compensated for all hours
14 worked. (Ly Decl. ¶25.) Plaintiff and the aggrieved employees were required to routinely work
15 “off the clock” and performed compensable activities before and after each working shift for
16 which no pay was provided. (Ly Decl. ¶26.) On a regular and consistent basis, Plaintiff and the
17 aggrieved employees were required to arrive 15-30 minutes before their scheduled start time to
18 complete COVID-19 screenings. (Ly Decl. ¶27.) Nobu maintained “Wellness and Safety
19 Guidelines” that required Plaintiff and the aggrieved employees to: go to a designated area to be
20 screened by a manager; have their temperature taken; asked questions about whether they were
21 experiencing COVID-19 symptoms; wash their hands for at least twenty seconds; and change
22 into uniform if required. (*Id.*) All of these screening tasks were performed off the clock and prior
23 to clocking in for their shifts. (*Id.*) Moreover, Defendant also required that Plaintiff and the
24 aggrieved employees use their personal cell phones to complete mandatory COVID-19
25 screenings before their scheduled start time. (Ly Decl. ¶28.) Each phone call took approximately
26 five minutes. (*Id.*) Plaintiff and the aggrieved employees were not compensated for the time
27 spent on these activities. (*Id.*)
28

1 By their policy of requiring Plaintiff and the aggrieved employees to work without being
2 paid all wages at their appropriate regular rate of pay and to work in excess of eight (8) hours in
3 a workday and/or forty (40) hours in a workweek without compensating them at the rate of one-
4 half (1 ½) their regular rate of pay, Defendant willfully violated the provisions of Labor Code §§
5 510, 1194, 1194.2, and 1199, as well as its own written policies. Defendant therefore owes
6 penalties under PAGA. Defendant disputes this off the clock time and argues that all employees
7 were paid for all hours worked. (Ly Decl. ¶29.)

8 **2. The Risks Associated with the Meal Period Claim**

9 Under California Labor Code section 512 and IWC Wage Order No. 5, no employer shall
10 employ any person for a work period of more than five hours without providing a meal period of
11 not less than thirty minutes.

12 Here, Plaintiff and the aggrieved employees consistently worked shifts over five (5)
13 hours. (Ly Decl. ¶30.) Defendant maintained a written policy for meal and rest periods but
14 violated its own policies. (Ly Decl. ¶31.) Defendant required that all hourly employees to take
15 their meal periods between 4pm to 5pm before the restaurant opened for evening dining. (*Id.*)

16 Additionally, Defendant has had a consistent policy of failing to pay Plaintiff and the
17 aggrieved employees one (1) hour of pay at the employees' regular rate of compensation for each
18 workday that the compliant meal period was not provided. (Ly Decl. ¶32.) On July 15, 2021, in
19 *Ferra v. Loews Hollywood Hotel, LLC*, the California Supreme Court set forth the formula for
20 calculating the one extra hour of bonus pay that employees are owed if an employer fails to
21 provide a compliant meal period or rest break. (*Id.*) Specifically, the Court held that those bonus
22 payments must include the hourly value of any nondiscretionary earnings (such as a
23 nondiscretionary bonuses, commissions, etc.), and cannot simply be paid at an employee's base
24 hourly rate. (*Id.*) Here, when meal periods are provided, Defendant has had a consistent policy of
25 paying meal period premiums at the base rate and not the appropriate blended rate in violation of
26 Labor Code §§ 226.7 and 512. (Ly Decl. ¶33.) Thus, Defendant failed to provide lawful meal
27 periods and pay meal premiums out at the proper rate. Defendant therefore owes penalties.

28 Defendant argued that the employees did receive their meal periods and presented evidence

1 that other employees would testify to that fact. (Ly Decl. ¶34.) Additionally, Defendant
2 maintained valid meal and rest period policies. (Ly Decl. ¶35.) This presented a risk on the meal
3 period claim that Plaintiff considered when evaluating this settlement. (Ly Decl. ¶36.)

4 **3. The Risks Associated with the Rest Period Claim**

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

9 Employers must authorize and permit a net ten-minute paid rest period for every four
10 hours, or major fraction thereof, of work for its employees. If an employer does not, then the
11 employer must pay the employee one hour of pay at the employee's regular rate of pay for each
12 workday that the rest period is not provided. (Cal. Code Regs., tit. 8, § 11050, subd. 12(B).)

13 Here, Defendant failed to maintain a lawful procedure of providing rest breaks to Plaintiff
14 and the aggrieved employees. (Ly Decl. ¶37.) Defendant maintained a written policy governing
15 rest breaks, but the policy states that rest breaks will only be given "as much as practicable" in
16 the "middle" of each work period. (Ly Decl. ¶38.) Defendant failed to provide Plaintiff and the
17 aggrieved employees with uninterrupted rest breaks of not less than ten (10) minutes as required
18 by the Labor Code during the relevant time period and did not ensure it occurred within the first
19 3.5 hours of an employee's shift. (Ly Decl. ¶39.)

20 Defendant also did not pay rest break premiums even after it began providing some rest
21 breaks. (Ly Decl. ¶40.) Further, Plaintiff and the aggrieved employees were not compensated
22 with one (1) hour of wages for each compliant rest period as required by Labor Code § 226.7.
23 (Ly Decl. ¶41.)

24 Defendant again raised the defense that employees received their rest breaks and presented
25 evidence that employees would testify as such. (Ly Decl. ¶42.) Given that the rest period policy
26 was accurate, Plaintiff considered this a viable risk. (Ly Decl. ¶43.)

27 **4. The Risks Associated with the Reimbursement Claim**

28 Labor Code section 2802 provides that an employer must "indemnify his or her employee

1 for all necessary expenditures or losses incurred by the employee in direct consequence of the
2 discharge of his or her duties” (Lab. Code, § 2802, subd. (a).)

3 On a regular and consistent basis, Defendant has failed to reimburse Plaintiff and the
4 aggrieved employees the cost of using their personal cell phones to complete mandatory
5 COVID-19 screenings for business related purposes. (Ly Decl. ¶44.) These personal cell phones
6 were a necessary part of Plaintiff and the aggrieved employees’ job duties because if they did not
7 complete the COVID-19 screenings over the phone, they could not commence their scheduled
8 shift. (Ly Decl. ¶45.) These cell phones were not provided by Defendant, and Defendant failed to
9 reimburse Plaintiff and the aggrieved employees for the costs associated with using these
10 personal cell phones for business related purposes. (Ly Decl. ¶46.) Additionally, Plaintiff was
11 required to download an app to view his work schedule, as well as for payroll purposes. (Ly
12 Decl. ¶47.) To Plaintiff’s knowledge, Defendant did not maintain an expense reimbursement
13 policy, nor was he ever informed to seek reimbursement for his cell phone use. (*Id.*) Thus,
14 Defendant owes penalties under PAGA for violations of Labor Code section 2802.

15 Defendant raised possible defenses on the basis that COVID-19 Screening was no longer
16 in effect during the PAGA Period and not all Aggrieved Employees used their cell phones for
17 every pay period as on-site time-keeping systems were available to most, if not all, employees.
18 (Ly Decl. ¶48.) Accordingly, Plaintiff has acknowledged the risks posed and that the damages
19 were relatively small. (Ly Decl. ¶49.)

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

21 California Labor Code §226(a) requires Defendant to provide its employees with an
22 accurate, itemized written wage statement that shows, in relevant part, total hours worked by the
23 employee, the name and address of the legal entity that is the employer, and all applicable hourly
24 rates and the corresponding number of hours worked. Specifically, Labor Code §226(a) requires
25 employers to furnish accurate itemized wage statements in writing that show total hours worked
26 by the employee and all applicable hourly rates in effect during the pay period and the
27 corresponding number of hours worked at each hourly rate by the employee. (Labor Code §§
28 226(a)(2) and (9) respectively.)

1 Here, Defendant furnishes Plaintiff and the aggrieved employees with itemized wage
2 statements that do not accurately show total hours worked. (Ly Decl. ¶50.) Defendant furnishes
3 Plaintiff and the aggrieved employees with itemized wage statements that do not accurately show
4 all applicable hourly rates in effect during the pay period and the corresponding number of hours
5 worked at each hourly rate because Plaintiff and the aggrieved employees performed work while
6 off the clock. (Ly Decl. ¶51.) The work performed off the clock was not recorded and thus was
7 not reflected in the aggrieved employees' wages and wage statements. (*Id.*)

8 Further, Plaintiff and the aggrieved employees are issued wage statements that do not
9 include accurate meal and rest premiums as a result of the claims alleged above. (Ly Decl. ¶52.)
10 Defendant's failure to provide accurate itemized wages statements according to Labor Code §
11 226(a) was all done on a regular and consistent basis. Thus, Defendant owes the aggrieved
12 employees penalties under PAGA for failing to provide accurate and itemized wage statements.

13 As this is a derivative claim, the same risks present for the above claims were present for
14 this claim. (Ly Decl. ¶53.)

15 **6. The Risks Associated with the Waiting Time Penalties Claim**

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

22 Here, Plaintiff Waldon and numerous aggrieved employees are no longer employed by
23 Defendant. Defendant failed to pay all wages owed and due upon their termination and/or
24 resignation. (Ly Decl. ¶54.) Defendant's actions were willful, as they have intentionally failed or
25 refused to perform an act which was required to be done. (See *Amaral v. Cintas Corp. No. 2* (2008)
26 163 Cal.App.4th 1157, 1201.) "The failure to pay is willful if the employer 'knows what [it] is
27 doing [and] intends to do what [it] is doing', and does not also require proof that the employer
28 acted with "a deliberate evil purpose to defraud work[ers] of wages which the employer knows to

1 be due.” (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 868.)

2 Plaintiff factored in the risk of establishing that any violation was “willful” and the fact
3 that this claim is derivative. (Ly Decl. ¶55.)

4 In light of all these significant risks and given that PAGA gives the Court broad discretion
5 to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement
6 Amount of \$110,000.00 was fair and reasonable (Ly Decl. ¶56, Exhibit 1, ¶3.1.)

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

9 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a
10 showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp.* No. 2 163 Cal. App 4th
11 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007
12 WL 1650942, at *3.

13 However, PAGA does provide the Court with discretion when it awards these penalties.
14 Labor Code section 2699(e)(2) states that “a court may award a lesser amount than the maximum
15 civil penalty amount specified by this part if, based on the facts and circumstances of the particular
16 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
17 confiscatory.”

18 In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, the
19 Court exercised its discretion to reduce the PAGA penalty amount. There, the plaintiff brought a
20 PAGA claim for violations of section 226(a) based on the following issues: (a) the statements did
21 not show either an employee identification number or the last four digits of the social security
22 number of the employee; (b) the statements did not show the beginning date of the pay period for
23 which the employee was paid; (c) the statements identified Covidien as the employee’s employer.
24 (*Id.* At *2). There were approximately 28,000 wage statements at issue. (*Id.* at *3). The *Fleming*
25 court calculated the maximum potential civil penalty exposure at \$2.8 million (\$100 per wage
26 statement). (*Ibid*; see also Labor Code § 2699(f)(2)). After a bench trial, the Court elected to
27 exercise its discretion to reduce the civil penalty per wage statement to \$18 per wage statements,
28 reflecting 18% of the potential exposure. (*Id.* at *4). The Court reasoned:

Here, the aggrieved employees suffered no injury due to the erroneous wage statements, and made no complaint of the errors or omissions contained therein prior to filing suit. Also, Defendants were not aware that the wage statements violated the law and took prompt steps to correct all violations once notified. Given these circumstances, the Court finds a \$2.8 million penalty unjust according to § 2699(e)(2). Accordingly, in its discretion, the Court reduces the penalty to \$500,000.

Id. at *4. A court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence. *See e.g., Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbucks’ “good faith attempts” to comply and because the violations were minimal).

Here, as explained above, Plaintiff’s counsel anticipated that, at trial, Counsel for Defendant would argue that: (1) all Aggrieved Employees were properly paid and/or reimbursed in accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate Aggrieved Employees was the result of inadvertence and clerical error; (2) all Aggrieved Employees were provided with the opportunity to take meal and rest breaks in compliance with California law; (3) until this Action was filed, no employees had complaints about any alleged failure to pay wages, provide meal and/or rest breaks, reimburse expenses, issue accurate itemized wage statements; (4) none of Defendant’s employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff’s allegations. All of which, Counsel for Defendant would argue, should mitigate in favor of significantly reducing the civil penalty. After engaging in pertinent informal discovery in this Action, Plaintiff’s counsel determined that a settlement of \$110,000.00 is reasonable given the above risks.

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

Based on these figures, the maximum potential exposure for the PAGA claims for Aggrieved Employees is \$248,300.00 (2,483 pay periods at issue multiplied by \$100 a pay period). If the Court stacks pay periods, the full value could balloon up to over \$1,000,000.00, but in light of the immense discretion available, Plaintiff believes the Settlement is reasonable.

Given that this Settlement is for \$110,000.00, Plaintiff believes this is a very fair and reasonable settlement.

VII. THE REQUEST FOR ATTORNEYS' FEES AND COSTS

As detailed fully in the Agreement, the settlement provides for Defendant to create a Gross Settlement Amount of \$110,000.00. (Ly Decl. ¶61; Ex. 1 at ¶¶1.11; 3.1.) From that fund, Plaintiff requests an award of attorneys' fees for PAGA Counsel in the amount of \$36,666.67, or 33.33% of the Gross Settlement Amount, and \$11,174.21 in reimbursement for litigation costs. (*Id.*; Ex. 1 at ¶3.2.1.)

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

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

We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards Class Counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.

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

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

(*Id.* at 573.)

An award of 33.33% of the common fund is appropriate here under the “substantial benefit” theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a

1 representative capacity to recover fees when the litigant’s efforts have created a substantial, actual,
2 and concrete benefit for members of an ascertainable class and the court’s jurisdiction over the
3 subject matter makes possible an award which spreads the cost proportionately among the
4 members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th
5 563, 578.)

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

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

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

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

26 (Newberg on Class Actions, 3rd Ed., 1992, § 14.03; and see *Chavez v. Netflix, Inc.* (2008) 162
27 Cal.App.4th 43, 66, fn 11 [“Empirical studies show that, regardless whether the percentage method
28 or the lodestar method is used, fee awards in class actions average around one-third of the

recovery.”].) Thus, PAGA Counsel’s requested fee of 33.33% is not only well within the range of reasonableness, but lower than the average fee award of 35% and is fair compensation for undertaking this complex, risky, expensive, and time-consuming litigation on a contingent basis.

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

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

i. Requested Multiplier

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

Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Ly Decl. ¶70.) PAGA Counsel have an aggregate lodestar in the amount of \$35,380.00 which represents 36.00 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiff’s instant Motion, and ten future hours. (*Id.*) As such, PAGA Counsel is asking for a lodestar multiplier of 1.04. (Ly Decl. ¶71.) Typically, the lodestar is merely the starting point of the calculation of a reasonable fee, and courts often multiply the lodestar by a factor to account for

1 the risk of non-payment, delay in payment, the quality of work, and the novelty and difficulty of
2 the issues involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253; *Beasley v. Wells Fargo*
3 *Bank*, (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of Supervisors*,
4 (1997) 76 Cal.App.3d 241, 251.)

5 This case dealt with difficult legal and factual questions. (Ly Decl. ¶90.) Significantly,
6 the risk attendant to the underlying claims in this matter was great considering Defendant's
7 defenses as discussed in detail above. (*Ibid.*) Were this case to proceed, Defendant would have a
8 strong incentive to litigate tenaciously. (*Ibid.*) There are genuine issues in dispute. (*Ibid.*)
9 Furthermore, PAGA Counsel was able to obtain close to the full value for this case. (Ly Decl.
10 ¶91.)

11 As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades
12 of experience who diligently prepared and litigated this matter. (Ly Decl. ¶¶57-60; ¶92.) To
13 achieve the ultimate result in this case, my firm had to incur substantial risk and expense, and were
14 precluded from taking other fee generating employment for 46 hours of attorney time. (Ly Decl.
15 ¶93.) This matter had been handled purely on a contingency fee basis and my firm has advanced
16 many thousands of dollars in costs while deferring all payment of fees, with no guarantee that any
17 of the fees incurred or costs advanced would ever be recovered, and diverting significant firm
18 resources to prosecution of this matter. (Ly Decl. ¶94.) PAGA Counsel believe this is an
19 exceptional result that has been well received by the Aggrieved Employees. (Ly Decl. ¶95.)

20 **VIII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF** 21 **COSTS**

22 In addition to their request for fees, PAGA Counsel further request reimbursement of the
23 reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this
24 litigation, in the amount of \$13,500.00. (Ly Decl. ¶96.) To date, Kingsley and Kingsley has
25 incurred \$11,074.21 in costs. (Ly Decl. ¶97.) PAGA Counsel anticipates incurring an additional
26 \$100.00 in costs to file and serve this motion. (Ly Decl. ¶98.) As such, counsel is requesting a
27 cost reimbursement of \$11,174.21. (Ly Decl. ¶99.)

28 All of the requested costs are reasonable in amount and were necessarily incurred by Class

Counsel in prosecuting this litigation. (Ly Decl. ¶100; Exhibit 2 [Cost Report].) Expenses in this matter to date include costs for filing fees, research, mediation, and additional costs for the prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Liane Katzenstein Ly. All of these costs have been incurred in the course of this litigation, and all costs advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of filing the present motion. (Ly Decl. ¶101.)

Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court should approve the request for reimbursement in the amount of \$11,174.41. (Ly Decl. ¶102.)

IX. THE COURT SHOULD APPROVE THE PROPOSED ENHANCEMENT TO PLAINTIFF

The Agreement calls for an enhancement payment of \$5,000.00 to the named Plaintiff, to be paid from the Gross Settlement Amount. (Ly Decl. ¶103; Ex. 1 at ¶3.2.2.) Incentive awards “are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. “[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

Here, the enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of all Aggrieved Employees. The time spent by Ronnie Waldon includes identifying competent counsel, providing information to PAGA Counsel regarding his relevant employment experiences, compiling documents, meeting with PAGA Counsel frequently to discuss the status of the case and the theories of liability, reviewing settlement documents, and making himself available for a full day of mediation. (Ly Decl. ¶104.)

PAGA Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶105.)

1 The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiff
2 in coming forward to litigate this matter on behalf of all Aggrieved Employees. (Ly Decl. ¶106.)
3 Accordingly, Plaintiff should be awarded the agreed-upon enhancement of \$5,000.00.

4 **X. CONCLUSION**

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

9
10 DATED: November 29, 2023

KINGSLEY & KINGSLEY, APC

11
12 By: 

13 Liane Katzenstein Ly
14 Attorneys for Plaintiff RONNIE WALDON, JR. and
all Aggrieved Employees

(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 November 29, 2023, 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:

Kevin S. Wattles
kwattles@slfesq.com
Rachael L. Marko
rmarko@slfesq.com
Linda Abernethy
labernethy@slfesq.com
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Thousand Oaks, CA 91360
Attorneys for Defendant

ABRAMSON LABOR GROUP
William Zev Abramson
Wza@abramsonlabor.com
11846 Ventura Blvd., Suite 100
Studio City, CA 91604

[XX] BY ELECTRONIC SERVICE: I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] (BY ELECTRONIC MAIL TRANSMISSION): I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 29, 2023, at Los Angeles, California.



Taylor Gregg