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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

BILLY JAMES PIZARRO, individually, and on
behalf of all others similarly situated,

Plaintiff,

vs.

POMERADO OPERATIONS, LLC, a limited
liability company dba BOULDER CREEK POST
ACUTE; and DOES 1 through 10, inclusive,

Defendants.

Case No.: 37-2023-00012945-CU-OE-CTL

[Assigned to Hon. Judy S. Bae, Dept. C-62]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR AN ORDER APPROVING
SETTLEMENT OF CLAIMS BROUGHT
PURSUANT TO THE PRIVATE
ATTORNEY GENERAL'S ACT OF 2004;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: February 7, 2025
Time: 9:10 a.m.
Courtroom: C-62
Judge: Hon. Judy S. Bae

Action Filed: March 29, 2023
Trial Date: Not Set

1 TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on February 7, 2025, at 9:10 a.m., or as soon thereafter as the
3 matter may be heard, in Department C-62 of the above-captioned Court, located at 330 West Broadway,
4 San Diego, California 92101, Plaintiff BILLY JAMES PIZARRO (“Plaintiff”) will and hereby does
5 move this Court for an order approving the PAGA SETTLEMENT AGREEMENT (“Agreement” or
6 “Settlement”) reached with Defendant POMERADO OPERATIONS, LLC dba BOULDER CREEK
7 POST ACUTE (“Defendant”), a true and correct copy of which is attached as **Exhibit 1** to the
8 Declaration of H. Scott Leviant submitted herewith.

9 Specifically, Plaintiff moves for an order to:

10 1. Grant approval of the terms of the Agreement pursuant to the Labor Code Private
11 Attorney Generals Act of 2004, Labor Code § 2698, *et seq.*, including the amount of the
12 settlement; the amount of distributions to the State and Aggrieved Employees; the amounts
13 allocated to attorney’s fees and costs; and, the amount allocated to the settlement administrator;
14 and,

15 2. Direct disbursement of the Gross Settlement Amount pursuant to the terms of the
16 Agreement.

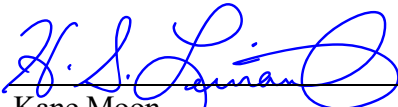
17 **TENTATIVE RULINGS:** Tentative Rulings issued by the Civil Law and Motion Judges will
18 be accessible on the Court’s webpage at 4:00 p.m. the day before the hearing.

19 This motion is based on this Notice, the following Memorandum of Points and Authorities, the
20 Declarations of H. Scott Leviant, and Lisa Mullins of ILYM Group, Inc., submitted herewith, all other
21 pleadings and papers on file in this action, and any oral argument or other matter that may be
22 considered by the Court.

23 Respectfully submitted,

24 Dated: November 27, 2024

MOON LAW GROUP, PC

25 By: 
26 Kane Moon
27 H. Scott Leviant
28 Sandy Pham

Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff BILLY JAMES PIZARRO (“Plaintiff”) moves the Court for approval of the Private Attorneys General Act Settlement Agreement (“Settlement”) between Plaintiff and Defendant POMERADO OPERATIONS, LLC dba BOULDER CREEK POST ACUTE (“Defendant”) (together with Plaintiff, the “Parties”). The Settlement resolves the Private Attorneys General Act (“PAGA”) claims alleged in this Action on behalf of Plaintiff, all alleged Aggrieved Employees, and the State of California.

The PAGA claims are alleged pursuant to PAGA, which states: “[T]he...court shall review and approve any settlement of any civil action filed pursuant to this part.” Lab. Code § 2699(l)(2). The California Supreme Court has interpreted this provision to ensure “any negotiated resolution [of a PAGA claim] is fair to those affected.” *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549. The California Supreme Court has not defined a standard by which trial courts are to review and approve proposed PAGA settlements. Nonetheless, California courts largely consider whether a proposed PAGA settlement provides “genuine and meaningful [relief] consistent with the underlying purpose of the statute” and is reasonable in light of the potential verdict value of all claims released. See *O’Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016); *see also* Lab. Code § 2699(l)(2).

After exchanging documents and data prior to their settlement negotiations, Plaintiff and Defendant reached a proposed settlement that will resolve the PAGA claims pending in this action (the “Lawsuit”) for approximately 291 aggrieved employees (“Aggrieved Employees”). Under the Agreement, Defendant shall pay a maximum sum of **\$380,000.00**, referred to in the Agreement as the Gross Settlement Amount, for Aggrieved Employees employed in California during the designated PAGA period.

This motion is brought pursuant to Labor Code § 2699.3(b)(4). This motion and the Agreement were served on the LWDA prior to the filing of this Motion. Labor Code § 2699(e)(2).

For the reasons below, Plaintiff requests that the Court enter an order approving the settlement.

II. SUMMARY OF THE TERMS OF SETTLEMENT

The full terms of the settlement are in the Agreement. The key material terms are as follows:

- (a) Aggrieved Employees: All persons employed by Defendant as hourly-paid or non-exempt employees in the State of California who worked for Defendant from March 29, 2022 until and including June 18, 2024. (Agreement, ¶¶ 1.4, 1.19).
- (b) No Reversion: The Settlement is *non-reversionary*. (Agreement, ¶ 3.1.)
- (c) Gross Settlement Amount: Defendant agrees to pay the maximum sum of **\$380,000.00** (hereinafter referred to as the “Gross Settlement Amount” or “GSA”) for settlement of the PAGA Penalties, which shall be inclusive of Plaintiff’s Counsel’s attorney’s fees and costs, and the settlement administrator’s fees and costs, and subject to the escalator clause. (Agreement, ¶¶ 3.1, 3.2, 8.1.)
- (d) Net Settlement Amount: At least **\$228,333.33** will be available for distribution to the Aggrieved Employees and the LWDA. Of this amount, the LWDA will receive at least **\$171,250.00** under the Agreement, and Aggrieved Employees will receive at least **\$57,083.33**. (Agreement, ¶¶ 1.15, 3.2.3.)
- (e) Attorney’s Fees: Plaintiff’s Counsel requests an award of attorney’s fees in the amount of **\$126,666.67**, subject to the escalator clause, which is one-third of the GSA. (Agreement, ¶¶ 3.2.1, 8.1; Leviant Decl., ¶ 39, and Exh. 2.)
- (f) Litigation Costs: Plaintiff’s Counsel seeks reimbursement of actual litigation costs, that was originally anticipated to be a maximum amount of \$15,000.00. However, those actual costs are expected to be \$19,530.74, which is more than the originally anticipated amount. Therefore, **\$19,530.74** is requested. (Agreement, ¶ 3.2.1; Leviant Decl., ¶ 40, and Exh. 2.)
- (g) Settlement Administration: Payment to Aggrieved Employees and administration will be accomplished through third-party settlement administrator, ILYM Group, Inc., which has agreed to perform Administrator duties for a flat fee not to exceed **\$4,750.00**, which is reasonable, based on all of the services offered. (Agreement, ¶ 3.2.2; Leviant Decl., ¶ 41; Declaration of Lisa Mullins [Decl. of Mullins], ¶ 7.)
- (h) Uncashed Checks: Uncashed checks will be cancelled, and the funds will, pursuant to Unclaimed Property laws, be directed to the California State

Controller's Office in the name of the Aggrieved Employee who did not cash the check. (Agreement, ¶ 4.4.3.)

- (i) Release: In exchange for the above settlement consideration, Defendant shall be entitled to a *limited* release from the LWDA and each and every Aggrieved Employee, including Plaintiff.¹ (Agreement, ¶ 5; Leviant Decl. ¶ 24, Exh. 1.)
- (j) Notice to LWDA: The Declaration of H. Scott Leviant confirms that notice was provided to the LWDA and attaches the confirmatory submission documents. (Leviant Decl., ¶ 45, Exh. 3.)

III. STATEMENT OF FACTS

Plaintiff alleges that Defendant engaged in practices and procedures that violated the California Labor Code. (Leviant Decl., ¶ 3.) These alleged statutory violations subject Defendant to potential liability for PAGA penalties pursuant to Labor Code § 2698. (*Id.*) Through this action, Plaintiff seeks to recover penalties pursuant to Labor Code § 2698, *et. seq.* (*Id.*)

Defendant operates a short-term, post-hospital rehabilitation/nursing facility located in Poway, California. (*Id.* at ¶ 5.) Plaintiff worked for Defendant in California during the PAGA Period. (Leviant *Id.* at ¶ 6.) Defendant contends it had lawful policies, including break and pay policies, in effect throughout the statutory period, and viable defenses to a substantial portion of the alleged penalty claims. (*Id.* at ¶ 7.)

IV. PROCEDURAL HISTORY

On March 28, 2023, Plaintiff's Counsel sent a letter to the LWDA on behalf of Plaintiff in compliance with California Labor Code § 2699.3. (Leviant Decl., ¶ 8.) More than 65 days passed after the letter was sent to the LWDA, and the LWDA did not indicate that it intended to investigate the alleged violations referenced in the letter. (*Id.* at ¶ 9.) On March 29, 2023, Plaintiff commenced this Action by filing a Complaint alleging causes of action against Defendant for failure to pay minimum wages, failure to pay overtime compensation, failure to provide meal periods, failure to authorize and

¹ This comports with settled California Supreme Court authority. *See Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009) (concluding that "with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act....").

1 permit rest breaks, failure to indemnify necessary business expenses, failure to timely pay final wages at
2 termination, failure to provide accurate itemized wage statements, and for unfair business practices. (*Id.*
3 at ¶ 10.) On June 9, 2023, Plaintiff filed a First Amended Complaint adding a ninth cause of action for
4 civil penalties under PAGA. (*Id.*) The First Amended Complaint is the operative complaint in the Action
5 (the “Operative Complaint.”). (*Id.*) On July 28, 2024, this Court granted an order dismissing class
6 claims without prejudice and Plaintiff’s individual claims with prejudice. (*Id.*) The Parties agreed to
7 settle the matter as a PAGA action only. (*Id.*) Defendant denies the allegations in the Operative
8 Complaint, deny any failure to comply with the laws identified in in the Operative Complaint and deny
9 any and all liability for the causes of action alleged. (*Id.* at ¶ 11). Defendant admits to no claim by virtue
10 of its agreement to settle this matter. (*Id.*) Because Court approval of a PAGA settlement is required, the
11 settlement is presented to this Court for review and approval. (*Id.* at ¶ 12.)

12 **V. SETTLEMENT NEGOTIATIONS**

13 Counsel for Plaintiff has thoroughly investigated the facts relating to the claims alleged in the
14 operative complaint and have made a thorough study of the legal principles applicable to the claims
15 asserted against Defendant. (Leviant Decl., ¶ 13.) Based on their investigation and evaluation of this
16 case, Plaintiff’s Counsel has concluded that the settlement is fair, reasonable, and adequate in light of all
17 known facts and circumstances, including the defenses asserted by Defendant, potential adverse findings
18 regarding liability, and numerous potential appellate issues. (*Id.*)

19 On June 18, 2024, the Parties participated in an all-day mediation presided over by a professional
20 and neutral mediator, Lynn Frank, Esq. (Leviant Decl., ¶ 14.) Although the Parties were unable to settle
21 at mediation, the Parties were able to reach a settlement, pursuant to a mediator’s proposal, which led to
22 this Agreement to settle the Action. (*Id.*)

23 The Parties have memorialized the terms of the settlement in a long-form agreement.
24 (“Settlement”). (Leviant Decl., ¶ 15.)

25 **DISCUSSION**

26 **VI. THE QUI TAM NATURE OF PAGA CLAIMS**

27 In 2003, California enacted the Private Attorneys General Act of 2004 after recognizing systemic
28 underenforcement of many worker-protection laws and regulations. *Williams v. Superior Court*, 3 Cal.

5th 531, 545 (2017). The solution enacted by the Legislature deputized private citizens to recover civil penalties for the State, where those penalties were previously only available to law enforcement. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009) (emphasis added).

“*Because an aggrieved employee’s action under the Labor Code Private Attorneys General Act of 2004 functions as a substitute for an action brought by the government itself*, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government.” *Arias*, 46 Cal. 4th at 986. With limited exceptions, “[o]f the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the ‘aggrieved employees.’” *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380 (2014) *certiorari denied sub nom. CLS Transportation Los Angeles v. Iskanian*, — U.S. —, 135 S.Ct. 1155, 190 L.Ed.2d 911 (Jan. 20, 2015). Thus, a PAGA claim is, predominantly, a claim belonging to the State.

“The civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities.” *Iskanian*, 59 Cal. 4th at 381. Because of this distinction, and the fact that the penalties made available through PAGA fell previously within the exclusive domain of State enforcement, the California Supreme Court explained that PAGA suits are best viewed as a species of *qui tam* action. *Iskanian*, 59 Cal. 4th at 382 (“A PAGA representative action is therefore a type of *qui tam* action.”).

VII. THE STANDARDS FOR APPROVAL OF A PAGA SETTLEMENT

Prior to *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021), the only sources of persuasive guidance as to how to assess the reasonableness of a PAGA allocation were found in federal court decisions. In their view, a PAGA allocation, even if a small portion of the total settlement, could be reasonable if the settlement of the underlying wage and hour claims is robust and serves the deterrent purpose of the PAGA statute. *O’Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1135 (N.D. Cal. 2016) (“By providing fair compensation to the class members as employees and substantial monetary relief, a settlement not only vindicates the rights of class members as employees, but may have a deterrent effect upon the defendant employer and other employers, an objective of PAGA.”).

Moniz then provided explicit confirmation that this was an appropriate yardstick by which to

1 measure reasonableness of a PAGA settlement. *Moniz*, 72 Cal. App. 5th at 77. *Moniz*, in agreeing with
2 federal courts, concluded that the class action factors are appropriately considered, along with a
3 consideration of whether the settlement furthers “PAGA’s purposes to remediate present labor law
4 violations, deter future ones, and to maximize enforcement of state labor laws.”

5 The class action settlement factors used to assess the fairness, adequacy, and reasonableness of a
6 class action settlement are well understood. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794 (1996), held
7 that “a presumption of fairness exists where: (1) the settlement is reached through arm’s-length
8 bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act
9 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
10 small.”² *Id.* at 1801. The court should also consider the expense, complexity and likely duration of
11 further litigation. *Dunk*, 48 Cal. App. 4th at 1801. “It is, of course, the strong public policy of this state to
12 encourage the voluntary settlement of litigation.” *Osumi v. Sutton*, 151 Cal. App. 4th 1355, 1359 (2007).
13 Finally, these factors are not exclusive and the court is free to balance and weigh, based on
14 circumstances. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 244-245 (2001).

15 While class settlement factors provide some guidance as to how a Court may approach the
16 evaluation of a PAGA settlement, there are significant differences between PAGA settlements and class
17 action settlements that must be recognized. Unlike a class action settlement, the scope of release
18 permitted in a PAGA settlement is limited. While “judgment in [a PAGA] action is binding not only on
19 the named employee plaintiff but also on government agencies and any aggrieved employee not a party
20 to the proceeding,” *Arias*, 46 Cal. 4th at 986, “the nonparty employees, because they were not given
21 notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to
22 remedies other than civil penalties.” *See id.*, at 987. Thus, the scope of a release in a PAGA settlement is
23 confined to PAGA penalties, and not related individual claims available under the Labor Code.³

24
25
26 ² PAGA provides no notice or claim procedures as exist in class action cases.

27 ³ This is contrasted with the much broader release permitted in a class action context, which may be
28 based on “any matter or fact” alleged in the complaint. *See In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 221 (5th Cir. 1981). In this matter, the Agreement will not affect the rights of Aggrieved Employees who may possess individual wage and hour claims.

Applying the above standards to this settlement, the settlement meets all criteria for approval.

VIII. THE SETTLEMENT MEETS ALL THE CRITERIA FOR APPROVAL

Applying the class settlement fairness factors discussed above – limited to those compatible with the unique features of PAGA claims – the proposed settlement embodies all of the key features of a settlement that is fair, reasonable, adequate, and as such, meets all the criteria necessary for approval.

Plaintiff and Plaintiff's counsel have diligently investigated the claims in this matter. (Leviant Decl., ¶ 18.) Plaintiff and Counsel concluded, after taking into account the disputed factual and legal issues involved in this Action, the substantial risks attending further prosecution, including risks related to the outcome of possible summary judgment efforts, and the substantial benefits to be received pursuant to the compromise and settlement of the Action as set forth in the Settlement, that settlement on the terms agreed to are in the best interest of Plaintiff and the Aggrieved Employees and are fair and reasonable. (*Id.*) Plaintiff's Counsel brought to bear a great deal of experience with wage and hour actions in negotiating the settlement of this case. (*Id.*)

Resolution at this time will forestall the need for additional expensive and time-consuming litigation that could very well result in an outcome less satisfactory than that proposed under this settlement. (Leviant Decl., ¶ 19.) But, before any other consideration, we have agreed to this settlement because it is objectively reasonable. (*Id.*) The potential for resolution benefits the Aggrieved Employees and the State of California, since they do not have to wait additional years for a similar recovery. (*Id.*) The efficiency of this litigation benefits the Court, the parties and their counsel. (*Id.*) A settled resolution now is the most realistic method for addressing the claims raised in this matter.

Plaintiff's counsel have engaged in the necessary investigation in this case that made it possible to exercise informed judgment in those aspects of the settlement process in which we were involved. (Leviant Decl., ¶ 20.) The Defendant in this matter produced important information, including declarations from their human resource manager and pay and time data for a substantial sampling of employees. (*Id.*) That information, coupled with other data provided, was sufficient to permit Plaintiff's counsel to adequately evaluate the settlement; Plaintiff had more than enough information upon which to evaluate its reasonableness. (*Id.*)

Here, the expense, complexity and likely duration of future litigation was to some extent an

1 unknown. (Leviant Decl., ¶ 21.) However, what is certain is that to adequately establish the
2 foundational violations that would support any penalty award, significant time and expense would be
3 invested. (*Id.*) To adequately establish that Aggrieved Employees experience the alleged violations, and
4 at what frequency, the Aggrieved Employees would need to be interviewed in a systematic fashion. (*Id.*)
5 The process would be expensive and time-consuming. (*Id.*) But doing so would have been required,
6 since frequency of violations would need to be established before any penalties could be recovered. (*Id.*)
7 As to claims such as meal period and rest break violations, the decisions of Aggrieved Employees are a
8 major factor in assessing liability. (*Id.*) Thus, even if records show a facially non-compliant meal
9 period, no penalty could be assessed automatically. (*Id.*) In sum, the evidence collected to date leads
10 Plaintiff to conclude that, to the extent violations occurred, a fact which Defendant disputes, the
11 violations were *not* systematic and *not* uniform across all of Defendant's employees who worked during
12 the PAGA period. (*Id.*) With these considerations in mind, the amount of the Settlement is reasonable.
13 (*Id.*)

14 **A. The PAGA Penalties Provide Genuine and Meaningful Relief to the LWDA and**
15 **Aggrieved Employees Consistent with the Dual-Purpose of PAGA**

16 The PAGA Penalties, pursuant to PAGA and the terms of the Settlement Agreement, will be
17 allocated to the LWDA and all Aggrieved Employees, with seventy-five percent allocated to the former
18 and twenty-five percent allocated to the latter. (Leviant Decl., ¶ 22.)

19 The PAGA Penalties, which are estimated to be \$229,052.59⁴, provide genuine and meaningful
20 relief to the LWDA and all alleged Aggrieved Employees consistent with the dual-purpose of PAGA
21 because it both redresses the alleged Aggrieved Employees for the Labor Code violations they suffered
22 from throughout their employment with Defendant and deters Defendant from violating the Labor Code
23 in the future, in light of the long-term, costly process required to litigate, mediate, and ultimately settle
24 the Action. (*Id.* at ¶ 23.) For these reasons, the PAGA Penalties amount to genuine and meaningful relief
25 consistent with the underlying purpose of PAGA. (*Id.*)

26
27 ⁴ The PAGA Penalties equal the Gross Settlement Amount (\$380,000.00) less the PAGA Counsel Fees
28 Payment (\$126,666.67), PAGA Counsel Litigation Expenses Payment (\$19,530.74), and Administration Expenses
Payment (\$4,750.00).

1 **B. The PAGA Penalties Are Reasonable Pursuant To Labor Code § 2699(e)**

2 The ultimate decision as to the amount of penalties is always up to the discretion of the Court.
3 Labor Code § 2699(e) states: “For purposes of this part, whenever the [LWDA] has discretion to assess a
4 civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and
5 conditions, to assess a civil penalty...[A] court may award a lesser amount than the maximum civil
6 penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do
7 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” Lab. Code §
8 2699(e). This section grants the Court discretion to limit a PAGA civil penalties award where the facts or
9 circumstances justify reduction, or where such award is unreasonable and/or excessive.

10 The PAGA Penalties are also reasonable in light of the potential verdict value of all claims
11 released. Indeed, the Settlement Agreement contains a release of all PAGA claims that arise or could
12 arise from the facts underlying the operative Complaint and PAGA Notice, including those related to
13 unpaid wages, including minimum wages, overtime compensation, meal period premiums, rest break
14 premiums and unreimbursed business expenses. (Leviant Decl., ¶ 24.) These claims served as the basis
15 of the alleged Aggrieved Employees’ PAGA claims. (*Id.*)

16 For the PAGA Period, the number of PAGA Pay Periods at issue is estimated to be about 9,060
17 total for the Aggrieved Employees, reflecting short average terms of employment. (*Id.* at ¶ 21.) Using
18 the most straightforward formulation of applying the “catch-all” \$100 penalty specified in Labor Code §
19 2699(f)(2) to each PAGA Pay Period, the total penalty exposure is approximately \$906,000. (*Id.*) This
20 settlement of \$380,000.00 is a reasonable compromise that recovers nearly one \$85 penalty for every
21 other PAGA Pay Period. (*Id.*) The actual exposure that could be established at a trial is likely *lower*,
22 since, it would be essentially impossible to demonstrate that 292 employees experienced one violation in
23 every PAGA Pay Period that they worked, just accounting for the likely low participation rate by the
24 Aggrieved Employees. (*Id.*)

25 In addition, with assistance from Plaintiff’s data consultant, and after a thorough review of
26 evidence casting serious doubt on the viability of many of the theories of penalty recover, counsel
27 separately estimated the plausible potential PAGA exposure to be, on a penalty-by-penalty basis, to be
28 approximately **\$1,359,000.00**, which includes many overly optimistic assumptions about the ability to

1 prove the frequency of violations for all Aggrieved Employees who allegedly experienced issues. (*Id.*)

2 The settlement is just over **27.96%** of that very optimistic exposure calculation, described below:

- 3 • Failure to compensate for unpaid wages based on off-the-clock work and regular rate errors –
4 Delays caused by the clock-in process and use of a cellphone-based communications
5 application resulted in alleged off-the-clock work. Defendant's alleged failure to incorporate
6 overtime and sick pay resulted in the alleged regular rate errors. The maximum exposure is
7 estimated to be as much as \$906,000 (9,060 total pay periods * \$100 penalty). However, it is
8 more plausible to assume that, at best, half the Aggrieved Employees would support the off-
9 the-clock allegations, resulting in less exaggerated exposure of \$453,000 (\$906,000
10 maximum exposure * assumed 50% violation rate).
- 11 • Failure to provide meal periods – Deficient meal periods given the nature of the work
12 resulted in the alleged non-compliant meal periods. Assuming that facial violations in time
13 records all result in a penalty, a generous assumption given that employee choice can be a
14 significant factor, the calculated maximum exposure is \$453,000 (9,060 total pay periods *
15 \$50 penalty). However, this claim is highly dependent upon Aggrieved Employee testimony,
16 resulting in a more realistic exposure of \$181,200 (\$453,000 maximum exposure * 40%
17 violation rate).
- 18 • Failure to provide rest breaks – Similarly, time constraints due to the nature of the work
19 resulted in the alleged non-compliant rest breaks. Assuming that rest break violations
20 occurred and all result in a penalty, a generous assumption given that employee rest breaks
21 are not recorded and employee choice can be a significant factor, the calculated maximum
22 exposure is \$453,000 (9,060 total pay periods * \$50 penalty). However, Defendant heavily
23 disputed this theory. Given the absence of any record to establish missed rest breaks and the
24 highly dependent Aggrieved Employee testimony, it is estimated that this claim could
25 support, at best, a more realistic exposure of \$135,900 (\$453,000 maximum exposure * 30%
26 violation rate).
- 27 • Unreimbursed business expenses – Plaintiff alleged that all employees were required to use a
28 cellphone-based communications application without reimbursement. Per *employee* tied to

the use of cell phones, and disregarding that charges are incurred on a *monthly* basis, this results in a maximum exposure of \$906,000 (9,060 total pay periods * \$100 penalty).

However, Defendant contends that any incurred business expenses were highly individualized and, if business expenses were incurred, employees were reimbursed. Given Defendant's defenses and noting the issue of a monthly charge generating penalties in each pay period, it is estimated that this claim could support, at best, a more realistic exposure of \$271,800 (\$906,000 maximum exposure * 30% violation rate). Even this violation rate overstates the likely true number of instances where this occurred.

- Failure to timely pay wages – It is estimated that the maximum exposure for this claim is \$906,000 (9,060 total pay periods * \$100 penalty). However, given Defendant's defenses to underlying unpaid wage claims, it is more plausible to estimate that that this claim could support, at best, penalties of \$90,600 (\$906,000 maximum exposure * 10% violation rate). This also gives rise to an argument about "stacking," since it is a second penalty sought for the same underlying alleged misconduct.
- Failure to furnish accurate itemized wage statements – It is estimated that the maximum exposure for this claim is \$2,265,000 (9,060 total pay periods * \$250 penalty), tied to the unpaid wage claims and regular rate errors. However, it is more plausible to assume that a small percentage of the aggrieved employees would come forward and support the off-the-clock claim, while regular rate errors affected very few employees, resulting in a more realistic exposure of no more than \$226,500 (\$2,265,000.00 maximum exposure * 10% violation rate). This also gives rise to an argument about "stacking," since it is a second penalty sought for the same underlying alleged misconduct.

(See, Leviant Decl., ¶ 21.)

Further reflected in the PAGA Penalties is the potential risks in continuing to litigate the action, including, but not limited to, the risk of not prevailing at trial, and the risk that, even if Plaintiff prevailed, the PAGA damages would be limited due to the largely discretionary nature of PAGA civil penalties; Defendant's defenses; and the fact that the ultimate purpose of the Action is and has been to obtain genuine and meaningful relief for the LWDA and, secondarily, the Aggrieved Employees. (Leviant

Decl., ¶ 25.)

1. The Total Amount Offered in Settlement is \$380,000.00

The Settlement provides a monetary benefit that falls well within “the range of an acceptable settlement” under the circumstances, which is the standard on which the instant Settlement must be judged. As held by the Ninth Circuit, a settlement may be fair and reasonable even where it only provides a fraction of what could have been obtained at trial. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998).

Under the Agreement, Defendant shall pay a maximum sum of \$380,000.00. Defendant argued that numerous individualized inquiries would be needed to determine liability on Plaintiff’s claims, including (1) whether employees worked off-the-clock with knowledge of a supervisor or Defendant, incurring overtime, (2) whether each individual took a particular meal period or rest break on a particular occasion, (3) whether the meal period was waived or voluntarily not taken, and (4) where the individual skipped the meal or rest period, or *why* it was skipped for each of the allegedly Aggrieved Employees.

2. Payment of At Least \$229,052.59 in Penalties

Under the Agreement, the amount available for distribution as penalties under PAGA is at least **\$229,052.59**. The amount is a significant penalty, but it is not confiscatory, nor is it, in the terms of the PAGA statute, “unjust, arbitrary, or oppressive.” Labor Code § 2699(e)(2).

a) The LWDA shall receive at least \$171,789.44

As 75% of the penalties are allocated to the LWDA, the LWDA stands to receive at least **\$171,789.44** under the Agreement. Further, pursuant to Labor Code § 2699.3(b)(4) the “provisions of the settlement relating to health and safety laws shall be submitted to the division at the same time that they are submitted to the court. This requirement shall be construed to authorize and permit the division to comment on the settlement provisions, and the court shall grant the division's commentary appropriate weight.” The LWDA will have an opportunity to comment upon the amount to be paid to the LWDA. This provision protects against collusive settlements for less than a reasonable value of the claim.

b) Aggrieved Employees shall receive at least \$57,263.15

Approximately 292 Aggrieved Employees shall receive at least **\$57,263.15** (25% of the penalty) under the terms of the Agreement and by operation of PAGA. The Court should give weight to the fact

that the primary purpose of PAGA is not to provide a windfall to Aggrieved Employees; the penalties recovered under PAGA are *not* surrogate individual damages. Instead, the amount available to Aggrieved Employees is in addition to any damages that could be recovered via individual claims.

C. The Presence of a Government Participant

As set forth above, 75% of the penalty is paid to the LWDA. In connection therewith, Labor Code § 2699.3(b)(4) permits the LWDA to comment on the penalties. This provides an independent check on collusive settlements. The LWDA was notified of the Settlement. (Leviant Decl., ¶ 45.)

D. PAGA Counsel Are Experienced and Negotiated Aggressively

The court may also consider that negotiations between the Parties were conducted at arm's length, in an adversarial manner, despite a mutual desire to resolve the case. (Leviant Decl. ¶¶ 14, 18.) The court may consider the opinion of all counsel that the settlement arrived at is fair, reasonable and in the best interests of the Aggrieved Employees. PAGA Counsel are experienced with employment class and representative actions, as set forth more fully in the Declaration of H. Scott Leviant filed herewith.

E. Additional Factors Weigh in Favor of Approving the Terms of the Proposed Settlement, Including the Requested Fees and Costs

In addition to the factors presented above, the proposed settlement does not possess any obvious deficiencies with respect to its other terms, including the agreed-upon fees and costs.

1. Fees and Costs

Courts in the Ninth Circuit and California generally use the “percentage method” rather than the lodestar approach when awarding attorneys’ fees in a common fund type settlements. *See* 7 Witkin, B.E., CALIFORNIA PROCEDURE (2007 Supp.) §§ 255-261 at 236-241 (describing prevalence of percentage method in California); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole”); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) (endorsing percentage method).

While this is not a class action, the custom and practice in class actions is to award approximately one-third of a fund as a fee award. *See Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008) (“Empirical studies show that, regardless whether the percentage method or the lodestar method is used,

1 fee awards in class actions average around *one-third* of the recovery.”) (emphasis added). The proposed
2 attorney fee award here is 33 1/3% of the Gross Settlement Amount, an amount reasonably comparable
3 to “average” fees awarded in California state court class action cases used for comparison purposes here.
4 *Chavez*, 162 Cal. App. 4th at 66 n. 11. Again, this is *not* a class action. It is more akin to contingent
5 representation with an additional requirement of Court review due to the *qui tam* nature of PAGA claims.
6 The California Supreme Court has removed any lingering doubt about the use of the percentage of the
7 fund method to award attorney’s fees in California Courts, endorsing and encouraging that method.
8 *Laffitte v. Robert Half Intern. Inc.*, 1 Cal. 5th 480, 503 (2016).⁵

9 Thus, courts regard circumstances in which class counsel’s work is wholly contingent, such as in
10 class actions and other common fund type cases, as a factor weighing in favor of approving a negotiated
11 fee award that approximates market rates. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001). This
12 matter has been litigated by Plaintiff’s Counsel in a manner that is reasonable, diligent, and efficient.
13 The actual lodestar incurred by Plaintiff’s counsel to date is no less than \$130,438.00, not including
14 unbilled time and estimated future work. (Leviant Decl., ¶¶ 37-38.) Counsel for Plaintiff invested time
15 evaluating data before the negotiations in this matter and in preparing for settlement discussions with
16 Defendant’s counsel. (*Id.* at ¶ 20.) Those efforts led to this reasonable settlement. (*Id.*) Plaintiff’s
17 Counsel requests a fee of **\$126,666.67**, as specified in the Settlement Agreement, which represents a
18 “negative” multiplier of less than 0.98. (Leviant Decl., ¶ 39.)

19 The Agreement also provides for the award of actual costs. Under the Agreement, Defendant
20 will not oppose a request for costs up tot \$15,000.00. However, because actual costs incurred by
21 Plaintiff’s Counsel’s as a result of taking on representation in this lawsuit on a contingency basis are
22 higher, a cost award of **\$19,530.74** is requested. (Leviant Decl., ¶ 40.) (*Id.*)

23 2. Administration Fees Are Very Reasonable

24 Administration will be completed by ILYM Group, Inc., for **\$4,750.00**, a very reasonable amount
25

26 ⁵ The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing
27 doubt about the use of the percentage method: “The *Dunk* court, while finding the percentage method
28 inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport
to bar its usage generally in common fund cases.” *Laffitte*, at 501.

1 for the services rendered. (Leviant Decl., ¶ 41; Mullins Decl., ¶ 7.)

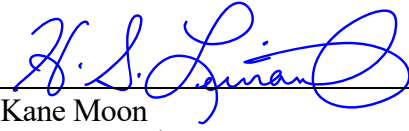
2 **IX. CONCLUSION**

3 For the above reasons in fact and law, Plaintiffs request this court enter an order approving the
4 settlement memorialized in the Agreement.

5 Respectfully submitted,

6 Dated: November 27, 2024

MOON LAW GROUP, PC

7
8 By: 
Kane Moon
H. Scott Leviant
Sandy Pham

10 Attorneys for Plaintiff

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 725 S. Figueroa St., 31st Floor, Los Angeles, CA 90017.

On the date indicated below, I served the document described as: **PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR AN ORDER APPROVING SETTLEMENT OF CLAIMS BROUGHT PURSUANT TO THE PRIVATE ATTORNEY GENERAL'S ACT OF 2004; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by sending ☐ the original [or] ☒ a true copy thereof ☒ to interested parties as follows [or] ☐ as stated on the attached service list:

Shane Criqui, Esq.
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Attorneys for Defendant

☒ **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, California, by e-mail delivery on the parties listed herein at their most recent known e-mail address or e-mail of record in this action.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed this **November 27, 2024** at Los Angeles, California.

H. Scott Leviant
Type or Print Name



Signature