MARALLE MESSRELIAN (SBN 316974)
maralle@mmlawapc.com
MM LAW, APC
500 N. Brand Blvd., Ste 2000
Glendale, CA 91203
Telephone (818) 810-7747
Facsimile (818) 230-9018

Attorneys for Plaintiff,
AMAIRANI GOMEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

(*UNLIMITED JURISDICTION*)

AMAIRANI GOMEZ, *Plaintiff*, vs. FOCUS INDUSTRIES, INC., a California corporation; STAN SHIBATA, an individual; and DOES 1 to 25, inclusive, *Defendants*.	Case No.: 30-2023-01336931-CU-OE-CXC **NOTICE OF PLAINTIFF'S MOTION AND MOTION FOR APPROVAL OF PAGA SETTLEMENT** *Assigned for All Purposes to Hon. Randall J. Sherman, Department CX105* Action filed: 07/17/2023 Hearing Date: 06/13/2025 Hearing Time: 10:00 a.m. Hearing Dept: CX105 **Reservation Number: 74496889** Submitted Herewith Under Separate Cover: 1. Memorandum of Point and Authorities; 2. Declaration of Maralle Messrelian; 3. Declaration of Amairani Gomez; 4. Declaration of Michael Moore; and 5. [Proposed] Order and Judgment Approving PAGA Settlement.

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

PLEASE TAKE NOTICE that on June 13, 2025 at 10:00 a.m., or as soon thereafter as the matter may be heard, in Department CX105 of the Orange County Superior Court, located at 751 W Santa Ana Blvd, Santa Ana, CA 92701, Plaintiff Amairani Gomez ("Plaintiff" or "Gomez") will and hereby does move this Court for an order approving the Private Attorneys General Act (Labor Code § 2698 *et seq*.) Settlement Agreement (the "Agreement" or "PAGA Settlement") and entering the [Proposed] Order and Judgment Approving PAGA Settlement.

The PAGA Settlement is on behalf of Gomez and all persons within the State of California who are or were employed with non-exempt status by Defendants Focus Industries, Inc. and Stan Shibata (collectively, "Defendants" or "FOCUS") from April 10, 2022, through June 20, 2024 (collectively, the "PAGA Members"). Plaintiff alleges that FOCUS is liable to her and other PAGA Members for (1) failure to compensate for all hours worked, including minimum and overtime wages; (2) failure to provide accurate, itemized wage statements; (3) failure to pay all wages owed during and at the end of employment; (4) failure to maintain accurate records; (5) failure to provide rest breaks and meal periods; and (6) failure to reimburse business expenses. Plaintiff has sought to impose civil penalties for violations of Labor Code sections 201, 202, 203, 204, 226, 226.7, 510, 512, 558, 558.1, 1174, 1194, 1197, 1198, 2802 and IWC Wage Order No. 1.

The Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the declarations Maralle Messrelian, Amairani Gomez, and Michael Moore, the PAGA Settlement, all papers and pleadings on file with the Court in this action, all matters judicially noticeable, and on such oral and documentary evidence as may be presented in connection with the hearing on the Motion.

Respectfully submitted,

MM LAW, APC

Dated: February 25, 2025

By: *Maralle Messrelian*

Maralle Messrelian
Attorneys for Plaintiff, Amairani Gomez

MARALLE MESSRELIAN (SBN 316974)
maralle@mmlawapc.com
MM LAW, APC
500 N. Brand Blvd., Ste 2000
Glendale, CA 91203
Telephone (818) 810-7747
Facsimile (818) 230-9018

Attorneys for Plaintiff,
AMAIRANI GOMEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

(*UNLIMITED JURISDICTION*)

AMAIRANI GOMEZ,

Plaintiff,

vs.

FOCUS INDUSTRIES, INC., a California corporation; STAN SHIBATA, an individual; and DOES 1 to 25, inclusive,

Defendants.

Case No.: 30-2023-01336931-CU-OE-CXC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR APPROVAL OF PAGA SETTLEMENT

Assigned for All Purposes to
Hon. Randall J. Sherman, Department CX105

Action filed: 07/17/2023
Hearing Date: 6/13/2025
Hearing Time: 10:00 a.m.
Hearing Dept: CX105

Reservation Number: 74496889

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Amairani Gomez ("Plaintiff" or "Gomez") submits this memorandum of points and authorities in support of her motion for approval of the PAGA (Private Attorneys General Act, Labor Code § 2698 *et seq*.) Settlement Agreement (the "Agreement" or "PAGA Settlement")[1] for the civil penalties claim she brought against Defendants Focus Industries, Inc. and Stan Shibata (collectively, "Defendants" or "FOCUS") under the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, *et seq.* ("PAGA"). Plaintiff brings this motion because Labor Code section 2699, subdivision (*l*), of the PAGA requires Court-approval of any civil penalties sought as part of a proposed settlement agreement. Through this motion, Plaintiff respectfully requests for this Court to approve the PAGA Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

FOCUS began to employ Plaintiff in or around November 2022 as an assembly worker at its facility located at 25301 Commercentre Drive in Lake Forest, California. FOCUS continuously employed Plaintiff in that capacity until on or about March 31, 2023 when her employment ended. MM, ¶ 5.

A. Plaintiff's Written Notice to the State of California

Plaintiff complied with the procedures of Labor Code § 2699.3 for bringing suit under the Labor Code Private Attorneys General Act of 2004, Labor Code §§ 2698, et seq. ("PAGA"). On April 10, 2023, Plaintiff, on behalf of herself and FOCUS's other California non-exempt hourly employees (hereafter collectively the "PAGA Members") gave written notice by electronic service to the California Labor and Workforce Development Agency ("LWDA") and via certified mail to Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. MM, ¶ 6, Ex. 3. The specific provisions alleged to have been violated in the PAGA notice letter included Labor Code sections 201, 202, 203, 204, 226, 226.7, 510, 512, 558, 558.1, 1174, 1194, 1197, 1198, 2802 and

[1] The Agreement is attached as Exhibit ("Ex.") 1 to the Declaration of Maralle Messrelian ("MM"), which is submitted herewith under a separate cover.

Industrial Welfare Commission Wage Order No. 1.

B. Plaintiff's Lawsuit

On July 17, 2023, Plaintiff filed a lawsuit in Orange County Superior Court (the "Lawsuit") against Defendants. The Lawsuit alleged the following relevant causes of action against Defendants: (1) failure to pay all wages earned for all hours worked [*Lab. Code*, §§ 510, 1194, 1197, and 1198]; (2) failure to provide rest breaks [*Lab. Code*, §§ 226.7, 1198]; (3) failure to provide meal periods [*Lab. Code*, §§ 226.7, 512, 1198]; (4) failure to indemnify [*Lab. Code*, § 2802]; (5) failure to provide accurate, itemized wage statements [*Lab. Code*, § 226]; (6) failure to pay wages when employment ends [*Lab. Code*, §§ 201, 202, 203]; (7) failure to pay wages owed every pay period [*Lab. Code*, § 204]; (10) imposition of civil penalties pursuant to California Private Attorneys General Act ("PAGA") [*Lab. Code*, §§ 2698, *et seq*.]; and (19) unfair competition [*Bus. & Prof. Code*, §§ 17200, *et seq*.]. MM, ¶ 7, Ex. 4. The parties met and conferred and agreed that it may be in their mutual interests to discuss Plaintiff's allegations informally, rather than through litigation, and scheduled private mediation. MM, ¶ 8.

C. Mediation With Professional Neutral Gig Kyriacou

Upon mutual agreement of the parties, on June 20, 2024, the parties participated in a full-day mediation session with professional neutral Gig Kyriacou. MM, ¶ 8. At the mediation, the parties agreed to settle the Action. Before agreeing to the terms of the Settlement, the Parties engaged in informal discovery regarding FOCUS's policies, practices, operations, time and payroll information and other topics. In advance of mediation, Defendants provided Plaintiff's counsel with information and documents relating to other PAGA Members, including timekeeping and payroll data. Through extensive, arm's length negotiations at the mediation, and only after discovery and investigation were performed, the parties agreed to settlement terms. Now that the parties have finalized the PAGA Settlement, Plaintiff submits it to this Court for approval. MM, ¶ 9.

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

III. OVERVIEW OF SETTLEMENT

A. "PAGA Members" Definition

The PAGA Members are all persons employed by FOCUS in California and classified as a non-exempt, who worked for FOCUS for one or more pay periods during the PAGA Period. Agreement, ¶ 1. The PAGA Period means the period of time from April 10, 2022 through June 20, 2024. Agreement, ¶ 2.

B. Monetary Terms Of The Settlement

Defendants have agreed to pay a total of $50,000.00 ("Gross Settlement Amount" or "GSA") to settle the PAGA claims identified in Plaintiff's LWDA letter and Complaint (described more fully below), from which all settlement payments to the PAGA Members, to the State of California, for Court approved attorneys' fees and costs, and for settlement administration costs shall be paid. Agreement, ¶ 4. Each Aggrieved Employee will receive a portion of the civil penalties on a pro-rata basis calculated based on the total number of pay periods each PAGA Employee worked as a non-exempt hourly employee of FOCUS in California during the PAGA Period. See, Agreement, ¶ 6. The GSA will be divided as follows:

1. PAGA Counsel's Fees Payment amounting to $16,666.66 (33.33% of the GSA),
2. PAGA Counsel's Litigation Expenses Payment in the amount of $5,366.13 (the Agreement provides up to $7,500);
3. Administration Expenses Payment of $3,000.00 to Phoenix Class Action Administration Solutions ("Phoenix" or "Administrator") to administer the Settlement;
4. Approximately $24,967.21 ("Net Settlement Amount"), divided as follows:
   a. $ 18,725.41 to the LWDA (75%); and
   b. $ 6,241.80 to the PAGA Members (25%)

Agreement, ¶ 4.

C. Funding and Distribution of the Settlement

Within thirty (30) calendar days after the Effective Date[2], Defendant shall deposit the

[2] "Effective Date" means the date the Court has signed an order approving the motion or joint stipulation of settlement for approval of this PAGA Settlement, and enters an order thereon.

GSA with the Settlement Administrator. Agreement, ¶ 10.

Within ten (10) calendar days after the Effective Date, Defendants shall provide the Settlement Administrator with a list of all PAGA Members with each listed employee's full name, hiring, and, if applicable, termination dates in connection with the employee's employment with Defendant during the PAGA Period, last known mailing address, and social security number. Agreement, ¶ 10. Within twenty (20) calendar days of receipt of the list of all PAGA Members, the Settlement Administrator shall run all the addresses of PAGA Members through the United States Postal Service NCOA database to obtain current address information, and issue payments to (a) the PAGA Members; (b) the LWDA; (c) PAGA Counsel for PAGA Counsel's Fees and Costs; and (c) itself. Agreement, ¶¶ 6, 10.

The Administrator will issue each Aggrieved Employee a check for his or her pro rata share of 25% of the PAGA Penalties calculated according to the number of Pay Periods the Aggrieved Employee worked during the PAGA Period along with the Notice of PAGA Settlement (Exhibit A to the Settlement; Exhibit 2 to MM Declaration) by First-Class United States mail, postage prepaid, with directions to the Postmaster to forward the Notice of PAGA Settlement and return all undeliverable Notices to the Administrator. The Administrator will promptly skip trace return mail and perform a single re-mailing. Agreement, ¶ 11.

D. Individual PAGA Payments and Uncashed Checks

The settlement checks issued to PAGA Members will remain valid for one hundred eighty (180) days. Any settlement checks remaining uncashed for more than one hundred eighty (180) days after issuance will be distributed to the California State Controller's Office Unclaimed Property Fund with an identification of the amount of unclaimed funds attributable to each PAGA Employee. All settlement payments to PAGA Members will be treated as miscellaneous income for which an IRS Form 1099 will be issued by the Administrator if required by law. Agreement, ¶ 11.

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

Upon the Effective Date of this Settlement, Plaintiff, the State of California (including, but not limited to, the LWDA), and the PAGA Members will be deemed to have fully, finally, and forever released, settled, compromised, relinquished, and discharged the Released PAGA Claims with respect to Defendant FOCUS and its past and present officers, directors, shareholders, unit holders, managers, employees, agents, principals, heirs, representatives, accountants, auditors, consultants, and its respective successors and predecessors in interest, subsidiaries, affiliates, parents and attorneys. (the "Released Parties"). The Released PAGA Claims means:

> all known or unknown claims for civil penalties, attorneys' fees and costs, or any other relief under PAGA arising out of the Labor Code claims and allegations expressly plead in the operative Complaint and all other Labor Code claims that could have been asserted based on the facts and allegations plead in the operative Complaint, including but not limited to: California Labor Code Sections §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 558, 558.1, 1174, 1194, 1197, 1198, 2802, and IWC Wage Order 1, §§7, 11-12.

Agreement, ¶ 12.

IV. ARGUMENT

A. STANDARD FOR APPROVAL OF A PAGA SETTLEMENT

The Settlement of a PAGA claim requires court approval. *Lab. Code*, § 2699, subd. (*l*)(2). The Court necessarily has broad discretion in making the decision to approve or reject a settlement for civil penalties as the statutory scheme authorizes the Court to determine whether, in certain circumstances, penalties should be assessed and, if so assessed, the appropriate amount of penalties based on the facts and circumstances of the particular case. *See Lab. Code,* § 2699, subds. (e)(1)-(2), Although the PAGA does not set forth the particular standards against which a PAGA settlement should be evaluated, the LWDA has provided guidance for approval that mirrors the standards for evaluating class action settlements. MM, ¶ 12; *See, e.g., Salazar v. Sysco Cent. Cal., Inc.*, 2017 U.S. Dist. LEXIS 14971, *6, n. 4-5 (E.D. Cal. 2017) (stating, based on the LWDA's guidance, that approval of PAGA settlements may be had where the statutory requirements of the PAGA are met and the terms of the settlement are fundamentally fair, reasonable, and adequate). The established standards for evaluating whether class action settlements are fair, reasonable, and adequate provide a familiar, useful framework for the Court to evaluate PAGA settlements and have been adopted by several courts. *Id.*, *See Juarez v.*

Villafan, 2017 U.S. Dist. LEXIS 137205, *5 n. 4 (E.D. Cal. 2017) (*citing Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)); *Ramirez v. Benito Valley Farms, LLC*, 2017 U.S. Dist. LEXIS 137272, *8-9 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1998)); *Gutilla v. Aerotek, Inc.*, 2017 U.S. Dist. LEXIS 41655, *7, n.4 (E.D. Cal. 2017); *Smith v. H.F.D. No. 55, Inc.*, 2018 U.S. Dist. LEXIS 67192, *6 (E.D. Cal. 2018); *Rincon v. W. Coast Tomato Growers, LLC*, 2018 U.S. Dist. LEXIS 22886, *6 (S.D. Cal. 2018).

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

B. THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF PAGA

PAGA imposes two requirements for the settlement of a PAGA claim. Both are met here. First, any civil penalties recovered, whether by judgment or settlement, must be distributed as follows: 75 percent to the LWDA, and the remaining 25 percent to the Aggrieved Employees. *See Moorer v. Noble L.A. Events, Inc*. (2019) 32 Cal.App.5th 736, 742; *Lab. Code*, § 2699, subd. (i). The parties' Settlement so provides. MM, ¶ 13, Ex. 1. Second, the LWDA must be given notice of the settlement so that it may be heard before the Court decides whether to grant approval. *Lab. Code*, § 2699, subd. (*l*)(2). Here, notice is being given to the LWDA concurrently with the filing of this motion. MM, ¶¶ 13, 42, Ex. 9. As a result, Plaintiff has met all procedural statutory requirements for settling a PAGA action.

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

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

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

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

The PAGA Settlement warrants a presumption of fairness for several reasons: (1) The parties reached the Settlement through arm's-length bargaining with the aid of a respected mediator; (2) The parties conducted sufficient investigation and discovery to allow Counsel and the Court to act intelligently. Plaintiff requested and Defendants provided the number PAGA Members, the total number of pay periods during the PAGA Period, all policies in effect during the PAGA Period, and a sampling of anonymized payroll and time punch data for its California non-exempt employees for the relevant period; and (3) Counsel for the Parties are experienced with PAGA cases. MM, ¶ 19. Moreover, neither Plaintiff nor Plaintiff's Counsel have any conflicts of interest with the absent PAGA Members and there are no issues of ascertainability. MM, ¶ 19. For the reasons discussed below, this Court should approve the PAGA Settlement.

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

The PAGA Settlement was reached only after informal discovery and arms' length negotiations between experienced attorneys, which included a full-day mediation with professional neutral Gig Kyriacou. At all times, the negotiations were adversarial and contentious, although still professional in nature. MM, ¶ 9.

Counsel for the Parties have further investigated the applicable law as applied to the facts discovered regarding Plaintiff's claims, the defenses thereto, and the Labor Code violations claimed by Plaintiff. Plaintiff's counsel is experienced in prosecuting PAGA lawsuits. Counsel for the Defendants are experienced in defending PAGA cases. Based on the parties' own independent investigations and evaluations, the parties and their respective counsel are of the opinion that the Settlement for the consideration and on the terms set forth in the Agreement are fair, reasonable and adequate and are in the best interests of Plaintiff, the PAGA Members, the State, and Defendant in light of all known facts and circumstances and the risks inherent in litigation. MM, ¶ 11.

2. <u>The Extent of Investigation and Discovery Completed Provided Ample Information to Enter into an Informed and Reasonable Settlement</u>

Plaintiff considered various sources of information in the lead-up to and during the mediation of June 20, 2024 that enabled her to achieve the PAGA Settlement at issue. MM, ¶ 20. Among other things, Plaintiff considered the following:

- Defendants produced and Plaintiff's counsel reviewed Plaintiff's personnel file.
- Plaintiff's counsel requested that Defendants provide any and all policies regarding overtime and double-time wages, off the clock work, expense reimbursement, meal periods, rest breaks, meal period waivers and agreements, compensation plans, and complaints about working conditions in effect during the relevant time period beginning in April of 2022. Defendants produced those policies as part of their employee handbook.
- Plaintiff's counsel requested that Defendants provide the total number of employees, paychecks, and the pay cycles during the relevant period. Defendants provided the answers to each of these questions.
- Plaintiff requested a 20% sampling of time and payroll records. Defendants provided Plaintiff's counsel with anonymized payroll and time punch data for approximately 55 of its non-exempt employees during the relevant time period.
- Plaintiff's counsel then retained a professional data analyst, James Toney, to examine the records and determine the meal period violation rates, if there was any pay

discrepancy in timesheet hours versus paid hours, and if there was any rounding/time shaving issues. Plaintiff is prepared to provide the Court with the data analysis for *in camera* inspection upon its request.

- Plaintiff's counsel analyzed the state of caselaw on PAGA claims, meal and rest break violations, claims for "off the clock" work and business expense reimbursement, especially as it relates to "manageability" arguments brought up by the defense.

MM, ¶ 20.

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

Defendant estimated for purposes of mediation that, through June 20, 2024, there were approximately 77 PAGA Members[3] who incurred 1,987 pay periods during the relevant period. Based on this information, Plaintiff's counsel prepared an estimate of the maximum possible civil penalties under the PAGA. MM, ¶ 21. The maximum possible civil penalties under the PAGA is the total number of pay periods with one or more violations multiplied by the maximum possible civil penalty amount per pay period. *Id*.

Plaintiff's analysis, which Defendant strongly disputes, revealed that 60% of the sample shifts showed unfavorable rounding and that 55.6 % of pay periods with shifts greater than 5 hours had at least one meal violation (late, short, or no meal). Under the civil penalty formulas applicable under PAGA, Plaintiff calculated Defendant's potential exposure as follows: $100 penalty per pay period, assuming 60% violation, based on Labor Code § 1197.1 for violation of Labor Code § 1194 (failure to pay wages)(1,987 x $100 x 60%= $119,220); $250 penalty per pay period, assuming 60% violation rate, based on Labor Code § 226.3 for violation of Labor Code § 226 (failure to provide compliant wage statements) (1,987 x $250 x 60% = $298,050); $50 penalty per pay period, assuming 55.6% violation, based on Labor Code § 558 for violation of Labor Code § 512 (failure to provide meal periods)(1,987x $50 x 55.6% =$55,238); $100 penalty per pay period under Labor Code sec. 2699(f)(2), assuming the same 55.6% violation rate for rest break violations (1,987x $100 x 55.6% =$110,477). Stacking each of these maximum recoverable civil penalty estimates yields a total amount of $582,985. Assuming that Plaintiff's calculations and analysis are accurate, the maximum exposure also presumes that the

[3] The number of PAGA Members was inadvertently stated as 76 instead of 77 in the Settlement Agreement.

Court will not reduce the penalty award as unjust, arbitrary, oppressive, or confiscatory. For the rest period violations, it also presumes that the meal and rest period violation rates were identical. The potential for recovery of approximately $582,985 in civil penalties depends on circumstances that are extremely unlikely independently and in combination. It would depend on the Court stacking the maximum recoverable civil penalties for unpaid wage violations, meal period violations, rest break violations, and faulty wage statement violations per pay period for all 1,987 pay periods for all 77 PAGA Members during the PAGA Period. Plaintiff's counsel is not aware of any California State court decision awarding a plaintiff and the other aggrieved employees she represents multiple civil penalties for the same pay period under different Labor Code provisions. At best, Plaintiff could hope to recover one penalty for each pay period (regardless of the different Labor Code violations that potentially occurred for the same employee, during the same pay periods). Plaintiff had to substantially discount the value of these claims in the settlement negotiations for this and a variety of other reasons (outlined below). MM, ¶ 22.

There are risks to Plaintiff's meal and rest period claims. MM, ¶ 23. Defendants contend that, to establish a violation for missed meal periods, a plaintiff must do more than show that a meal break was not taken. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. So long as an employer provides employees with a "reasonable opportunity" to take a duty-free meal period, it has no further duty to "police meal breaks and ensure no work thereafter is performed." *Id*. at 1040-41. Instead, a plaintiff must show the employer impeded, discouraged, or prohibited the employee from taking a proper break, or otherwise failed to release the employee of all control. Id. "Thus, the crucial issue with regard to the meal break claim is the reason that a particular employee may have failed to take a meal break." *Washington v. Joe's Crab Shack* (N.D. Cal. 2010) 271 F.R.D. 629, 641. Determining by a review of FOCUS's time records the exact reasons why a meal period appears to be short or late would be difficult and pinpointing those days in which Plaintiff and the PAGA Members worked during their meal periods will be a challenge. Additionally, FOCUS's Employee Handbook contains legally compliant meal period and rest break policies. MM, ¶ 23.

Defendants contend they provided non-exempt employees with the opportunity to take rest breaks in accordance with California law, and, accordingly, that Plaintiff's rest break claim has no support. Additionally, there are other risks to Plaintiff's rest period claim. Employers are not required to record rest periods and such periods are paid. Unlike meal periods, where there are often records showing whether an employee clocked out or not, there is no such evidence to prove a missed rest period or that the employer refused to authorize and permit one. MM, ¶ 24.

There are risks to Plaintiff's claim for unreimbursed expenses. Plaintiff alleges that Defendants did not reimburse her or the other PAGA Members for personal protective equipment (PPE), including gloves or safety glasses as well as their mobile phone expenses. There is a risk that the Court may consider Plaintiff's claims as to Defendants' alleged failure to indemnify for business expenses to be individual in nature. As such, Plaintiff's Counsel had to significantly discount the value of this claim during settlement negotiations. MM, ¶ 25.

Additionally, PAGA states a court has discretion to award a lesser amount than the maximum penalty. *See Lab. Code,* § 2699, subd. (e)(2) ("…a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."); *see also Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1135 (reducing PAGA award). There is a substantial risk that the Court could reduce civil penalties to an insignificant amount if it is unpersuaded by Plaintiff's evidence of willful and intentional conduct. MM, ¶ 26. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504 ("*Carrington*") illustrates this. In that case, the Court of Appeal affirmed a trial court's heavily discounted award of only $5 per violation because it was within the Court's discretion to significantly reduce PAGA penalties even when there is a finding that a violation of the California Labor Code occurred. The plaintiff in *Carrington* had requested penalties in excess of $70 million and was successful in proving the PAGA claim during a bench trial. However, the trial court reduced the total award after trial to only $150,000 (30,000 violations x $5) and stated that this reduction was warranted because imposing the maximum penalty would be "unjust, arbitrary, and oppressive", based on Starbucks's "good faith attempts" to comply with meal break obligations and because the Court found the violations were minimal. Applying the same formula here and assuming there was one violation during each pay period, the award of civil penalties could not exceed $9,935 in PAGA penalties (1,987 violations x $5). As such, this Settlement is a great result based solely on the risk the Court chooses to apply the *Carrington* formula. Defendants have also posed formidable defenses to the Labor Code claims underlying Plaintiff's allegations. Thus, the chance of Plaintiff recovering a higher amount than the Gross Settlement Amount is uncertain. MM, ¶ 26.

All in all, considering all of the risks detailed above, as well as potential manageability issues, the risk of not prevailing at trial, the risk that, even if Plaintiff prevailed, the damages would be limited due to the largely discretionary nature of the damages, and taking into account Defendant's defenses on the merits, Plaintiff applied a 75% discount to the maximum PAGA exposure of $582,985, resulting in a risk-discounted realistic potential exposure of $145,746. Therefore, the Gross Settlement Amount of $50,000 is a great result, amounts to relief consistent with the underlying purpose of PAGA, and represents approximately 34% of the risk-discounted realistic potential recovery. MM, ¶ 27. *See In re Cendant Corp., Derivative Action Litig*., 232 F. Supp. 2d 327 (D. N.J. 2002) (approving settlement that only provided a 2% recovery based on the estimated liability exposure).

The Parties further recognize that the issues presented in the representative PAGA claim are likely only to be resolved with extensive and costly pretrial and trial proceedings, and that further litigation will cause inconvenience, distraction, disruption, delay, and expense disproportionate to the maximum potential benefits to the Aggrieved Employees and Plaintiff from continued litigation, especially in the post pandemic era where further and extensive litigation may cause businesses to shut down, resulting in no monetary compensation to Plaintiff, Plaintiff's attorneys, other PAGA Members, and the State of California. MM, ¶ 28.

The settlement of the representative PAGA claim involves monetary relief to all PAGA Members, Plaintiff, her attorneys, and the State of California. The Settlement is reasonable given the uncertainties this lawsuit entails. It is also reasonable given the structure and purpose of the PAGA, since the PAGA is not a restitution statute. Rather, it is essentially a punishment statute. It provides for civil penalties only. Within the PAGA framework she is bound by, Plaintiff, considering the evidence he faced, achieved a great result for the employees concerned. Furthermore, any employees who are dissatisfied with the amount they received in civil penalties can pursue any damages they believe they are owed by the Defendants. The Settlement does not require them to opt out to do so. MM, ¶ 29.

Furthermore, Plaintiff recognizes that continued litigation presents significant risks that support a significant downward departure from Plaintiff's estimated civil penalties amount. In view of the risks, the Settlement represents a fair, adequate, and reasonable compromise amount for these claims and is in the best interest of Plaintiff and PAGA Members and thus, warrants approval. *See Laguna v. Coverall N. Am., Inc.*, Case No. 12-55479 (9th Cir. June 3, 2014) 2014 WL 2465049, * 3. The PAGA settlement and its terms are fair, just, reasonable, adequate, and equitable to Defendants, Plaintiff, and the State, especially in light of the current economic climate, and are the product of good faith, and informed arms-length negotiations between the Parties consistent with public policy and fully comply with applicable provisions of law. MM, ¶ 30.

As such, the settlement of PAGA penalties in the gross sum of $50,000.00, of which 75% of the net amount after attorney's fees, litigation costs, and settlement administration costs ($18,725.41) will be paid to the LWDA and 25% ($6,241.80) will be distributed to the PAGA Members, is reasonable and appropriate under the circumstances. MM, ¶ 31.

4. <u>Each PAGA Employee Will Be Paid Based on the Potential Extent of His or Her Injury Compared to Other PAGA Members</u>

Each PAGA Employee will receive a portion of the civil penalties on a pro-rata basis depending on the number of pay periods Defendants employed them for during the PAGA Period. Agreement, ¶ 6. Based on the data provided to the Settlement Administrator, with a total of 77 PAGA Members, the highest PAGA settlement share to be paid is approximately $267.99, the average PAGA settlement share to be paid is approximately $121.23, and the lowest PAGA settlement share to be paid is approximately $4.70. This is a great result given the uncertainties this lawsuit entails. MM, ¶ 32; *See* Declaration of Michael Moore ¶ 22.

///

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

Plaintiff's counsel has considerable experience in wage and hour litigation and is qualified to evaluate the PAGA claims, the value of settlement versus moving forward with litigation, and viability of possible affirmative defenses. *See* MM, ¶¶ 14-18, 38. Similarly, Defendant's counsel, Matthew Theriault and Neo Chen of Gordon Rees Scully Mansukhani, LLP, have broad experience in handling employment matters and wage and hour litigation. MM, ¶ 38.

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

Of the 50,000.00 allocated towards the GSA, Plaintiff's counsel requests $16,666.66 (33.33% of the GSA) in attorney's fees and $5,366.13 in litigation costs, which is fair and reasonable. MM, ¶ 36-37.

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

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

"[R]egardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn.11 ("*Chavez*")); *In re Pacific Enter. Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 379 ("*Pacific*") [affirming 33% fee award]; *Williams v. MGM-Pathe Communications Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 ("*MGM*") (awarding 33% of total fund amount).) This is also consistent with Plaintiff's Counsel's experience in wage and hour class and PAGA settlements. MM, ¶ 36.

Should the Court elect to use Plaintiff's Counsel's lodestar as the method for awarding fees, notwithstanding courts' clear preference for the percentage method, Plaintiff's Counsel's fee request of $16,666.636 (33.33% of GSA) is fair and reasonable based on their lodestar as cross-checked against the percentage of the recovery. MM, ¶ 37-38, Ex. 6. Plaintiff's counsel's previous experience in litigating wage and hour class and representative actions and the caliber of opposing counsel also support the reasonableness of the fee request. MM, ¶ 39. The award of attorneys' fees sought is also justified by the contingency nature of the attorney-client relationship, the risks of non-payment and non-reimbursement, the delay in payment and cost reimbursement, and the great results Plaintiff's Counsel has achieved for the PAGA Members. *Id.*

In addition, Plaintiff's Counsel incurred substantial costs, $5,366.13 to date, including the costs of a mediator, to aid in the representation of the PAGA Members. MM, ¶ 40, Ex. 7. As the evidence submitted herewith shows, all of these costs are documented and reasonably incurred. *Id*. Accordingly, they warrant the Court's approval.

///

///

7. **<u>The Proposed Settlement Administration Costs Are Fair and Reasonable and Should Be Approved.</u>**

With regard to the settlement administration costs provision, it is reasonable. Before agreeing to Phoenix Class Action Administration Solutions ("Phoenix"), the Parties sought and reviewed bids from other reputable third-party administrators and Phoenix's bid was comparable. MM, ¶ 41, Ex. 8; Declaration of Michael Moore, Ex. B. Thus, the settlement administration costs provision should be given approval.

<u>V. CONCLUSION</u>

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

Respectfully submitted,

MM LAW, APC

Dated: February 25, 2025

By: Maralle Messrelian

Maralle Messrelian
Attorneys for Plaintiff,
Amairani Gomez