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behalf of himself, all similarly aggrieved current and
former employees of Defendant, the Proposed Class
and the State of California

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF STANISLAUS

KENNETH MURPHY, on behalf of himself, all
similarly aggrieved current and former
employees of Defendant and the State of
California,

Plaintiff,

v.

STINSON ENTERPRISES, INC., a California
Corporation doing business as MODESTO
TOYOTA; KAMIL ESHO, an individual;
and DOES 1-10;

Defendants.

Case No. CV-23-002354

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR FINAL
APPROVAL OF CLASS ACTION AND
PAGA SETTLEMENT**

Action Filed: April 28, 2023
FAC Filed: July 12, 2023

Trial Date: TBA

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Dept: 23

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1 phones for Defendant's business purposes without any reimbursement, restitution or
2 compensation in violation of Labor Code section 2802. Plaintiff further maintains a cause of
3 action pursuant to the Private Attorneys' General Act ("PAGA") based on the Labor Code section
4 2802 violation. Plaintiff further asserts a number of individual claims, which are subject to a
5 separate settlement agreement. (FAC ¶1.) (**Basham Decl. ¶ 5.**)

6 Plaintiff filed his Complaint on April 28, 2023, asserting causes of action for (1)
7 Failure to Reimburse For Business Expenses (**Class**); (2) Failure to Provide Rest Breaks
8 (Individual); (3) Failure to Provide Meal Periods (Individual); (4) Failure to Furnish Accurate
9 Itemized Wage Statements (Individual); (5) Failure to Timely Pay All Wages Due at Termination
10 – Waiting Time Penalties (Individual); (6) Unfair Business Practices (**Class**) (7) Sexual
11 Harassment in Violation of FEHA (Individual); (8) Sexual Battery (Individual); (9) Intentional
12 Infliction of Emotional Distress (Individual); and (10) Negligent Infliction of Emotional Distress
13 (Individual). Plaintiff's First through Sixth Causes of Action are asserted against Defendant
14 Employer only. Plaintiff's Seventh Cause of Action is asserted against all Defendants. Plaintiff's
15 Eighth through Tenth Causes of Action are asserted Individual Defendant Kamil Esho ("Esho")
16 only. On July 12, 2023, Plaintiff filed his First Amended Complaint, asserting an Eleventh Cause
17 of Action for violation of PAGA based on Plaintiff's First Cause of Action. (**Basham Decl. ¶ 6.**)

18 The Court granted Plaintiff's Motion for Preliminary Approval of Class Action
19 Settlement in an Order dated May 14, 2024, and preliminarily found, subject to the final fairness
20 hearing, that the proposed settlement is entitled to a presumption of fairness and that all relevant
21 factors support preliminary approval of the settlement. (**Basham Decl., ¶7, Exhibit B thereto.**)
22 These same factors also satisfy all criteria required for final approval of the proposed settlement
23 under California law as the settlement is fair, adequate and reasonable. *See, Kullar v. Foot Locker*
24 *Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129-130; *Wershba v. Apple Computer* (2001) 91 Cal.
25 App. 4th 224, 244-245; *Dunk v. Ford Motor Company* (1996) 48 Cal. App. 4th 1794, 1802.

26 **III. SUMMARY OF THE SETTLEMENT AGREEMENT**

27 **A. THE PROPOSED CLASS**

28 The Settlement Agreement identifies the Settlement Class as "all individuals who

1 worked for Defendant as sales employees in California during the Class Period.” The Class Period
2 is the period of time from May 1, 2019 through October 31, 2023. At mediation, the Parties
3 determined that the total number of putative class members was 63 current and former employees
4 of Defendant. (Exhibit A ¶¶ I.C & K, II.E.) (Basham Decl. ¶ 8.)

5 **B. THE SETTLEMENT FUND**

6 The Settlement Agreement results in a Total Settlement Amount of \$50,000.00
7 (hereafter “Gross Settlement Amount”) for participating Class Members in exchange for a full
8 release. (Exhibit A, ¶III.A.) This amount includes \$10,000.00 in civil penalties to the LWDA
9 (75%) and participating PAGA Members (25%) for the PAGA claim, \$16,666.67 in reasonable
10 attorneys’ fees (or 33 1/3rd% of the Gross Settlement Amount), up to \$4,500.00 in costs, a
11 settlement administration fee of up to \$5,350.00, and an enhancement award to Plaintiff of up to
12 \$5,000. (Exhibit A, ¶III.B.) (Basham Decl. ¶ 9.)

13 The Net Settlement Amount will consist of the Gross Settlement Amount minus
14 the LWDA portion of the PAGA settlement, attorneys’ fees and costs, the enhancement award,
15 and the administrator’s costs. The Net Settlement Fund is therefore currently estimated to be
16 approximately \$10,983.33 to be shared by only 63 Class/PAGA members. (Exhibit A, ¶¶I.BB &
17 III.B & C.) Any unclaimed or uncashed funds from uncashed checks to be tendered to the
18 designated cy pres. (Exhibit A ¶III.E.10.) (Basham Decl. ¶10.)

19 The Net Settlement Sum will be distributed to the Settlement Class Members on a
20 pro-rata basis based on the total number of Workmonths worked during the Class Period. Current
21 and former employees need not undertake any action in order to receive their share of the Net
22 Settlement Fund. Each Class Member received a notice containing basic information regarding
23 the nature of the action, a summary of the substance of settlement, a class definition, the date for
24 the final approval hearing, the formula used to calculate Class Members’ individual settlement
25 amount, the procedure to opt-out and for exclusion, and the process for objecting. The notice
26 includes the time period during which the Class Member worked for Defendant during the Class
27 Period. Thus, a Class Member wishing to opt-out of the settlement, or to contest his or her share
28 of the settlement, was provided with a clear procedure for doing so. He or she was free to exercise

1 those rights and bring an individual claim against Defendant. A true and correct copy of an
2 exemplar of the Notice sent to Class Members is attached to the Declaration of Nathalie
3 Hernandez of ILYM Group, Inc. (“Hernandez Decl.”), as Exhibit A. (**Basham Decl. ¶11;**
4 **Hernandez Decl. ¶¶3-7, Exhibit A thereto.**)

5 **C. RELEASES**

6 Class Members who do not specifically opt-out will release Defendant from “all
7 claims that were or could have been asserted based on the Class/PAGA facts alleged in the First
8 Amended Complaint by Plaintiff and Class Members, including all claims under California Labor
9 Code section 2802 as alleged in the Action, for unreimbursed business expenses for the
10 Class/PAGA members’ use of their personal cell phones for Defendant’s business purposes,
11 penalties under the Private Attorneys General Act sections 2698, *et seq.*, and violations of
12 California Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*) relating to the
13 Class/PAGA members’ use of their personal cell phones for Defendant’s business purposes.”
14 The release is limited to the time period of May 1, 2019 through October 31, 2023. (**Exhibit A,**
15 **¶¶I.K, Z, DD & EE & III.F & G.) (Basham Decl. ¶ 12.)**

16 **D. CLAIMS ADMINISTRATION**

17 ILYM Group, Inc., is the Class Action Settlement Administrator (“Administrator”)
18 for the Class and PAGA claims in this action. On or about June 11, 2024, Class Notices were
19 mailed via First Class U.S. Mail to all sixty-three (63) individuals identified as Class Members in
20 the Class List. Two (2) of the Notices mailed to the Class were returned or were labeled as
21 undeliverable by the Post Office, with no forwarding addresses. The Administrator performed a
22 computerized skip trace on the 2 returned Notices, but could not find any forwarding addresses.
23 As a result, the two Class Notices were determined to be undeliverable. The Class Notice advised
24 the Class Members that the deadline for them to dispute the number of Workmonths, Request for
25 Exclusion, or make an Objection was July 26, 2024. No Class Members have opted-out of the
26 Class Settlement, no one submitted a dispute on the Workmonths and there are no objections to
27 the settlement. (**Hernandez Decl. ¶¶6-11, Exhibit A thereto; Basham Decl. ¶ 13, Exhibit C**
28 **thereto.**)

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2 **IV. LAW AND ARGUMENT**

3 **A. THE CLASS MEMBERS RECEIVED PROPER NOTICE**

4 Class notice requirements are set forth in the California Rules of Court. Cal. Rules
5 of Court, Rule 3.766. California law vests the Court with broad discretion in fashioning an
6 appropriate notice program. (*Cartt v. Superior Court* (1975) 50 Cal.App.3d 960, 973–74.) There
7 is no statutory or due process requirement that all class members receive actual notice. Rather, as
8 the Court of Appeal has explained, “[t]he notice given should have a reasonable chance of
9 reaching a substantial percentage of the Class Members.” (*Id.* at 974.)

10 The Notice approved by the Court and sent out to the Class Members by the
11 Administrator meets these requirements: it identified the Parties and described the lawsuit and the
12 claims being released, the Class, the net settlement amount, the proposed method for distribution
13 of the Settlement Shares to the Class Members, the amount proposed to be paid as an incentive
14 payment to the class representative, the requested amount for attorneys' fees and costs, the
15 procedure to object to the settlement, and the procedure to request exclusion from the settlement.
16 **(Hernandez Decl. ¶¶6-11, Exhibit A thereto; Basham Decl. ¶ 13, Exhibit C thereto.)**

17 The California Supreme Court has held that notice is appropriate if it has a
18 "reasonable chance of reaching a substantial percentage of the class members ..." *Cartt, supra*, 50
19 Cal.App.3d at 974. The Notice was mailed to each individual Class Member at that Class
20 Member's last known address, and all but two (2) of the Sixty-Three (63) Notices were
21 successfully mailed to Class Members. **(Hernandez Decl. ¶¶6-9, Exhibit A thereto; Basham
22 Decl. ¶ 13, Exhibit C thereto.)** As a result, the Notice given to Class Members was more than
23 adequate.

24 **B. FINAL APPROVAL OF SETTLEMENT IS APPROPRIATE**

25 Settlement of a class action requires court approval. Code Civ. Pro. § 1781(f.)
26 The purpose of the requirement is ‘the protection of those class members, including the named
27 plaintiffs, whose rights may not have been given due regard by the negotiating parties.’” (*Dunk v.*
28 *Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800–1801, fn. & citations omitted.) “In general,

1 questions whether a settlement was fair and reasonable, whether notice to the class was adequate,
2 whether certification of the class was proper, and whether the attorney fee award was proper are
3 matters addressed to the trial court's broad discretion.” (*Wershba v. Apple Computer, Inc.* (2001)
4 91 Cal. App. 4th 224, 234-35). “‘Due regard’ ... ‘should [also] be given to what is otherwise a
5 private consensual agreement between the parties. The [court's] inquiry “must be limited to the
6 extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
7 overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a
8 whole, is fair, reasonable and adequate to all concerned.” [Citation.] “Ultimately, the [trial] court's
9 determination is nothing more than ‘an amalgam of delicate balancing, gross approximations and
10 rough justice.’”” (*7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85
11 Cal.App.4th 1135, 1145 .)

12 The Settlement is fair, adequate, and reasonable because it provides substantial
13 benefits to Class Members and the general public. The fairness, adequacy, and reasonableness of
14 the Settlement are illustrated by the fact that not one of the Class Members has objected to the
15 settlement or requested exclusion from the Settlement. (**Basham Decl. ¶ 13, Exhibit C thereto.**)
16 Under the legal standards used by California courts to determine whether class action settlements
17 should be approved, this Settlement warrants approval.

18 **1. THE THREE-STEP SETTLEMENT APPROVAL PROCESS**

19 The law favors settlement, particularly in class actions and other complex cases
20 where substantial resources can be conserved by avoiding the time, cost, and rigors of formal
21 litigation. *4 Newberg on Class Actions* 4th (4th ed. 2002) § 11.41 (and cases cited therein). These
22 concerns apply with particular force in a case such as this one.

23 A class action, however, may not be dismissed, compromised, or settled without
24 the approval of the court. California Rules of Court Rule 3.769; Federal Rules of Civil Procedure,
25 Rule 23(e)

26 .¹ Judicial proceedings under F.R.C.P. Rule 23 have led to a defined procedure

27 ¹ The California Supreme Court has authorized California's trial courts to use Federal Rule 23 and
28 cases applying it for guidance in considering class issues. *See Vasquez v. Superior Court* (1971) 4
Cal.3d 800, 821; *Green v. Obledo* (1981) 29 Cal.3d 126, 145-146. Where appropriate, therefore,

1 and specific criteria for settlement approval in class action settlements, described in the Federal
2 Judicial Center, *Manual for Complex Litigation*, Fourth (4th ed. 2004) ("*Manual*") § 21.632, *et*
3 *seq.* The Manual's settlement approval procedure describes three distinct steps: (1) Preliminary
4 approval of the proposed settlement at an informal hearing; (2) Dissemination of mailed and/or
5 published notice of the settlement to all affected Class members; and (3) A "formal fairness
6 hearing," or final settlement approval hearing, at which Class members may be heard regarding
7 the settlement, and at which evidence and argument concerning the fairness, adequacy, and
8 reasonableness of the settlement may be presented. *Manual*, § 21.632-34.

9 The first two steps of this process are now complete. The first step was completed
10 on May 14, 2024, when this Court granted Preliminary Approval of the Settlement. (**Basham**
11 **Decl., ¶7, Exhibit B thereto.**) In doing so, the Court determined that the Settlement was within
12 the reasonable range of possible final approval and that notice to the Class Members of the
13 Settlement's terms and of the scheduling of the formal fairness hearing should be distributed. See
14 *Wershba v. Apple Computer* (2001) 91 Cal.App.4th 224, 234-35; 4 *Newberg, supra*, § 11.25.

15 The second step in the class action settlement approval process, the dissemination
16 of the Notice, is complete as well. In accordance with the Court's Preliminary Approval Order, the
17 Parties worked with the Administrator to implement the Court-approved Notice, which employed
18 the best practicable means to disseminate to all Class Members notices of the Settlement's terms
19 and of the date and time of the Final Approval hearing. C.C.P. § 382. (**Hernandez Decl. ¶¶6-9,**
20 **Exhibit A thereto; Basham Decl. ¶ 13, Exhibit C thereto.**)

21 The third and last step in the class action settlement approval process is the Final
22 Approval hearing at which the Court shall determine whether the Settlement is fair, adequate, and
23 reasonable. At the Final Approval hearing, scheduled for October 3, 2024, Class Members will
24 have the opportunity to be heard regarding the Settlement, and Class Counsel will present
25 evidence and argument in support of the Settlement. *See Manual*, § 21.634. At the conclusion of
26 the Final Approval hearing, this Court will decide whether to grant Final Approval of the

27
28 Plaintiffs cite F.R.C.P. Rule 23 and federal case law in addition to California law.

1 Settlement and whether to enter a final Order and enter Judgment in the action. In this case, not a
2 single class member has objected (to date) to the Settlement and no one (other than Plaintiff's
3 counsel and Defense counsel) has indicated that he or she will appear at the Final Approval
4 hearing and/or contest any aspect of this settlement. (**Basham Decl., ¶13, Exhibit C thereto.**)

5 When faced with a motion for final approval of a class action settlement under
6 Code of Civil Procedure § 382, the Court inquires whether the settlement is "fair, adequate, and
7 reasonable." See *Wershba, supra*, 91 Cal.App.4th at 244-45; *Dunk, supra*, 48 Cal.App.4th at
8 1801. A review of the terms of the proposed Settlement shows that it is more than fair.

9 At the final approval fairness hearing, "[A] presumption of fairness exists where:
10 (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are
11 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar
12 litigation; and (4) the percentage of objectors is small." (*Dunk v. Ford Motor Co.* (1996) 48
13 Cal.App.4th 1794, 1802). In deciding whether to grant final approval to a class action settlement,
14 California courts consider several factors, including the following: (1) the value of the settlement;
15 (2) the risks inherent in continued litigation; (3) the extent of discovery completed and the stage
16 of the proceedings when settlement was reached; (4) the complexity, expense, and likely duration
17 of the litigation in the absence of settlement; (5) the experience and views of class counsel; and
18 (6) the reaction of class members. See *Wershba, supra*, 91 Cal.App.4th at 244-45; *Dunk, supra*,
19 48 Cal.App.4th at 1801. As described below, all of the relevant criteria support final approval of
20 the Settlement.

21 **2. THE SETTLEMENT WAS REACHED THROUGH ARM'S LENGTH**
22 **NEGOTIATION AFTER INDEPENDENT INVESTIGATION,**
DISCOVERY, AND RISK ANALYSIS

23 The Parties' initial arms-length settlement negotiations resulted in a mediation
24 before noted mediator Laurie Saldaña on December 12, 2023. The Parties agreed to settle the
25 Action during the mediation and signed a short form written agreement. During the settlement
26 process, the Parties considered the evidence, discussed the risks and benefits of continued
27 litigation and proceeding with class certification and/or trial. The settlement negotiations were at
28 arm's length and, although conducted in a professional manner, were adversarial at all times.

1 Defendant maintained its position that its policies and practices were compliant with California
2 law, that Class Certification was not appropriate, and that the case was not manageable for trial.
3 Although the Parties were willing to explore the potential for a settlement, each side was also
4 committed and prepared to litigate through trial and appeal if a settlement had not been reached.
5 The proposed Settlement was reached at the end of a process that was neither fraudulent nor
6 collusive. To the contrary, counsel for the Parties advanced their respective positions throughout
7 the settlement negotiations. The Settlement Agreement that was reached with the assistance of
8 Ms. Saldaña takes into account the strengths and weaknesses of each side's case. Each side has
9 extensive experiencing litigating employment class actions and agrees the Settlement Agreement
10 is fair, balanced, and reasonable. Thereafter, the Parties engaged in further significant
11 negotiations, which led to the Parties executing the Settlement Agreement in late January and
12 early February 2024, which forms the basis of this Motion. (**Basham Decl., ¶14.**)

13 Plaintiff's Counsel has conducted a thorough investigation into the applicable facts
14 and has diligently pursued an investigation of the asserted claims against Defendant. The Parties
15 engaged in significant informal discovery before the mediation to ensure Plaintiff's counsel had
16 the information and documents he needed to enter into informed settlement negotiations on the
17 class and PAGA claims. Defendant produced Plaintiff's personnel file, wage records, and
18 documents relating to their policies, practices, and procedures regarding reimbursement of
19 business expenses. As part of Defendant's production, Plaintiff reviewed records relating to the
20 size and scope of the Class Members, as well as data permitting Plaintiff to understand the
21 number of Workmonths in the PAGA and Class Periods. Moreover, in preparation for the
22 mediation, Plaintiff's counsel extensively interviewed Plaintiff several times prior to the
23 mediation, and at the mediation as well, to fully understand the relevant facts applicable to the
24 Class and PAGA claims. The Parties agree that the above-described investigation and evaluations,
25 as well as the information exchanged during the settlement negotiations, are more than sufficient
26 to assess the merits of the respect Parties' positions and to compromise the issues on a fair and
27 equitable basis. (**Exhibit A ¶ II.F.**) (**Basham Decl. ¶ 15.**)

28 Based on his own independent investigation and evaluation, Plaintiff's Counsel is

1 of the opinion that the Parties' Settlement is fair, reasonable, and adequate and is in the best
2 interests of the Plaintiff and all Class and PAGA Members in light of all known facts and
3 circumstances, including the risk of significant delay, defenses asserted by Defendant, the
4 difficulties in meeting the various Class Certification and Manageability issues, and the numerous
5 potential appellate issues. The Parties further recognize that the issues presented in the Action are
6 likely only to be resolved with extensive and costly pretrial proceedings and that further litigation
7 will cause inconvenience, distraction, disruption, delay, and expense disproportionate to the
8 potential benefits of further litigation. The Parties further have taken into account the risk and
9 uncertainty of the outcome inherent in any further litigation. The Settlement Agreement that was
10 reached with the assistance of the mediator takes into account the strengths and weaknesses of
11 each side's case. (**Basham Decl.**, ¶16.)

12 Plaintiff recognizes there are serious risks concerning his Class and PAGA claims.
13 Defendant denies Plaintiff's allegations and asserts the following defenses: (1) many sales
14 employees had no business need to use their personal cell phones at work; (2) landline phones
15 were available to sales employees for their use for business purposes should the need arise; and
16 (3) any use of personal cell phones by sales employees for business purposes was based on
17 convenience and not any requirement made by Defendant. By entering into the Settlement
18 Agreement, Defendant does not admit to Plaintiff's allegations. To the contrary, Defendant
19 asserts it made the decision to resolve the Class and PAGA claims for business reasons to avoid
20 the substantial amounts of time, energy and expense a protracted class litigation would consume.
21 Nevertheless, prior to the mediation, Defendant disclosed that it began paying its sales employees
22 a sum of \$10 per month for any business use of personal cell phones by its sales employees.
23 (**Exhibit A**, ¶¶ II.H & I.) (**Basham Decl.** ¶ 17.)

24 Labor Code section 2802 requires an employer to indemnify an employee "for all
25 necessary expenditures or losses incurred by the employee in direct consequence of the discharge
26 of his or her duties." One of the elements of a section 2802 claim is that the expenditures or
27 losses were necessary. (*USS-Posco Indus. v. Case* (2016) 244 Cal. App. 4th 197, 205.)
28 Accordingly, there is a real risk of loss given the disputed facts and applicable case law.

1 **3. COUNSEL IS EXPERIENCED IN SIMILAR LITIGATION**

2 “Adequacy of representation depends on whether the plaintiff’s attorney is
3 qualified to conduct the proposed litigation and the plaintiff’s interests are not antagonistic to the
4 interests of the class.” (*McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450). Here, Plaintiff’s
5 counsel is well qualified to represent the Class. Class Counsel, Gary R. Basham, has decades of
6 class action experience and is well qualified to prosecute this action and protect the interest of
7 Class Members. Mr. Basham has no conflicts of interest with Class Members, and at no point in
8 this case has Defendant alleged Plaintiff or his counsel were incapable of fairly and properly
9 representing the proposed Class. (**Basham Decl., ¶¶18-34.**)

10 **4. PERCENTAGE OF THOSE WHO OBJECT**

11 The response to date from the Settlement Class confirms that the proposed
12 settlement is fair and appropriate. In response to the Notice of Class Settlement sent to the
13 proposed Class of 63 members (only 2 undeliverable), no class members have filed any objections
14 or disputes to the proposed settlement, and none of the proposed class member has opted out of
15 the proposed settlement. The deadline to object or opt-out to the settlement was July 26, 2024.
16 (**(Hernandez Decl. ¶¶6-9, Exhibit A thereto; Basham Decl. ¶ 13, Exhibit C thereto.)**)

17 **5. THE SETTLEMENT AMOUNT IS FAIR AND REASONABLE**

18 The Gross Settlement Amount of \$50,000 reflects a fair, adequate, and reasonable
19 resolution of this case. In reaching this amount, the Parties took into consideration the risks and
20 benefits of continued litigation, generally, and for this case specifically. The Net Settlement
21 Amount in this Action is \$10,983.33, with an additional \$7,500.00 being paid to the LWDA as
22 civil penalties under PAGA. Plaintiff calculates his likely award should he and the Class prevail
23 at approximately \$47,550 plus interest for violation of Labor Code §2802 damages (using \$30 per
24 month for reimbursement) and PAGA penalties of \$37,410 (using \$100 penalty per violation).
25 Further, each Class Members’ gross share of the Net Settlement is based on the number of months
26 worked, and paid-out on a pro-rata basis. (**Exhibit A ¶ III.C.1.**) The Net Settlement Amount is
27 fair and adequate based on the underlying facts and law. (**Basham Decl., ¶35.**)

28 This is a fair and appropriate method of distributing settlement funds for claims

1 under Labor Code §2802. The value of a reimbursement claim is necessarily connected to the
2 amount of personal resources devoted to an employer's purposes, and in this particular case, those
3 resources would increase based on the duration of employment. (**Basham Decl., ¶36.**)

4 The Parties' allocation formulas need only have a reasonable, rational basis,
5 particularly if recommended by experienced class counsel. (*Maley v. Del Glob. Techs. Corp.*
6 (SDNY 2002) 186 F. Supp. 2d 358, 367.) In this case, the settlement provides class members with
7 relief in a manner approximately commensurate with the potential value of individual claims in
8 light of the risks of continued litigation.

9 **C. COURT APPROVAL OF THE PAGA SETTLEMENT**

10 **1. The Private Attorneys Generals Act**

11 Under the Private Attorneys General Act (the "PAGA"), an aggrieved employee
12 may bring suit to recover civil penalties for violations of the California Labor Code. (Labor Code
13 §2699(a).) Civil penalties are specifically denoted as "civil" penalties and are distinct and separate
14 from statutory penalties. (*Villacres v. ABM Indus. Inc.* (2010) 189 Cal.App.4th 562, 579). PAGA
15 permits a representative Plaintiff to recover civil penalties for each employee who suffers the
16 subject Labor Code violation, for each and every pay period the violation was suffered, for a 1-
17 year limitations period. (*Id.*; *Thomas v. Home Depot USA Inc.* (N.D. Cal. 2007) 527 F.Supp.2d
18 1003, 1007). PAGA is intended to promote compliance with the Labor Code by expanding the
19 rights of individual employees to bring suit in the face of declining staffing and resources of
20 California's labor and employment law enforcement agencies. The employee-plaintiff in a PAGA
21 action sues as a proxy for state agencies and does so in a representative capacity on behalf of
22 other aggrieved employees. (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Sup. Ct.*
23 (2009) 46 Cal.4th 993, 1003).

24 In order to bring a PAGA action, the aggrieved employee must first exhaust
25 administrative remedies by filing a notice with the Labor Workforce Development Agency
26 ("LWDA"). (Labor Code §2699.3(a).) Under current regulations, a copy of the notice must be
27 filed with the LWDA online. A copy must also be sent to the employer by certified mail. After the
28 notice is filed and/or mailed, the employee must wait 65 days before commencing suit in

1 accordance with Labor Code §2699.3(a)(2)(A). If the PAGA notice specifies Labor Code
2 violations other than those expressly identified in Labor Code §2699.5, the employer has a right
3 to cure the Labor Code violations before the end of the statutory waiting period. However, if the
4 notice specifies a provision identified in section 2699.5, the employer has no right to cure.
5 Defendant had no right to cure as the PAGA cause of action is based on Labor Code §2802,
6 which is listed in section 2699.5.

7 In this case, Plaintiff submitted her PAGA letter to the LWDA and served the letter
8 on Defendant by certified mail on May 8, 2023. Plaintiff filed his Class and PAGA First
9 Amended Complaint with the Court on July 12, 2023, more than 65 days after submitting the
10 PAGA letter. Accordingly, Plaintiff has satisfied all requirements set forth in PAGA. (**Basham**
11 **Decl., ¶37, Exhibit D thereto.**)

12 The California Supreme Court has held PAGA actions need not satisfy state law
13 class certification requirements in order to proceed on a representative basis. (*Arias v. Superior*
14 *Court* (2009) 46 Cal.4th 969, 980). If a provision specified in section 2699.5 does not expressly
15 provide for a “civil” penalty, PAGA’s default civil penalty applies. (Labor Code §2699(f).) The
16 failure to reimburse for necessary business expenses is unlawful under Labor Code §2802. This
17 provision is specifically incorporated into PAGA under Labor Code §2699.5. Because Labor
18 Code §2802 does not provide for an independent “civil” penalty for a violation of its provisions,
19 the default civil penalty under Labor Code section 2699(f)(2) applies. The default civil penalty for
20 section 2802 violations is as follows: “[i]f, at the time of the alleged violation, the person employs
21 one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved
22 employee per pay period for the initial violation and two hundred dollars (\$200) for each
23 aggrieved employee per pay period for each subsequent violation.” (Labor Code §2699(f)(2).).

24 **2. Courts Have Significant Discretion To Approve PAGA Settlements**

25 Once an aggrieved employee files a PAGA lawsuit, the statutory scheme
26 recognizes that the employee may settle that lawsuit on behalf of the state. (Labor Code § 2699,
27 subd. (a).) When an aggrieved employee settles a PAGA action, the statute provides: "The
28 superior court shall review and approve any settlement of any civil action filed pursuant to this

1 part." (§ 2699, subd. (s)(2).)

2 In reviewing the settlement, the trial court "should evaluate [it] to determine
3 whether it is fair, reasonable, and adequate in view of PAGA's purposes to remediate present
4 labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Moniz*
5 *v. Adecco USA, Inc.*, 72 Cal. App. 5th 56, 77.) The court is vested with broad discretion in
6 making that determination. (p. 76.) To find the fairness of a **PAGA settlement**, the trial court
7 may consider many of the same factors used to evaluate the fairness of class action **settlements**,
8 "including the strength of the plaintiffs' case, the risk, the stage of the proceeding, the complexity
9 and likely duration of further litigation, and the settlement amount." (*Id.*, at p. 77.)

10 The PAGA statute provides that a penalty amount calculated under § 2699(f) may
11 be reduced where "based on the facts and circumstances of the particular case, to do otherwise
12 would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Labor Code §
13 2699(e)(2).) See, also, *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App .4th 1157 (PAGA
14 penalties imposed may be subject to reduction by trial court; increased penalty "for subsequent
15 violation" only triggered after employer has notice the activity is a violation).

16 There are evidentiary and legal issues that render litigating and proving the alleged
17 PAGA claim difficult, time-consuming, contentious, and uncertain. Even if Plaintiff is able to
18 prevail on the underlying Labor Code section 2802 claim, the PAGA penalty may be minimal.

19 Here, the proposed PAGA penalty of \$10,000.00 is reasonable given Defendant's
20 defenses, the number of aggrieved PAGA employees (33), Defendant's correction of the issue,
21 and the challenge, risk, costs, and uncertainty of litigating and proving PAGA violations.
22 Plaintiff calculates his likely PAGA award should he and the 33 PAGA members prevail at
23 approximately \$37,410 (using \$100 penalty per violation). Further, the aggrieved employees
24 suffered no known injury due to Defendant's alleged failure to reimburse, and made no complaint
25 to Defendant for its failure to reimburse for work related personal cell phone use until the filing of
26 Plaintiff's Complaint. Further, any alleged Labor Code section 2802 violations were corrected by
27 Defendant by October 31, 2023. Additionally, on February 20, 2024, Plaintiff's Counsel
28 submitted the fully executed Settlement Agreement to the LWDA online, and the LWDA has not

1 objected to the settlement or responded to the settlement submission in any way. (**Basham Decl.,**
2 ¶38.) (*See, Fleming v. Covidien, Inc.*, (C.D. Cal. Aug. 12, 2011) 2011 U.S. Dist. LEXIS 154590,
3 *8-9 [reducing PAGA penalty by 82% where Defendant promptly corrected the violation]).

4 The reasonableness of the Parties' PAGA settlement is further underscored when
5 compared to other court-approved PAGA settlements in cases with significantly greater exposure.
6 (*See, e.g., Chu v. Wells Fargo Investments* (N.D. Cal. Feb. 15, 2011) 2011 U.S. Dist. LEXIS
7 15821, *4 (approving \$10,000 PAGA settlement in a case involving \$6.9 million settlement and
8 2,752 class members); *Franco v. Ruiz Food Prods.* (E.D. Cal. Nov. 27, 2012) 2012 U.S. Dist.
9 LEXIS 169057,*14, 41 (approving \$10,000 settlement of PAGA claims in case involving 2,055
10 class members and \$2.5 million settlement)).

11 Further, Courts have approved PAGA settlements for only a fraction of the
12 potential PAGA civil penalties, particularly where counsel have presented good reasons why
13 recovery of penalties was unlikely. (*See, e.g., Vicerai v. Mistras Grp., Inc.* (N.D. Cal. Oct. 11,
14 2016, 2016 WL 5907869 at *9 [preliminarily approving class action settlement that included a
15 PAGA set-aside of just 0.15 percent of the PAGA claim's full potential value, where "Plaintiffs
16 face[d] a substantial risk of recovering nothing on either the class or PAGA claims"]).

17 For all of the reasons stated above, the PAGA Settlement is fair, reasonable and
18 adequate, and should be approved. As part of the Settlement, Defendant has agreed to pay
19 \$7,500.00 to the LWDA for its 75% portion of the claims of the Settlement Class brought
20 pursuant to PAGA, with the remaining 25% (\$2,500.00) being paid to aggrieved PAGA members.
21 This portion of the Settlement should be approved.

22 V. CONCLUSION

23 Based on the foregoing, Plaintiff respectfully requests the Court to grant Plaintiff's
24 Motion for Final Approval of Class Action and PAGA Settlement in its entirety.

25 Date: September 9, 2024

BASHAM LAW GROUP

26 By: 

GARY R. BASHAM

27 Attorneys for Plaintiff Kenneth Murphy and the
28 Proposed Class

PROOF OF SERVICE

I, the undersigned declare:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 8801 Folsom Blvd, Suite 280, Sacramento, California.

On September 9, 2024, I caused the following to be served:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S
MOTION FOR FINAL APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT**

_____ by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid for deposit in the United States Post Office mail box, at my business address shown above, following Basham Law Group's ordinary business practices for the collection and processing of mail, of which I am readily familiar, and addressed as set forth below.

_____ by depositing a true copy thereof enclosed in a sealed envelope with delivery fees thereon fully prepaid in a box or other facility regularly maintained by FedEx or delivering to an authorized courier or driver authorized by FedEx to receive documents on the same date that it is placed at Basham Law Group for collection, addressed as set forth below.

_____ by sending a copy by facsimile to the person(s) at the address(s) and facsimile number(s) set forth below.

_____ ☒ by email to the person(s) at the email address(s) set forth below.

Attorney for Defendant

Laura A. Wolfe
(Laura.Wolfe@mccormickbarstow.com)
McCormick Barstow LLP
7647 North Fresno Street
Fresno, CA 93720

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 9, 2024, at Sacramento, California.



Gary R. Basham