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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

(*UNLIMITED JURISDICTION*)

NATHALIE BARCENAS, as an "aggrieved employee" on behalf of herself and other similarly situated "aggrieved employees" under the Labor Code Private Attorneys General Act of 2004, *Plaintiff*, vs. EL TORO MEAT SHOP; EULOGIO BONILLA; and DOES 1 to 25, inclusive, *Defendants*.	Case No.: 30-2023-01351414-CU-OE-CXC **NOTICE OF PLAINTIFF'S MOTION AND MOTION FOR APPROVAL OF PAGA SETTLEMENT** *Assigned for All Purposes to Hon. Layne H. Melzer, Department CX102* Action filed: 09/27/2023 Hearing Date: 06/26/2025 Hearing Time: 2:00 p.m. Hearing Dept: CX102 **Reservation Number: 74539320** Submitted Herewith Under Separate Cover: 1. Memorandum of Point and Authorities; 2. Declaration of Maralle Messrelian; 3. Declaration of Nathalie Barcenas; 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 26, 2025 at 2:00 p.m., or as soon thereafter as the matter may be heard, in Department CX102 of the Orange County Superior Court, located at 751 W. Santa Ana Blvd, Santa Ana, CA 92701, Plaintiff Nathalie Barcenas ("Plaintiff" or "Barcenas") 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 Barcenas and all individuals employed by Defendant in California and classified as non-exempt who worked for Defendant during the PAGA Period (June 28, 2022 to July 3, 2024) (the "Aggrieved Employees"). Plaintiff alleges that Defendant is liable to her and other Aggrieved Employees 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; and (5) failure to provide rest breaks and meal periods. Plaintiff has sought to impose civil penalties for violations of Labor Code sections §§ 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 558, 558.1, 1174, 1194, 1197, 1198 and IWC Wage Order No. 7-2001.

The Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the declarations of Maralle Messrelian, Nathalie Barcenas, 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: April 16, 2025

By: Maralle Messrelian

Maralle Messrelian
Attorneys for Plaintiff,
Nathalie Barcenas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Nathalie Barcenas ("Plaintiff" or "Barcenas") submits this memorandum of points and authorities in support of her motion for approval of the PAGA Settlement Agreement (the "Agreement" or "PAGA Settlement")[1] for the civil penalties claim she brought against Defendant El Toro Meat Shop ("Defendant" or "El Toro") 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

El Toro first began to employ Plaintiff in or around August of 2022 as a cook at its meat shop located at 1340 W. 1st Street in Santa Ana, California. El Toro continuously employed her in that capacity until on or about May 29, 2023 when 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 June 28, 2023, Plaintiff, on behalf of herself and El Toro's other California non-exempt hourly employees (hereafter collectively the "Aggrieved Employees") 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, 221, 226, 226.7, 510, 512, 558, 558.1, 1174, 1194, 1197, 1198 and IWC Wage Order No. 7-2001.

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

B. Plaintiff's Lawsuit

On September 27, 2023, Plaintiff filed a representative lawsuit with a single cause of action for recovery of civil penalties against Defendant in the Orange County Superior Court (the "Lawsuit") pursuant to PAGA based on the same allegations set forth in her LWDA letter dated June 28, 2023. Specifically, Plaintiff alleged that Defendant had failed to pay her and the Aggrieved Employees all wages earned for all hours worked at the correct rates of pay; 2) failed to provide meal periods or pay correctly-calculated premium wages in lieu thereof; 3) failed to authorize and permit rest periods or pay correctly-calculated premium wages in lieu thereof; 4) failed to deduct wages lawfully; 5) failed to issue only accurate and complete itemized wage statements; 6) failed to timely pay wages during and upon separation from employment; and 8) failed to maintain accurate employment records. MM, ¶ 7, Ex. 4. In response to Plaintiff's assertions, Defendant filed its Answer on December 7, 2023. MM, ¶ 7, Ex. 5.[2]

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 July 3, 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 El Toro's policies, practices, operations, time and payroll information and other topics. In advance of mediation, Defendant provided Plaintiff's counsel with information and documents relating to other Aggrieved Employees, 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.

Defendant denies any liability or wrongdoing of any kind whatsoever associated with the

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[2] Individual defendant Eulogio Bonilla was dismissed on October 20, 2023.

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. "Aggrieved Employees" Definition

The Aggrieved Employees are all individuals employed by Defendant in California and classified as non-exempt who worked for Defendant during the PAGA Period. Agreement, ¶ 1.4. The PAGA Period means the period of time from June 28, 2022 through July 3, 2024. Id. at 1.25.

B. Monetary Terms Of The Settlement

Defendant has agreed to pay a total of $295,000.00 ("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 Aggrieved Employees, to the State of California, to Plaintiff, to PAGA Counsel for Court approved attorneys' fees and costs, and for settlement administration costs shall be paid. Agreement, ¶ 3. This Agreement is expressly contingent upon the approval of the Court in the Receivership Action. Agreement, ¶ 6.1. 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 Aggrieved Employee worked as a non-exempt hourly employee of El Toro in California during the PAGA Period. See, Agreement, ¶ 3.3.1.1. The GSA will be divided as follows:

1. PAGA Counsel Fees Payment amounting to $98,333.33 (33 1/3 % of the GSA),
2. PAGA Counsel's Litigation Expenses Payment in the amount of $13,631.60 (the Agreement provides up to $15,000);
3. Plaintiff's Enhancement Payment in the amount of $10,000;
4. Administrator Expenses Payment of $3,000.00 to Phoenix Settlement Administrators ("Phoenix" or "Administrator") to administer the Settlement;
5. Approximately $170,035.07 ("Net Settlement Amount"), split as follows:
   a. $ 127,526.30 to the LWDA (75%); and
   b. $ 42,508.77 to the Aggrieved Employees (25%)

Agreement, ¶ 3.2.

C. Funding and Distribution of the Settlement

Defendant shall make three equal payments to fully fund the Gross Settlement Amount by transmitting the funds to the Administrator:

- 1st Payment of $98,333.33 within 15 days after approval by the Receivership Court for the Receiver[3] to pay the Gross Settlement Amount;
- 2nd Payment of $98,333.33 on the first business day of the next calendar quarter following the 1st Payment; and
- 3rd Payment of $98,333.34 on the first business day of the next calendar quarter following the 2nd Payment.

Agreement, ¶ 4.3.

Within 15 days of receiving approval of the Court in the Action, Defendant will deliver the Aggrieved Employee Data to the Administrator in the form of a Microsoft Excel spreadsheet with each Aggrieved Employee's name, last-known mailing address, Social Security number, and number of PAGA Pay Periods worked during the PAGA Period. Agreement, ¶¶ 1.5, 4.2.

Within 14 days after the later of the Effective Date and Defendant fully funds the full Gross Settlement Amount, the Administrator will mail checks for all Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses Payment, the PAGA Counsel Litigation Expenses Payment, PAGA Counsel Fees Payment, and the Enhancement Payment. Agreement, ¶ 4.4. Before mailing any checks, the Administrator must update the recipients' mailing addresses using the National Change of Address Database. Agreement, ¶ 4.4.1.

The Administrator will issue each Aggrieved Employee a check for his or her pro rata share of 25% of the Net Settlement Amount calculated according to the number of Pay Periods the Aggrieved Employee worked during the PAGA Period, along with the Notice of PAGA 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

[3] Defendant is currently in Receivership. Pursuant to the Agreement, the PAGA Settlement must be approved by the court in the Receivership Action. The hearing for approval of the Agreement by the Receivership Action is currently set for June 9, 2025, at 9:00 a.m. in Department N15 of the Orange County Superior Court – North Justice Center.

undeliverable Notices to the Administrator. Agreement, ¶ 4.4.1. Within seven (7) days of receiving a returned check the Administrator must re-mail checks to the USPS forwarding address provided or to an address ascertained through the Aggrieved Employee Address Search. Agreement, ¶ 4.4.2

D. Individual PAGA Payments and Uncashed Checks

The settlement checks issued to Aggrieved Employees will remain valid for one hundred eighty (180) days. Agreement, ¶ 4.4.1. Any settlement checks remaining uncashed for more than one hundred eighty (180) days after issuance will be distributed to the California State Controller's Unclaimed Property Fund in the name of the Aggrieved Employee. Agreement, ¶ 4.4.3.

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

Upon the Effective Date of the Settlement, Plaintiff, the State of California (including, but not limited to, the LWDA), and the Aggrieved Employees will be deemed to have fully, finally, and forever released, settled, compromised, relinquished, and discharged the Released PAGA Claims with respect to Defendant and each of its former and present directors, officers, shareholders, owners, members, attorneys, insurers, predecessors, successors, assigns subsidiaries, and affiliates (the "Released Parties"). The Released PAGA Claims means:

> all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint, and the PAGA Notice. including violations of California Labor Code sections §§ 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 558, 558.1, 1174, 1194, 1197, 1198 and IWC Wage Order No. 7-2001.

Agreement, ¶ 5.1.

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. <u>THE SETTLEMENT MEETS THE STATUTORY REQUIREMENTS OF PAGA</u>

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. 11. As a result, Plaintiff has met all procedural statutory requirements for settling a PAGA action.

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

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 Defendant provided the number Aggrieved Employees, 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 Aggrieved Employees and there are no issues of ascertainability. *Id*. For the reasons discussed below, this Court should approve the PAGA Settlement.

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

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 Defendant 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 Aggrieved Employees, the State, and Defendant in light of all known facts and circumstances and the risks inherent in litigation. MM, ¶ 11.

2. <u>The Parties Conducted Sufficient Investigation and Discovery To Allow Counsel and the Court To Act Intelligently.</u>

Plaintiff considered various sources of information in the lead-up to and during the mediation of July 3, 2024 that enabled him to achieve the PAGA Settlement at issue. MM, ¶ 20. Among other things, Plaintiff considered the following:

- Defendant produced and Plaintiff's counsel reviewed Plaintiff's personnel file.

- Plaintiff requested that Defendant 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 June of 2022. Defendant produced those policies as part of their employee handbook.

- Plaintiff requested that Defendant 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. Defendant provided Plaintiff's counsel with anonymized payroll and time punch data for approximately 46 of its non-exempt employees during the relevant time period.

- Plaintiff 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 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>

Defendants estimated for purposes of mediation that there were approximately 254 Aggrieved Employees who worked approximately 10,632 pay periods during the PAGA 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 vehemently disputes, revealed a 31.4% violation rate for either late, short, or no meal periods for pay periods with shifts greater than 6 hours. Since the total number of pay periods in the PAGA period was 10,632 and since approximately

91.6% of the shifts in the sample analysis were over 6 hours, the total number of pay periods to consider for potential meal break violations was 9,739 (91.6% x 10,632 pay periods). Under the civil penalty formulas applicable under PAGA, Plaintiff calculated El Toro's potential exposure as follows: $50 penalty per pay period, assuming 31.4% violation, based on Labor Code § 558 for violation of Labor Code § 512 (failure to provide meal periods)(9,739 x 31.4% = 3,058 x $50 =$152,900); $100 penalty per pay period under Labor Code sec. 2699(f)(2), assuming the same 31.4% violation rate for rest break violations (9,739 x 31.4% = 3,058 x $100 =$305,800); $250 penalty per pay period, assuming 31.4% violation rate, based on Labor Code § 226.3 for violation of Labor Code § 226 (failure to provide compliant wage statements) (9,739 x 31.4% = 3,058 x $250 = $764,500). Stacking each of these maximum recoverable civil penalty estimates yields a total amount of $1,223,200. Assuming that Plaintiff's calculations and analysis are accurate, the maximum exposure also presumes that the Court will not reduce the penalty award as unjust, arbitrary, oppressive, or confiscatory. The potential for recovery of approximately $1.2 million 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 meal period violations, rest break violations, and faulty wage statement violations per pay period for all 10,632 pay periods for all 254 Aggrieved Employees 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. Defendant contends 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 El Toro'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 Aggrieved Employees worked during their meal periods will be a challenge. Additionally, El Toro's Employee Handbook contains legally compliant meal period and rest break policies. MM, ¶ 23.

Defendant contends it 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.

As it relates to Plaintiff's other claims, and unlike the arguments for meal/rest period violations, there would be issues with proof. The sampling did not reveal any rounding as hours were paid to the second decimal point. There would be no regular rate issue, since there were no non-discretionary bonus payments seen in the sample. As it relates to any overtime issues, the data showed the average workday was 7.7 hours, which means that overtime pay was not an issue. Regardless, when employees worked over 8.0 hours, they were paid 1.5 times their regular rate. Defendant also provided evidence at mediation that any deductions for work shoes from employee pay stubs was completely voluntary. Moreover, Defendant provided overall strong written policies as it related to wage and hour practices and showed that Plaintiff acknowledged the policies. 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 $53,160 in PAGA penalties 10,632 violations x $5). As such, this Settlement is a great result based solely on the risk the Court chooses to apply the *Carrington* formula. Defendant has 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 50% discount to the maximum PAGA exposure of 1,223,200, resulting in a risk-discounted realistic potential exposure of $611,600. Therefore, the Gross Settlement Amount of $295,000 is a great result, amounts to relief consistent with the underlying purpose of PAGA, and represents approximately 48% 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 Aggrieved Employees, and the State of California. MM, ¶ 28.

The settlement of the representative PAGA claim involves monetary relief to all Aggrieved Employees, Plaintiff, his 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 he 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 Defendant. 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. Among those risks is the very real possibility that the Court in the Receivership Action does not approve the Gross Settlement Amount (El Toro has been operating under a court-ordered receivership since September 6, 2011). As a result, this settlement is expressly contingent upon the approval of the Court in the Receivership Action. A hearing seeking approval of the PAGA Settlement is set for June 9, 2025 in the Receivership Action. 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 Aggrieved Employees 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 Defendant, 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 $295,000.00, of which 75% of the net amount after attorney's fees, litigation costs, Plaintiff's enhancement payment, and settlement administration costs ($127,526.30) will be paid to the LWDA and 25% ($42,508.77) will be distributed to the Aggrieved Employees, is reasonable and appropriate under the circumstances. MM, ¶ 31.

4. <u>Each Aggrieved Employee Will Be Paid Based on the Potential Extent of His or Her Injury Compared to Other Aggrieved Employees</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, ¶ 3.3.1.1. At the time of the mediation (July 3, 2024), Defendant estimated that there are approximately 254 Aggrieved Employees who worked a total of 10,632 pay periods during the PAGA Period. After deducting the requested Court-approved PAGA Counsel's Fees Payment ($98,333.33), PAGA Counsel's Litigation Expenses Payment ($13,631.60), the Enhancement Payment to Plaintiff ($10,000) and the Administrator Expense Payment ($3,000), the Net Settlement Amount ("NSA") will be approximately $170,035.07. Seventy five percent (75%) of the NSA will be paid to the Labor and Workforce Development Agency ("LWDA") ($127,526.30), and twenty five percent (25%) ($42,508.77) of the NSA will be paid to the Aggrieved Employees on a pro-rata basis based upon their respective number of pay periods during the PAGA Period. Based on this amount, the lowest estimated individual recovery for an Aggrieved Employee would be $4.00 ($42,508.77 divided by 10,632 pay periods) if he/she worked only one (1) pay period during the PAGA Period. The maximum estimated individual recovery for an Aggrieved Employee would be $420.00 if he/she worked 105 pay periods (estimated pay periods from June 28, 2022 to July 3, 2024) under the proposed settlement. The average estimated individual recovery for an Aggrieved Employee is approximately $167.36

($42,508.77/254 Aggrieved Employees). Given the discretionary nature of awarding PAGA penalties based upon Defendant's compliant policies and Aggrieved Employees' pay and time data, and considering the risk of not being able to proceed on a representative basis at all due to the risk of not prevailing at trial, and the risk that, even if Plaintiff prevailed, the damages would be limited due to the largely discretionary nature of the damages, this is an excellent result, amounting to relief consistent with the underlying purpose of PAGA. MM, ¶ 32.

5. <u>Counsel for the Parties Are Experienced in Similar Litigation</u>

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, 36. Similarly, Defendant's counsel, Brian J. Mills and Alexis Sadakane of Snell & Wilmer, have broad experience in handling employment matters and wage and hour litigation. MM, ¶ 36.

6. <u>The Proposed Attorneys' Fees and Costs Are Fair, Adequate, and Reasonable and Should Be Approved.</u>

Of the $295,000.00 allocated towards the GSA, Plaintiff's counsel $98,333.33 (33 1/3 % of GSA) in attorney's fees and $13,631.60 in litigation costs, which is fair and reasonable. MM, ¶ 33.

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 $98,333.33 (33 1/3 % of GSA) is fair and reasonable based on their lodestar as cross-checked against the percentage of the recovery. MM, ¶ 34-35, 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, ¶ 36. 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 Aggrieved Employees. *Id.*

In addition, Plaintiff's Counsel incurred substantial costs, $13,631.60 to date, including the costs of a mediator, to aid in the representation of the Aggrieved Employees. MM, ¶ 37, 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. Plaintiff's Enhancement Payment Is Fair, Adequate, and Reasonable and Should Be Approved.

Plaintiff's Enhancement Payment of $10,000 is being paid to Plaintiff for providing Defendants with a release of any and all individual (non-PAGA) claims, whether known or unknown, she may have against Defendant **and** her service to the State of California and the Aggrieved Employees in prosecuting the Lawsuit. MM, ¶ 38, Agreement ¶¶ 1.12; 5.1-5.1.1. By agreeing to settle the case in the best interests of the Aggrieved Employees and the State, Plaintiff has given up the right to pursue her individual claims and recover more in unreimbursed expenses, interest, waiting time penalties, and pay stub penalties that she will release as part of the Settlement. Plaintiff did not seek an individual settlement for her claims at all, instead choosing to prosecute this suit on behalf of the Aggrieved Employees and the State. *Id*. *See also* Declaration of Nathalie Barcenas ("Barcenas Decl.").

There is authority for the Enhancement Payment to Plaintiff. While the statutory language of the PAGA is silent on the issue of incentive awards to named Plaintiff, it nonetheless provides implicit support for incentive payments to named Plaintiffs. Moreover, language from the Ninth Circuit Court of Appeals and recent California district court caselaw indicates that such awards are permitted. MM, ¶¶ 38-40.

8. The Proposed Settlement Administration Costs Are Fair and Reasonable and Should Be Approved.

With regard to the settlement administration costs provision, it is reasonable. Before agreeing to Phoenix Settlement Administrators ("Phoenix"), the Parties sought and reviewed bids from other reputable third-party administrators and Phoenix's bid was comparable. MM, ¶ 41, Exs. 8-10; *See also* Declaration of Michael Moore. Thus, the settlement administration costs provision should be given approval.

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V. CONCLUSION

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: April 16, 2025

By: Maralle Messrelian

Maralle Messrelian
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