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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN MATEO

10 EDGAR RANGEL ROSALES, individually and	)	NO. 23-CIV-02945
11 on behalf of all similarly situated individuals and	)	
12 aggrieved employees,	)	PLAINTIFF EDGAR ROSALES'
13 Plaintiff,	)	NOTICE OF MOTION AND MOTION TO
14 v.	)	APPROVE PAGA SETTLEMENT;
15 ALL DAY USA OPERATIONS, LLC, and DOES	)	MEMORANDUM OF POINTS AND
16 1 to 100,	)	AUTHORTIES; DECLARATION OF
17 Defendants.	)	ADAM ROSE; DECLARATION OF
	)	EDGAR RANGEL ROSALES;
	)	PROPOSED ORDER
	)	Date: September 20, 2024
	)	Time: 2:00 p.m.
	)	Dept: 24

18
19 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

20 Please take notice that on September 20, 2024 at 2:00 p.m. or as soon thereafter as may be heard in
21 Department 24 of the San Mateo Superior Court located at 400 County Center, Redwood City, CA
22 94063, Plaintiff Edgar Rangel Rosales will move the court pursuant to Labor Code section
23 2699(1)(2) to approve the proposed PAGA settlement. The motion is based on this notice, the
24 memorandum of points and authorities, the declaration of Adam Rose with exhibits including the
25 settlement agreement, and arguments at the hearing.

26 Date: August 6, 2024

FRONTIER LAW CENTER

27 /s/ Adam Rose
Attorney for Plaintiff
28 Edgar Rangel Rosales

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. Introduction

3 Plaintiff Edgar Rangel Rosales worked for Defendant All Day USA Operations, LLC dba
4 All Day Kitchens (“ADK”) at its Berkeley and San Francisco locations from February 2021 to
5 February 2024. ADK operates ghost kitchens, which are locations restaurants contract with to
6 prepare their food for pickup or delivery. For example, Curry Up Now has a “brick and mortar”
7 location on Valencia Street in San Francisco, but people can order to pick up Curry Up Now food
8 items from ADK’s downtown location at 483 Sacramento Street, or have it delivered from there.

9 ADK was based in South San Francisco at the time of filing, which is why the case was
10 filed in San Mateo County (it has since moved to San Francisco). The case was filed on June 29,
11 2023, and a first amended complaint that added PAGA allegations was filed on September 6, 2023.
12 ADK filed an answer on October 30, 2023.

13 The parties subsequently met and conferred about the existence of an arbitration agreement
14 with ADK’s predecessor, Vrais Foods, LLC. Plaintiff signed the arbitration agreement with Vrais
15 Foods, LLC. ADK filed a document with the Secretary of State on July 26, 2021 to change its
16 name to All Day USA Operations, LLC. Plaintiff had already worked for ADK for about five
17 months when the name change occurred.

18 Nonetheless, the parties agreed to attend an early mediation with esteemed mediator
19 Michael Loeb of JAMS, and the mediation occurred on March 12, 2024. During the mediation, the
20 arbitration agreement that contained a class action waiver was discussed, as well as the fact that
21 ADK has progressively downsized as ghost kitchens are not as popular as before. Thus, the parties
22 agreed to settle on a PAGA-only basis. Plaintiff will file a declaration to dismiss the class action
23 allegations before this motion is heard.

24
25 II. Summary of Settlement Terms

26 The gross settlement amount is \$98,000. Of this figure, the following deductions apply:

- 27 1. Attorney fees of \$34,300 (35%)
28 2. Attorney costs up to \$13,000 (currently the amount is \$12,951.02)

1 3. Settlement administration expenses of \$3,750

2 4. Service enhancement of \$5,000

3 This leaves a net settlement amount of \$41,950. Of this amount, 75% or \$31,462.50 will go
4 to the LWDA, and 25% or \$10,487.50 will go to the 205 aggrieved employees. The average
5 recovery for each aggrieved employee is \$51.15, which is an excellent result.

6
7 III. The PAGA Allegations

8 The PAGA allegations relate to the following: a) nonpayment of work off the clock
9 including minimum wage and overtime, 2) missed meal breaks, 3) missed rest breaks, and 4)
10 derivative wage statement penalties.

11 For the nonpayment of work off the clock, the allegation is that ADK would have to stay to
12 work past scheduled shifts without payment.

13 For the missed meal and rest breaks, the allegation is that ADK did not have a firm policy
14 in place to relieve employees of all duties for 30-minute meal periods and 10-minute rest periods.

15 Finally for the derivative wage statement penalties, the allegation is that ADK did not list
16 the off the clock and missed breaks on the wage statements.

17 Notably, there are no PAGA allegations for waiting time penalties since Plaintiff was an
18 employee of ADK until March 2024. There are 4,637 pay periods at issue from June 27, 2022 (one
19 year prior to the PAGA letter) and March 12, 2024 for the 205 aggrieved employees.

20
21 A. Summary of Maximum Liability and Attendant Risks

22 The primary risk for the above is that even if it can be proved, ADK instituted a policy
23 where the kitchens would “pause” for 30-minute increments to allow employees to take meal
24 periods. Plaintiff would counter these pauses were not duty free, but that inquiry would require
25 interviewing many of the aggrieved employees to determine if the kitchen pauses were not truly
26 duty free. Similarly, for the rest periods ADK has a written policy providing for paid rest periods.
27 The inquiry would require another survey of aggrieved employees to determine if many of them
28 had the same experience of an alleged lack of duty-free rest periods.

1 1. Maximum Liability

2 The PAGA penalties for the meal break violations are in Labor Code section 558, which is
3 \$50 per aggrieved employee for the initial violation, and \$100 per aggrieved employee for
4 subsequent violations. The maximum liability is 205 x \$50 for the initial violations, or \$10,250,
5 and 4,432 times \$100 for the subsequent violations, or \$443,200, for a total of \$453,450.

6 The PAGA penalties for the rest break violations are in Labor Code section 2699, which is
7 \$100 per aggrieved employee for the initial violation, and \$200 per aggrieved employee for
8 subsequent violations. The maximum liability is 205 x \$100 for the initial violations, or \$20,500,
9 and 4,432 times \$200 for the subsequent violations, or \$886,400.

10 The PAGA penalties for the off the clock violations are also in Labor Code section 558, and
11 as explained above the total under Section 558 is \$453,450.

12 Finally, the PAGA penalties for the wage statement violations are also in Labor Code
13 section 2699, and as explained above the total under Section 2699 is \$886,400.

14 In sum, the total maximum PAGA liability is \$2,679,700. However, under *Amaral v. Cintas*
15 *Corp. #2* (2008) 136 Cal.App.4th 1157, the higher subsequent penalties apply only when the
16 employer was notified of the violations.

17 ADK was ostensibly not notified before the case was filed, so under the lower initial
18 violation rate, the total maximum liability is 4,637 x \$50 for the meal periods plus 4,637 x \$50 for
19 the overtime violations, 4,637 x \$100 for the rest break violations, and 4,637 x \$100 for the wage
20 statement violations, which is a total of 2 x \$10,250 plus \$221,600 plus \$10,250 plus
21 \$221,600, or \$1,310,000. The proposed settlement of \$98,000 is 7.5% of this maximum liability.
22 As explained below, the risks of proceeding further would support a downward adjustment to the
23 maximum liability.

24
25 2. Description of Risks

26 In anticipation of the mediation, ADK produced the following: 1) a sampling of time
27 records, 2) a sampling of premium payments for missed meal and rest breaks, 3) a sampling of pay
28 data, and 4) an index of class members with start and applicable end dates.

1 For the meal periods, Plaintiff's analysis showed a 43.2% violation rate. However as
2 explained above, ADK maintained that it instituted a pause in daily operations to give workers a
3 30-minute meal period, so a more realistic violation rate is 20%. Plaintiff would need to survey the
4 aggrieved employees, and they would need to corroborate the missed meal period allegation, which
5 may or may not be possible. With a 20% violation rate, the adjusted maximum liability for meal
6 period violations is $4,637 \text{ pay periods} \times \$50 \times 0.20 = \underline{\$46,370}$.

7 For the rest periods, ADK maintained that its rest break policy was administered throughout
8 its locations, so Plaintiff would again need to survey the aggrieved employees to determine if they
9 had similar experiences with rest break issues. Assuming one in every five rest breaks was missed,
10 that is a violation rate of 20%. The corresponding calculation is $4,637 \text{ pay periods} \times \$100 \times 0.20 =$
11 $\underline{\$92,740}$.

12 For the off the clock work, ADK apparently did not maintain a policy requiring work off
13 the clock. Further, assuming there was work off the clock it was off a rather short duration such as
14 five minutes which is roughly 10 percent of an hour. The corresponding calculation is $4,637 \text{ pay}$
15 $\text{periods} \times \$50 \times .10 = \underline{\$23,185}$.

16 For the wage statement penalties, Plaintiff would need to show the violations were knowing
17 intentional under Labor Code section 226, subdivision (e). Given ADK's seemingly compliant
18 policies, Plaintiff would need to obtain evidence demonstrating a conscious determination not to
19 place unpaid wages on the wage statements. There is a roughly 50% possibility that Plaintiff could
20 or could not obtain that evidence. Thus, the corresponding calculation is $4,637 \times \$100 \times 0.50 =$
21 $\underline{\$231,850}$.

22 23 3. The Settlement is Within the Range of Reasonableness

24 Thus, the total adjusted maximum liability given the above risks is $\underline{\$394,145}$. The proposed
25 settlement of \$98,000 is 24.8% of the total adjusted liability, and that is within the range of
26 reasonableness. (See, e.g., *Viceral v. Mistras Group, Inc.*, 2016 WL 5907869, * 9 (N.D. Cal. Oct.
27 11, 2016) (approving settlement of PAGA for 0.15% of maximum value where the settlement as a
28 whole vindicates employee rights and may have a deterrent effect on the employer).)

1 4. The Settlement Meets the Objectives of PAGA and is Fair, Reasonable, and Adequate

2 The average recovery of \$51.15 for the aggrieved employees provides proportionate
3 amounts relating to the above. The recovery comports with the purpose of PAGA by advancing
4 and promoting Labor Code compliance.

5 The 205 aggrieved employees worked at ADK's locations throughout the state and will
6 receive a commensurate recovery based on their lengths of employment, and the Labor and
7 Workforce Development Agency will receive funds to continue its goal of education of employers
8 and employees about their rights and responsibilities. (Lab. Code, § 2699, subd. (n).) Thus, the
9 settlement furthers the objectives of PAGA and is fair, reasonable, and adequate.

10
11 IV. Plaintiff is Entitled to a Service Enhancement

12 The requested \$5,000 service enhancement for Plaintiff for the PAGA settlement is based
13 on his extensive statements about experiences working at ADK, and the fact that he is releasing
14 individual Labor Code claims. Pursuant to *Cellphone Termination Fee Cases* (2010) 186
15 Cal.App.4th 1380, 1393-1394, Plaintiff should receive an incentive for taking the time and effort to
16 assist the aggrieved employees and LWDA for the proposed recovery.

17 The attached declaration of Mr. Rosales goes through the factors in *Clark v. American*
18 *Residential Services, LLC* (2009) 175 Cal.App.4th 785 in support of the service enhancement .

19
20 V. Frontier Law Center is Entitled to Attorney Fees and Costs

21 PAGA allows a plaintiff to obtain attorneys' fees and costs. (Lab. Code, § 2699(g).) An
22 appropriate method for determining attorneys' fees is based on a percentage of the total value of
23 benefits to class members by the settlement. (*Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
24 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) ("*Serrano III*"). Although this is not a
25 class action, the same logic applies as a PAGA case is a representative case. When a litigant's
26 efforts create or preserve a fund from which others derive benefits, he or she may require the
27 passive beneficiaries to compensate those who created the fund. Both California state and federal
28 courts have embraced this doctrine. (*Serrano III, supra*, 20 Cal. 3d at p. 35.)

1 Attorney fees in common fund wage and hour class action settlements should start with the
2 percentage method. *See Laffitte v. Robert Half Int'l* (2016) 1 Cal. 5th 480, 503 (2016) (“We join
3 the overwhelming majority of federal and state courts in holding that when class action litigation
4 establishes a monetary fund for the benefit of the class members ... the court may determine the
5 amount of a reasonable fee by choosing an appropriate percentage of the fund created.”).

6 The requested fees of \$34,300 for the PAGA settlement is reasonable, as it represents 35%
7 of the common fund. Also, Plaintiff’s counsel incurred approximately \$13,000 in costs litigating
8 this case, which should be approved through this motion.

9
10 VI. The Settlement Administrator’s Expenses Should be Approved

11 Attached to the declaration of Adam Rose is the administration bid from Phoenix Class
12 Action Administration Solutions for \$3,750. As the third-party administrator, Phoenix will send out
13 the checks and notices accompanying the checks to the aggrieved employees. The bid of \$3,750 is
14 reasonable given there are 205 aggrieved employees.

15
16 VII. Conclusion

17 Based on the above and the declarations of Adam Rose and Edgar Rangel Rosales, Plaintiff
18 respectfully requests the court to grant the motion to approve the PAGA settlement.

19
20 Date: August 6, 2024

FRONTIER LAW CENTER

21 /s/ Adam Rose
22 Attorney for Plaintiff
23 Edgar Rangel Rosales
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