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Attorney for Plaintiff
Edgar Rangel Rosales

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

EDGAR RANGEL ROSALES, individually and on behalf of all similarly situated individuals and aggrieved employees,	)	NO. 23-CIV-02945
	)	
Plaintiff,	)	PLAINTIFF EDGAR ROSALES'
	)	NOTICE OF MOTION AND RENEWED
v.	)	MOTION TO APPROVE PAGA
	)	SETTLEMENT; MEMORANDUM OF
ALL DAY USA OPERATIONS, LLC, and DOES	)	POINTS AND AUTHORTIES;
1 to 100,	)	DECLARATION OF
	)	ADAM ROSE; DECLARATION OF
Defendants.	)	EDGAR RANGEL ROSALES;
	)	DECLARATION OF LISA MULLINS;
	)	PROPOSED ORDER

Date: February 14, 2025
Time: 2:00 p.m.
Dept: H

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on February 14, 2025 at 2:00 p.m. or as soon thereafter as may be heard in Department H of the San Mateo Superior Court located at 800 N. Humboldt St., San Mateo, CA 94401, Plaintiff Edgar Rangel Rosales will move the court pursuant to Labor Code section 2699(s)(2) to approve the proposed PAGA settlement. The motion is based on this notice, the memorandum of points and authorities, the declaration of Adam Rose with exhibits including the amended settlement agreement, and arguments at the hearing.

Date: January 16, 2025

FRONTIER LAW CENTER

/s/ Adam Rose

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. In fact, it appears
22 the only remaining locations are in San Francisco and Santa Monica. Thus, the parties agreed to
23 settle on a PAGA-only basis. Plaintiff has dismissed the class action allegations.

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 \$32,634 (33.3%)
28 2. Attorney costs up to \$13,000 (currently the amount is \$13,158)

1 3. Settlement administration expenses of \$3,350

2 4. Service enhancement of \$5,000 (includes release of individual claims)

3 This leaves a net settlement amount of \$44,016. Of this amount, 75% or \$33,012 will go to
4 the LWDA, and 25% or \$11,004 will go to the 205 aggrieved employees. The average recovery for
5 each aggrieved employee is \$53.67.

6 The amended settlement agreement reduces the attorney fees from 35% to 33.3%, and there
7 is a lower settlement administration quote from ILYM. These points yield a slightly higher amount
8 for each of the aggrieved employees.

9
10 III. The PAGA Allegations

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

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

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

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

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

23
24 A. Summary of Maximum Liability and Attendant Risks

25 The primary risk for the above is that even if it can be proved, ADK instituted a policy
26 where the kitchens would “pause” for 30-minute increments to allow employees to take meal
27 periods. Plaintiff would counter these pauses were not duty free, but that inquiry would require
28 interviewing many of the aggrieved employees to determine if the kitchen pauses were not truly

1 duty free. Similarly, for the rest periods ADK has a written policy providing for paid rest periods.
2 The inquiry would require another survey of aggrieved employees to determine if many of them
3 had the same experience of an alleged lack of duty-free rest periods.

4
5 1. Maximum Liability

6 The PAGA penalties for the meal break violations are in Labor Code section 558, which is
7 \$50 per aggrieved employee for the initial violation, and \$100 per aggrieved employee for
8 subsequent violations. The maximum liability is 205 x \$50 for the initial violations, or \$10,250,
9 and 4,432 times \$100 for the subsequent violations, or \$443,200, for a total of \$453,450.

10 The PAGA penalties for the rest break violations are in Labor Code section 2699, which is
11 \$100 per aggrieved employee for the initial violation, and \$200 per aggrieved employee for
12 subsequent violations. The maximum liability is 205 x \$100 for the initial violations, or \$20,500,
13 and 4,432 times \$200 for the subsequent violations, or \$886,400.

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

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

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

21 ADK was ostensibly not notified before the case was filed, so under the lower initial
22 violation rate, the total maximum liability is 4,637 x \$50 for the meal periods plus 4,637 x \$50 for
23 the overtime violations, 4,637 x \$100 for the rest break violations, and 4,637 x \$100 for the wage
24 statement violations, which is a total of 2 x \$10,250 plus \$221,600 plus \$10,250 plus
25 \$221,600, or \$1,310,000. The proposed settlement of \$98,000 is 7.5% of this maximum liability.

26 As explained below, the risks of proceeding further would support a downward adjustment
27 to the maximum liability, and within the lens of the more realistic maximum liability, the
28 settlement is within the range of reasonableness.

1 2. Description of Risks

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

5 For the meal periods, Plaintiff's analysis showed a 43.2% violation rate. However as
6 explained above, ADK maintained that it instituted a pause in daily operations to give workers a
7 30-minute meal period, so a more realistic violation rate is 20%. Plaintiff would need to survey the
8 aggrieved employees, and they would need to corroborate the missed meal period allegation, which
9 may or may not be possible. With a 20% violation rate, the adjusted maximum liability for meal
10 period violations is $4,637 \text{ pay periods} \times \$50 \times 0.20 = \underline{\$46,370}$.

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

15 For the off the clock work, ADK apparently did not maintain a policy requiring work off
16 the clock. Further, assuming there was work off the clock it was off a rather short duration such as
17 five minutes which is roughly 10 percent of an hour. The corresponding calculation is $4,637 \text{ pay}$
18 $\text{periods} \times \$50 \times .10 = \underline{\$23,185}$.

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

24
25 3. The Settlement is Within the Range of Reasonableness

26 The total adjusted maximum liability given the above risks is \$394,145. The proposed
27 settlement of \$98,000 is 24.8% of the total adjusted liability, and that is within the range of
28 reasonableness. (See, e.g., *Gilmore v. McMillan-Hendryx Inc.*, 2022 WL 184004, at *4 (E.D. Cal.

1 Jan. 20, 2022) (PAGA award of 4.2% of the maximum estimated value of PAGA claims and 2.3%
2 of the total settlement amount was “not unreasonable and weighs in favor of settlement”); *Merante*
3 *v. Am. Inst. for Foreign Study, Inc.*, 2022 WL 2918896, at *6 (N.D. Cal. July 25, 2022) (PAGA
4 award of between 0.27% and 2% of the maximum estimated value of PAGA claims was “small”
5 but “within the range of reasonableness”).

6
7 4. The Settlement Meets the Objectives of PAGA and is Fair, Reasonable, and Adequate

8 The recovery comports with the purpose of PAGA by advancing and promoting Labor
9 Code compliance. The 205 aggrieved employees worked at ADK’s locations throughout the state
10 and will receive a commensurate recovery based on their lengths of employment, and the Labor
11 and Workforce Development Agency will receive funds to continue its goal of education of
12 employers and employees about their rights and responsibilities. (Lab. Code, § 2699, subd. (n).)
13 Thus, the settlement furthers the objectives of PAGA and is fair, reasonable, and adequate.

14
15 IV. Plaintiff is Entitled to a Service Enhancement

16 The requested \$5,000 service enhancement is based on his extensive statements about work
17 experiences, and the fact that he is releasing individual Labor Code claims. Pursuant to *Cellphone*
18 *Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1393-1394, Plaintiff should receive an
19 incentive for taking the time and effort to assist the aggrieved employees and LWDA for the
20 recovery. The attached declaration of Mr. Rosales goes through the factors in *Clark v. American*
21 *Residential Services, LLC* (2009) 175 Cal.App.4th 785 in support of the service enhancement.
22 Further, the amended settlement agreement demonstrates Plaintiff is releasing all individual claims.

23
24 V. Frontier Law Center is Entitled to Attorney Fees and Costs

25 PAGA allows a plaintiff to obtain attorneys’ fees and costs. (Lab. Code, § 2699, subd. (k).)
26 An appropriate method for determining attorneys’ fees is based on a percentage of the total value of
27 benefits to class members by the settlement. (*Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
28 224, 254 (2001); *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977) (“*Serrano III*”).

1 Although this is not a class action, the same logic applies as a PAGA case is a
2 representative case. When a litigant's efforts create a fund from which others derive benefits, they
3 may require the passive beneficiaries to compensate those who created the fund. Both California
4 state and federal courts have embraced this doctrine. (*Serrano III, supra*, 20 Cal. 3d at p. 35.)

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

10 Plaintiff submits that the 25% benchmark set by the *Ninth Circuit in Six (6) Mexican*
11 *Workers v. Ariz. Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1311 does not apply to state court
12 cases as it is not clear there are state court cases that apply the Ninth Circuit's benchmark.

13 Thus, the requested fees of \$32,634 for the PAGA settlement is reasonable, as it represents
14 33.3% of the common fund. Also, Plaintiff's counsel incurred approximately \$13,000 in costs
15 litigating this case, which should be approved through this motion.

16
17 VI. The Settlement Administrator's Expenses Should be Approved

18 Attached to the declaration of Adam Rose is the administration bid from ILYM Group for
19 \$3,350. As the third-party administrator, Phoenix will send out the checks and notices
20 accompanying the checks to the aggrieved employees. As encompassed in the amended settlement
21 agreement, uncashed checks will go to cy pres recipient Bay Area Legal Aid.

22
23 VII. Conclusion

24 Plaintiff submits that the settlement is fair, reasonable, and adequate. The rather small
25 imprint of All Day Kitchens, coupled with the risks described above including the articulated
26 violations rates, would yield a conclusion that the gross settlement of \$98,000 is within the range of
27 reasonableness. The settlement was reached as a result of arm's length negotiations with
28 experienced mediator Michael Loeb of JAMS, and is supported by all parties.

1 Based on the above and the declarations of Adam Rose that explains the time spent on the
2 case and the costs incurred, and Edgar Rangel Rosales that explains he is releasing all individual
3 claims and has contributed to moving the case forward, Plaintiff respectfully requests the court to
4 grant the motion to approve the PAGA settlement.

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6 Date: January 21, 2025

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7
8 /s/ Adam Rose

Attorney for Plaintiff

Edgar Rangel Rosales
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