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as an individual and on behalf of all employees
similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

CARL EMPY, individually, and on behalf of
all others similarly situated,

Plaintiff,

vs.

24 WINDWARD AVENUE LLC, a
California Limited Liability Company; and
DOES 1 through 10, inclusive,

Defendants

Case No. 23STCV18608

[Assigned for all purposes to Hon. Lynne M.
Hobbs, Dept. 61]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR AN ORDER APPROVING
SETTLEMENT OF CLAIMS BROUGHT
PURSUANT TO THE PRIVATE
ATTORNEYS GENERAL ACT OF 2004;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Reservation ID: 456611727168

Date: July 24, 2024

Time: 10 a.m.

Courtroom: Dept. 61

Judge: Hon. Lynne M. Hobbs

Action Filed: August 7, 2023

Trial Date: Not Set

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on July 24, 2024, at 10 a.m., or as soon thereafter as the matter may be heard, in Department 61 of the above-captioned Court, located at 111 N Hill St, Los Angeles, CA 90012, Plaintiff CARL EMPY ("Plaintiff") will and hereby does move this Court for an order approving of the PRIVATE ATTORNEYS GENERAL ACT SETTLEMENT AGREEMENT AND RELEASE ("Agreement" or "Settlement") reached with Defendant 24 WINDWARD AVENUE LLC ("Defendant"), a true and correct copy of which is attached as Exhibit 1 to the Declaration of Lilit Tunyan submitted herewith.

Specifically, the Plaintiff moves for an order to:

1. grant approval of the terms of the Agreement pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code § 2698, *et seq.*, including the amount of the settlement; the amount of distributions to the State and Aggrieved Employees; the amount allocated to Plaintiff's service award; the amounts allocated to attorneys' fees and costs; the amount allocated to the settlement administrator; and,
2. direct disbursement of the Gross Settlement Amount pursuant to the terms of the Agreement.

This motion is based on this Notice, the following Memorandum of Points and Authorities, the Declarations of Lilit Tunyan, Plaintiff and ILYM Group, Inc. submitted herewith, all other pleadings and papers on file in this action, and any oral argument or other matter that may be considered by the Court.

Respectfully submitted,

Dated: May 15, 2024

TUNYAN LAW, APC

By: _____



Lilit Tunyan
Artur Tunyan

Attorneys for Plaintiff CARL EMPY



Make a Reservation

CARL EMPY vs 24 WINDWARD AVENUE LLC, A CALIFORNIA LIMITED LIABILITY COMPANY

Case Number: 23STCV18608 Case Type: Civil Unlimited Category: Other Employment Complaint Case

Date Filed: 2023-08-07 Location: Stanley Mosk Courthouse - Department 61

Reservation

Case Name:

CARL EMPY vs 24 WINDWARD AVENUE LLC, A
CALIFORNIA LIMITED LIABILITY COMPANY

Case Number:

23STCV18608

Type:

Motion for Order (approving settlement of claims
brought under PAGA)

Status:

RESERVED

Filing Party:

Carl Empe (Plaintiff)

Location:

Stanley Mosk Courthouse - Department 61

Date/Time:

07/24/2024 10:00 AM

Number of Motions:

1

Reservation ID:

456611727168

Confirmation Code:

CR-MCMOQFQA6SQWDERLS

Fees

Description

Fee

Qty

Amount

Motion for Order (name extension)

0.00

1

0.00

TOTAL

\$0.00

Payment

Amount:

\$0.00

Type:

NOFEE

Account Number:

n/a

Authorization:

n/a

Payment Date:

1969-12-31

Print Receipt

Reserve Another Hearing

View My Reservations

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff CARL EMPY (“Plaintiff”) filed this action seeking civil penalties under the Private Attorneys General Act of 2004, California Labor Code §§ 2698 et seq. (“PAGA”) stemming from alleged wage and hour claims against Defendant 24 WINDWARD AVENUE LLC (“Defendant”) (Plaintiff and Defendant collectively referred to herein as the “Parties”). After exchanging documents and voluminous data prior to mediation, Plaintiff and Defendant reached a proposed settlement that will resolve the PAGA claims pending in this action (the “Lawsuit”).

Under the PRIVATE ATTORNEYS GENERAL ACT SETTLEMENT AGREEMENT AND RELEASE (“Agreement” or “Settlement”), Defendant shall pay a maximum sum of **\$70,000.00**, referred to in the Agreement as the Gross Settlement Amount, for aggrieved employees employed in California as non-exempt hourly employees during the designated PAGA period (there were approximately **199** individuals meeting this definition of aggrieved employee as of April 11, 2024. It is estimated that there are approximately **5,546** pay periods. This is a fair and reasonable result, based upon the facts and circumstances discovered to exist. The Agreement is based upon the model agreement template made available by the Los Angeles Superior Court.

The proposed settlement will dispose of the PAGA claim alleged in this matter – which was predicated upon certain alleged violations of the Labor Code – on behalf of the California Labor and Workforce Development Agency (“LWDA”) and current and former California employees of Defendant who were employed at any time from June 1, 2022 through the date of entry of order for PAGA settlement approval of the Settlement or modified under Section 8 of the Agreement.

This motion is brought pursuant to Labor Code § 2699.3(b)(4). This motion and the Agreement were served on the LWDA prior to the filing of this Motion. Labor Code § 2699(e)(2).

For the reasons below, Plaintiff requests that the Court enter an order approving the settlement.

II. SUMMARY OF THE TERMS OF SETTLEMENT

The full terms of the settlement are in the Agreement. The key material terms are as follows:

- (a) The Aggrieved Employees: The Aggrieved Employees (also known as the “PAGA Members”) are: “All non-exempt or hourly employees of Defendant who

worked for Defendant in the State of California from June 1, 2022 through the date of entry of order for PAGA settlement approval of the Settlement or modified under Section 8 of the Agreement (“PAGA Period”).” It is estimated that there are approximately 5,546 pay periods from June 1, 2022 through April 11, 2024. (Agreement, ¶ 1.4, 1.19, 4.1.)

- (b) No Reversion: The Settlement is ***non-reversionary***. (Agreement, ¶ 3.1.)
- (c) Gross Settlement Amount: Defendant agrees to pay the maximum sum of **\$70,000.00** (hereinafter referred to as the “Gross Settlement Amount” or “GSA”) for settlement of the PAGA Penalties, which shall be inclusive of Individual PAGA Payments, the LWDA PAGA Payment, Plaintiff’s Service Award, Plaintiff’s Counsel’s attorneys’ fees and costs and the settlement administrator’s fees. (Agreement, ¶ 1.10.)
- (d) Net Settlement Amount: At least **\$31,585.22** will be available for distribution to the Aggrieved Employees and the LWDA. Of this amount, the LWDA will receive at least **\$23,688.92** under the Agreement, and Aggrieved Employees will receive at least **\$7,896.31**. (Agreement, ¶¶ 1.15., 3.2.4)
- (e) Plaintiff’s Service Award: Plaintiff shall receive **\$5,000.00** as a Service Award for representing the PAGA group and a general release of all known and unknown claims beyond PAGA claims (Agreement, ¶ 3.2.1.)
- (f) Attorneys’ Fees: Plaintiff’s Counsel request an award of attorneys’ fees in the amount of **\$23,333.33**, which is one third of the GSA. (Agreement, ¶ 3.2.2.)
- (g) Litigation Costs: Plaintiff’s Counsel’s litigation costs are capped to a maximum amount of **\$9,000.00**. The actual costs are **\$6,731.45** which include the future costs of motion, final report and Case Management Conference statement filing fees. Therefore, Plaintiff requests **\$6,731.45** for litigation costs. (Agreement, ¶¶ 3.2.2.)
- (h) Settlement Administration: Payment to Aggrieved Employees and administration will be accomplished through third-party settlement administrator ILYM Group,

Inc., which has agreed to perform Administrator duties for a flat not to exceed fee of \$3,350.00, which is reasonable, based on all of the services offered.

(Agreement, ¶ 3.2.3.)

(i) Uncashed Checks: Funds represented by checks returned as undeliverable after a re-mailing, and funds represented by checks remaining un-cashed for more than 180 days after issuance, will be tendered to the Unclaimed Property Fund in the name of the Aggrieved Employee. (Agreement, ¶ 4.4.3.)

(j) Release: In exchange for the above settlement consideration, Defendant shall be entitled to a release from the LWDA and each and every Aggrieved Employee, including Plaintiff.¹ (Agreement, ¶¶ 5.1-5.2.)

(k) Notice to LWDA: The Declaration of Lilit Tunyan confirms that notice was provided to the LWDA and attaches the confirmatory submission documents. (Tunyan Decl., ¶ 46 and Exh.3.)

III. STATEMENT OF FACTS

Plaintiff alleges that Defendant engaged in practices and procedures that violated the California Labor Code. These alleged statutory violations subject Defendant to potential liability for PAGA penalties pursuant to Labor Code § 2698, the PAGA. Through this action, Plaintiff seeks to recover civil penalties pursuant to Labor Code § 2698, *et. seq.* (Tunyan Decl., ¶ 3.)

Defendant operates a restaurant entitled Belles Beach House in California. (Tunyan Decl., ¶ 4.) For purposes of this settlement, Defendant employed individuals in non-exempt positions in California. (Tunyan Decl., ¶ 5.) Plaintiff worked for Defendant in California during the PAGA Period. (Tunyan Decl., ¶ 6.)

IV. PROCEDURAL HISTORY

On June 1, 2023, Plaintiff's Counsel sent a letter to the LWDA on behalf of Plaintiff, in compliance with California Labor Code § 2699.3. More than 65 days passed after the letter was sent to

¹ This comports with settled California Supreme Court authority. *See Arias v. Superior Court*, 46 Cal. 4th 969, 986 (2009) (concluding that "with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act....").

1 the LWDA, and the LWDA did not indicate that it intended to investigate the alleged violations
2 referenced in the letter. (Tunyan Decl., ¶ 7.) On August 7, 2023, Plaintiff filed a complaint seeking civil
3 penalties under the Private Attorneys General Act of 2004, California Labor Code §§ 2698 et seq.
4 (“PAGA”) stemming from alleged wage and hour claims against Defendant (“Complaint”) in the
5 Superior Court of California, Los Angeles County entitled *Empy v. 24 Windward Ave LLC*, Case No.
6 23STCV18608 (the “Lawsuit”). After exchanging documents and voluminous data prior to mediation,
7 Plaintiff and Defendant reached a proposed settlement that will resolve the PAGA claims pending in this
8 action and Plaintiff’s individual claims. (Tunyan Decl., ¶ 8.) Defendant denies all liability and admit to
9 no claim by virtue of their agreement to settle. (Tunyan Decl., ¶ 9.) Because Court approval of a PAGA
10 settlement is required, the settlement is presented for approval. (Tunyan Decl., ¶ 10.)

11 **V. SETTLEMENT NEGOTIATIONS**

12 Counsel for Plaintiff has thoroughly investigated the facts relating to the claims alleged in the
13 operative complaint and have made a thorough study of the legal principles applicable to the claims
14 asserted against Defendant. Based on their investigation and evaluation of this case, Plaintiff’s Counsel
15 have concluded that the settlement is fair, reasonable, and adequate in light of all known facts and
16 circumstances, including the defenses asserted by Defendant, potential adverse findings regarding
17 liability, and numerous potential appellate issues. (Tunyan Decl., ¶ 11.)

18 The Parties agreed to participate in a mediation in an effort to resolve the PAGA claims asserted
19 in this matter. The Parties selected mediator Brandon Coen, Esq., a neutral with extensive experience
20 litigating and mediating wage and hour class and representative actions. The Parties participated in a
21 full-day mediation on April 11, 2024. They have not reached a settlement on the mediation day but
22 continued settlement negotiations with the assistance of the mediator and reached a settlement shortly
23 after the mediation. The Parties then spent many weeks thereafter negotiating the detailed terms of the
24 Settlement memorialized in a long-form agreement to resolve this matter. (Tunyan Decl., ¶ 12.) Prior to
25 the mediation, Plaintiff requested substantial data from Defendant, and Defendant provided requested
26 data. (Tunyan Decl., ¶ 13.)

DISCUSSION

VI. THE QUI TAM NATURE OF PAGA CLAIMS

This case is solely a PAGA claim, not a class action, and the standard for determining the reasonableness of a settlement has not been the subject of significant judicial discussion. In 2003, California enacted the Private Attorneys General Act of 2004 to remedy systemic underenforcement of many worker protections. *Williams v. Superior Court*, 3 Cal. 5th 531, 545 (2017).

The solution enacted by the Legislature deputized private citizens to recover civil penalties for the State, where those penalties were previously only available to State law enforcement agencies:

The Legislature declared that ***adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market***, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.

Arias v. Superior Court, 46 Cal. 4th 969, 980 (2009) (emphasis added).

“Because an aggrieved employee’s action under the Labor Code Private Attorneys General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government.” *Arias*, 46 Cal. 4th at 986. With limited exceptions, “[o]f the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the ‘aggrieved employees.’” *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380 (2014) *certiorari denied sub nom. CLS Transportation Los Angeles v. Iskanian*, — U.S. —, 135 S.Ct. 1155, 190 L.Ed.2d 911 (Jan. 20, 2015). Thus, a PAGA claim is, predominantly, a claim belonging to the State.

“The civil penalties recovered on behalf of the state under the PAGA are distinct from the statutory damages to which employees may be entitled in their individual capacities.” *Iskanian*, 59 Cal. 4th at 381. Because of this distinction, and the fact that the penalties made available through PAGA fell previously within the exclusive domain of State enforcement, the California Supreme Court explained that PAGA suits are best viewed as a species of *qui tam* action. *Iskanian*, 59 Cal. 4th at 382. After recognizing that PAGA actions are a form of *qui tam* action, *Iskanian* concluded that because the

1 State was the real party in interest in a PAGA suit, it would violate public policy to compel an individual
2 employee to waive representative claims under PAGA: “[W]here, as here, an employment agreement
3 compels the waiver of representative claims under the PAGA, it is contrary to public policy and
4 unenforceable as a matter of state law.” *Iskanian*, 59 Cal. 4th at 384.

5 **VII. THE STANDARDS FOR APPROVAL OF A PAGA SETTLEMENT**

6 In deciding whether to grant approval of the proposed Settlement, the primary issue to be decided
7 is whether the Settlement is fair, adequate, and reasonable. Specifically, the issues are whether the PAGA
8 penalties to which the parties have agreed provide “genuine and meaningful” relief, “consistent with the
9 underlying purpose of the statute to benefit the public” and whether the penalties are reasonable in light
10 of the potential verdict value in this case. *Villalobos v. Calandri Sunrise Farm LP*, 2015 WL 12732709,
11 Case No. CV 12-2615 PSG (JEMx) (C.D. Cal., July 22, 2015).

12 In *O'Connor v. Uber Technologies*, No. 13-CV-03826-EMC, 2016 WL 4398271 (N.D. Cal. Aug.
13 18, 2016) the court was faced with a proposed class action settlement which also included a claim under
14 PAGA. The court separately discussed the standard for approval under PAGA. The court recognized that
15 cases discussing class action standards may be helpful and required the parties to demonstrate that either
16 the factors set forth in the class action case of *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
17 1998) “or any other coherent analysis” justified the proposed settlement of the PAGA claim.²

18 Therefore, although class settlement jurisprudence has no direct application to this case, it is not
19 inappropriate to consider the *Hanlon* factors: (1) the strength of the plaintiff's case; (2) the risk, expense,
20 complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent
21 of discovery completed and the stage of the proceedings; (5) the experience and views of counsel; and
22 (6) the presence of a government participant.

23 The *Hanlon* court also mentioned, as a factor, the “reaction of the class members to the proposed
24 settlement.” That factor has no analogous component here. The interest served is that of the State of
25 California and the LWDA is the only person or entity who has standing to comment upon any settlement.

26
27 ² The *O'Connor v. Uber* court did not approve the settlement, finding the disparity between the
28 amount proposed for the class compared to the PAGA settlement was not fair to the LWDA. That is not
a concern here. Seventy-five percent of the net will be paid to the LWDA by statute.

1 Labor Code § 2699.3(b)(4). The *Hanlon* court also identified “the risk of maintaining class action status
2 throughout the trial” as a factor, but, again, that factor has no application here. Otherwise, the six
3 remaining factors provide a useful framework for evaluating the settlement. *Hanlon*, 150 F.3d at 1026;
4 *see also Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015) (same); *Churchill Vill., L.L.C. v. Gen.*
5 *Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (same).

6 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794 (1996), held that “a presumption of fairness
7 exists where: (1) the settlement is reached through arm’s-length bargaining; (2) investigation and
8 discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in
9 similar litigation; and (4) the percentage of objectors is small.”³ *Id.* at 1801; *In re Microsoft I-V Cases*,
10 135 Cal. App. 4th 703, 723 (2006); *see also* Newberg & Conte, *Newberg on Class Actions*, (2d.Ed.
11 1987) § 11.41, p. 11-91.

12 It would also be appropriate for this Court to look to case law concerning settlement of a claim
13 brought under the Fair Labor Standards Act 28 U.S.C. § 201 et seq. (“FLSA”) which, likewise, requires
14 court approval. Because the Ninth Circuit has not established a standard for district courts to follow when
15 evaluating an FLSA settlement, California district courts have applied the standard established by the
16 Eleventh Circuit in *Lynn’s Food Stores, Inc. v. U.S. By & Through U.S. Dept of Labor*, 679 F.2d 1350,
17 1352 (11th Cir. 1982). *See Dunn v. Teaches Ins. & Annuity Ass’n of Am.*, 2016 WL 153266, at *3 (N.D.
18 Cal. Jan. 13, 2016) and *Ambrosino v. Home Depot U.S.A., Inc.*, No. 11 CV 1319 L (MDD), 2014 WL
19 3924609, at * 1 (S.D. Cal. Aug. 11, 2014) (“A district court may approve an FLSA settlement if the
20 proposed settlement reflects ‘a reasonable compromise over [disputed] issues.’”) (quoting *Lynn’s Food*
21 *Stores, Inc.*, 679 F.2d at 1354). Although the standard for approving FLSA collective actions may be
22 different from the standard for approving class actions under Federal Rule of Civil Procedure 23, courts
23 have applied the *Hanlon* factors to a settlement of an FLSA claim. *Millan v. Cascade Water Sews., Inc.*,
24 No. 1:12 - cv -1821-AWI-EPG, 2016 WL 3077710, at * 3 (E.D. Cal. Jun. 2, 2016); *see also Otey v.*

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26
27 ³ PAGA provides no notice or claim procedures as exist in class action cases. Therefore, objections
28 (other than potentially by the LWDA) are not contemplated in PAGA actions. Despite the absence of
any right to object, the Agreement here contemplates informing Aggrieved Employees of the resolution
so that they are made aware of the result, despite having no standing to object to this settlement.

1 *CrowdFlower, Inc.*, No. 12-CV-05524-JST, 2014 WL 1477630, at * 11 (N.D. Cal. Apr. 15, 2014). In
2 *Selk v. Pioneers Mem'l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1173 (S.D. Cal. 2016) the court
3 evaluated an FLSA settlement using a totality of the circumstances approach “that replicates the factors
4 relevant to Rule 23 class actions where appropriate, but adjusts or departs from those factors when
5 necessary to account for the labor rights at issue.”

6 While a court should not simply “rubber stamp” a proposed settlement with little or no
7 independent evaluation, the court “must stop short of the detailed and thorough investigation that it
8 would undertake if it were actually trying the case.” *Clark v. Am. Residential Sews. LLC*, 175 Cal. App.
9 4th 785, 799 (2009). The court should not expect that the parties offer concrete “proof” in support of
10 settlement, but rather that the parties have made a good faith effort to explain the reasoning behind
11 certain strategic decisions and the valuation of specific claims. “[W]hether a settlement is fundamentally
12 fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in
13 the estimation of the reviewing court.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). “It is,
14 of course, the strong public policy of this state to encourage the voluntary settlement of litigation.”
15 *Osumi v. Sutton*, 151 Cal. App. 4th 1355, 1359 (2007).

16 Finally, the factors identified above are not exclusive and the court is free to balance factors
17 depending on circumstances. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 244-245 (2001).

18 While class settlement factors provide some guidance as to how a Court may approach the
19 evaluation of a PAGA settlement, there are significant differences between PAGA settlements and class
20 action settlements that must be recognized. Unlike a class action settlement, the scope of release
21 permitted in a PAGA settlement is limited. While “judgment in [a PAGA] action is binding not only on
22 the named employee plaintiff but also on government agencies and any aggrieved employee not a party
23 to the proceeding,” *Arias*, 46 Cal. 4th at 986, “the nonparty employees, because they were not given
24 notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to
25 remedies other than civil penalties.” *See id.*, at 987. Thus, with the possible exception of plaintiffs, the
26 scope of a release in a PAGA settlement is confined to PAGA penalties, and not related individual
27
28

claims.⁴ Applying the above standards to this Settlement, the Settlement meets all criteria for approval.

VIII. THE SETTLEMENT MEETS ALL THE CRITERIA FOR APPROVAL

Applying the class settlement fairness factors discussed above – limited to those compatible with the unique features of PAGA claims – the proposed settlement embodies all of the key features of a settlement that is fair, reasonable, adequate, and as such, meets all the criteria necessary for approval.

A. The Relative Strength of the PAGA Claim, and the Realistic Range of Outcomes in the Litigation, Strongly Favor Approval of the Settlement

“In determining whether the proposed settlement falls within the range of reasonableness, perhaps the most important factor to consider is plaintiffs’ expected recovery balanced against the value of the settlement offer.” *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (internal quotation omitted). Here, the relative strength of the PAGA claim brought by Plaintiff weighs in favor of the Court finding that the settlement is fair, adequate, and reasonable, since there are significant risk factors that Plaintiff would face if he did not settle this matter.

Most significantly, the ultimate decision as to the amount of penalties is always up to the discretion of the Court. Labor Code § 2699(e)(2) states: “In any action by an aggrieved employee seeking recovery of a civil penalty available under subdivision (a) or (f), 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.” Subdivision (a) states, “Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action

⁴ This is contrasted with the much broader release permitted in a class action context, which may be based on “any matter or fact” alleged in the complaint. *See In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 221 (5th Cir. 1981) (“The weight of authority establishes that ... a court may release not only those claims alleged in the complaint and before the court, but also claims which ‘could have been alleged by reason of or in connection with any matter or fact set forth or referred to in’ the complaint.”); *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (“we have held that federal district courts properly released claims not alleged in the underlying complaint where those claims depended on the same set of facts as the claims that gave rise to the settlement.”). In this matter, the Agreement will not affect the rights of Aggrieved Employees who may possess individual wage and hour claims.

1 brought by an aggrieved employee on behalf of himself or herself and other current or former employees
2 pursuant to the procedures specified in Section 2699.3.” Subdivision (f) specifies the penalties in
3 instances where the underlying statute does not specify any civil penalty. In other words, where the facts
4 and circumstances of the case demonstrate that an unreduced award would be “unjust, arbitrary and
5 oppressive, or confiscatory,” the court (or arbitrator) may reduce the award to ameliorate such.

6 In *Moniz v. Adecco USA, Inc.*, 72 Cal. App. 5th 56 (2021) the court said:

7 [W]hile PAGA does not require the trial court to act as a fiduciary for aggrieved
8 employees, adoption of a standard of review for settlements that prevents “ ‘ ‘ ‘fraud,
9 collusion or unfairness’ ” (Dunk, supra, 48 Cal.App.4th at pp. 1800–1801, 56
10 Cal.Rptr.2d 483), and protects the interests of the public and the LWDA in the
11 enforcement of state labor laws is warranted. Because many of the factors used to
evaluate class action settlements bear on a settlement’s fairness—including the strength
of the plaintiff’s case, the risk, the stage of the proceeding, the complexity and likely
duration of further litigation, and the settlement amount—these factors can be useful in
evaluating the fairness of a PAGA settlement.

12 Given PAGA’s purpose to protect the public interest, we also agree with the LWDA
13 and federal district courts that have found it appropriate to review a PAGA settlement to
ascertain whether a settlement is fair in view of PAGA’s purposes and policies.
14 (*O’Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1132–
1134; *Jordan v. NCI Group, Inc.* (Jan. 5, 2018, No. EDCV 16-1701-JVS) 2018 WL
15 1409590, at *1–*2, 2018 U.S. Dist. Lexis 25297, at *3–*4; *Chamberlain v. Baker*
Hughes, a GE Co., LLC, supra, 2020 WL 4350207 at *3–*4, 2020 U.S. Dist. Lexis
16 134582 at *10–*11; see *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of*
America (2006) 141 Cal.App.4th 46, 59, 61–62, 45 Cal.Rptr.3d 647 [where the
17 Legislature required court approval of private settlements of Proposition 65 actions
brought to vindicate the public interest, court must evaluate the resulting consent decree
18 to determine if it is “just” and “serves the public interest”].) We therefore hold that a
trial court should evaluate a PAGA settlement to determine whether it is fair,
19 reasonable, and adequate in view of PAGA’s purposes to remediate present labor law
violations, deter future ones, and to maximize enforcement of state labor laws. (See
20 *Williams*, supra, 3 Cal.5th at p. 546, 220 Cal.Rptr.3d 472, 398 P.3d 69 [PAGA “sought
to remediate present violations and deter future ones”]; *Arias*, supra, 46 Cal.4th at p.
21 980, 95 Cal.Rptr.3d 588, 209 P.3d 923 [the declared purpose of PAGA was to augment
state enforcement efforts to achieve maximum compliance with labor laws].) The trial
22 court below used this standard.

23 *Moniz*, 72 Cal. App. 5th at 77. *Moniz*, in agreeing with the federal courts that have considered how to
24 evaluate a PAGA settlement, concluded that the class action factors are appropriately considered, along
25 with a consideration of whether the settlement furthers “PAGA’s purposes to remediate present labor law
26 violations, deter future ones, and to maximize enforcement of state labor laws.”

27 A final note on the analysis discussion in *Moniz* is appropriate. In *Moniz*, the Court found the
28 record lacked any support for the disparate allocation of PAGA penalties between different types of

employees: “[T]he settlement’s allocation of shares of civil penalties to Colleagues that are fifteen times greater than the shares allocated to Associates does not seem to have been justified below and may be contrary to PAGA’s purposes.” *Moniz*, 72 Cal. App. 5th at 87. Here, PAGA penalties are allocated by pay period, irrespective of job classification, an equitable method of allocation.

In addition, there is no evidence that a court or a commissioner had informed Defendants that any conduct violated the Labor Code. *Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1209 (2008); *Willis v. Xerox Bus. Servs., LLC*, 2013 WL 6053831, *7-8 (E.D. Cal. 2013) (“Under California law, courts have held that employers are not subject to heightened penalties for subsequent violations until and unless a court or commissioner notified the employer that it is in violation of the Labor Code.”) And in *Cotter*, the court found a significant reduction of the PAGA claim would be appropriate because “[t]his does not appear to be a case where a company has deliberately sought to evade the law.” *Cotter v. Lyft, Inc.*, 176 5 F. Supp. 3d 930, 941 (N.D. Cal. 2016). Here, Defendant can state a strong case that, as the Court concluded in *Cotter*, the efforts to devise compliant operational policies do not indicate an organization that has deliberately sought to evade the law. This is a very significant risk factor. Establishing violations for purposes of PAGA would be difficult in this matter.

After analyzing the claims in this matter and thorough investigation of the claims and defenses, Plaintiff has concluded that the value of this Settlement is fair, adequate, and reasonable. (Tunyan Decl., ¶¶ 13-15.)

The Settlement of **\$70,000.00** is 64% of the **\$109,345.00** estimate of *risk-adjusted* penalty recovery (excluding interest) at this stage in the litigation, *based upon a penalty-by-penalty analysis*. On that basis, it would be unwise to pass up this settlement opportunity. This assessment is based on a carefully constructed model of the current fair value of the case, using estimated risks, appellate authority, and estimates of violation frequency by pay period. The Settlement of **\$70,000.00** is about 7% of roughly estimated non-single penalty maximum exposure value of **\$1,038,050.00**. (Tunyan Decl., ¶ 25.)

B. The Risk, Expense, and Complexity of Further Litigation Balances Strongly in Favor of Approval of the Settlement

To assess the fairness, adequacy, and reasonableness of a class action settlement, the court should

1 consider the expense, complexity and likely duration of further litigation. *Dunk*, 48 Cal. App. 4th at
2 1801. Here, the expense, complexity and likely duration of future litigation was to some extent an
3 unknown. What is certain is that to adequately establish the foundational violations that would support a
4 substantial penalty award, tremendous time and expense would be invested. To adequately establish that
5 aggrieved employees experience the alleged violations, and at what frequency, most of the aggrieved
6 employees would need to be interviewed in a systematic fashion and their testimony cataloged in way
7 sufficiently meaningful to permit the submission of summary evidence at trial, such as via survey. *First*,
8 the burdensome nature of such a process would be expensive and time-consuming. *Second*, the
9 substantial risk that the Court would either substantially reduce any penalty ultimately awarded or
10 conclude that the conduct was insufficient to support a penalty award. *Third*, it would be essentially
11 impossible to formulate an objectively reliable means of summarizing testimonial experiences, other than
12 by an extraordinarily detailed survey. And formulating such a survey would have been important, since
13 frequency of violations would need to be established before any penalties could be recovered. In sum, the
14 evidence collected to date leads Plaintiff to conclude that, to the extent violations occurred, a fact which
15 Defendant dispute, some violations were **not** systematic and **not** uniform across all of Defendant's
16 employees who worked during the relevant period. Alternatively, direct testimony would have been
17 required from as many of the roughly **199** aggrieved employees as could be obtained, which would be, at
18 best, very difficult. Plaintiff's Counsel also considered defense arguments and defenses. (Tunyan Decl., ¶
19 ¶ 21-23.)

20 C. The Amount Offered in Settlement Under the Agreement

21 The Settlement provides a monetary benefit that falls well within "the range of an acceptable
22 settlement" under the circumstances, which is the standard on which the instant Settlement must be
23 judged. As held by the Ninth Circuit, a settlement may be fair and reasonable even where it only
24 provides a fraction of what could have been obtained at trial. *See Linney v. Cellular Alaska P'ship*, 151
25 F.3d 1234, 1242 (9th Cir. 1998).

26 1. The Total Amount Offered in Settlement is \$70,000.00

27 Under the Agreement, Defendant shall pay a maximum sum of \$70,000.00. Plaintiff's Counsel,
28 with the assistance of a data analyst, assessed the maximum plausible penalty exposure to be

1 **\$1,038,050.00.** (Tunyan Decl., ¶ 25.) This estimate is overly optimistic. The Settlement is 7% of that
2 maximum plausible exposure before factoring in the many risk adjustments and the Court’s ability to
3 reduce the penalty at its discretion.

4 Furthermore, Defendant asserted a number of defenses that potentially could have undermined
5 Plaintiff’s claims if they were to be litigated. Specifically, Defendant argued that it had compliant
6 written policies and practices, it paid meal premiums, numerous individualized inquiries would be
7 needed to determine liability on Plaintiff’s claims, including (1) whether employees worked off-the-clock
8 with knowledge of a supervisor or Defendant, (2) whether each individual took a particular meal period
9 or rest break on a particular occasion, (3) where the individual skipped the meal or rest period, **why** it was
10 skipped for each of the allegedly aggrieved employees. Defendant argued the case would be
11 unmanageable.

12 2. Payment of At Least \$31,585.22 in Penalties

13 Under the Agreement, the amount available for distribution as penalties under PAGA is at least
14 \$31,585.22. The amount is a significant penalty, but it is not confiscatory, nor is it, in the terms of the
15 PAGA statute, “unjust, arbitrary, or oppressive.” Labor Code § 2699(e)(2).

16 a) *The LWDA shall receive at least \$23,688.92*

17 As 75% of the penalties are allocated to the LWDA, the LWDA stands to receive at least
18 \$23,688.92 under the Agreement. Further, pursuant to Labor Code § 2699.3(b)(4) the “provisions of the
19 settlement relating to health and safety laws shall be submitted to the division at the same time that they
20 are submitted to the court. This requirement shall be construed to authorize and permit the division to
21 comment on the settlement provisions, and the court shall grant the division's commentary appropriate
22 weight.” The LWDA will have an opportunity to comment upon the amount to be paid to it. This
23 provision protects against collusive settlements for less than a reasonable value of the claim.

24 b) *Aggrieved Employees shall receive at least \$7,896.31*

25 Approximately 200 Aggrieved Employees shall receive at least \$7,896.31 (25% of the penalties)
26 under the terms of the Agreement and by operation of PAGA. The Court should give weight to the fact
27 that the primary purpose of PAGA is not to provide a windfall to Aggrieved Employees; the penalties
28 recovered under PAGA are not surrogate individual damages. Instead, the amount available to

1 Aggrieved Employees is in addition to any damages that could be recovered via individual claims.

2 **D. The Presence of a Government Participant**

3 As set forth above, 75% of the penalty is paid to the LWDA. In connection therewith, Labor
4 Code § 2699.3(b)(4) permits the LWDA to comment on the penalties. The LWDA was notified of the
5 Settlement. (Tunyan Decl., ¶ 46.)

6 **E. PAGA Counsel Are Experienced and Negotiated Aggressively**

7 The Court may also consider that negotiations between the Parties were conducted at arm's
8 length, in an adversarial manner, despite a mutual desire to resolve the case. (Tunyan Decl. ¶¶ 13-14, 18-
9 23.) The court may consider the opinion of all counsel that the Settlement is fair, reasonable and in the
10 best interests of the Aggrieved Employees. PAGA Counsel are experienced with employment class
11 actions and representative actions, as set forth more fully in the Declaration of Lilit Tunyan filed
12 herewith. (Tunyan Decl. ¶¶ 29-34.)

13 **F. The Substantial Exchange of Data and the Stage of the Proceedings Favor Approval**

14 In evaluating the Parties' basis for valuing a settlement, "formal discovery is not a necessary
15 ticket to the bargaining table." *Linney*, 151 F.3d at 1239.

16 Here, the substantial exchange of data was sufficient to enable Plaintiff's Counsel to evaluate the
17 strength and value of the claim for purposes of settlement. (Tunyan Decl., ¶¶ 13-14, 21-22.) As
18 discussed above, Plaintiff's Counsel reviewed policies, performed calculations with data, and inspected
19 related documents, such as handbooks and wage statements, to assess exposure and risk.

20 Based on Plaintiff's Counsel's experience litigating wage and hour claims, such investigation
21 was sufficient to determine the potential value of the PAGA claim, and to evaluate the strength of this
22 claim for purposes of settlement. (Tunyan Decl., ¶¶ 18-21.)

23 **G. Additional Factors Weigh in Favor of Approving the Terms of the Proposed**
24 **Settlement, Including the Requested Fees and Costs**

25 In addition to the factors presented above, the proposed settlement does not possess any obvious
26 deficiencies with respect to its other terms, including the agreed-upon fees and costs.

27 **1. Fees and Costs**

28 Courts in the Ninth Circuit and California generally use the "percentage method" rather than the

1 lodestar approach when awarding attorneys' fees in a common fund settlement. See 7 Witkin, B.E.,
2 CALIFORNIA PROCEDURE (2007 Supp.) §§ 255-261 at 236-241 (describing prevalence of percentage
3 method under California law); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“[A] litigant or a
4 lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled
5 to a reasonable attorney’s fee from the fund as a whole”); *In re Activision Sec. Litig.*, 723 F. Supp. 1373,
6 1377-78 (N.D. Cal. 1989) (Patel, J.) (endorsing percentage method). See generally, *Serrano*, 20 Cal. 3d
7 at 25; *accord Hanlon*, 150 F.3d 1011 (9th Cir. 1998). While this settlement is what is traditionally
8 imagined when using the term “common fund,” it does create benefit for others beyond Plaintiff.

9 According to a leading treatise on class actions, “No general rule can be articulated on what is a
10 reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee
11 award from a common fund in order to assure that the fees do not consume a disproportionate part of the
12 recovery obtained for the class, although somewhat larger percentages are not unprecedented.” See
13 Conte & Newberg, *Newberg on Class Actions* (3rd Ed.) § 14.03. Attorneys’ fees that are fifty percent of
14 the fund are typically considered the upper limit, with **thirty to forty percent commonly awarded in**
15 **cases where the settlement is relatively small**. See *id*; see also, *Van Vranken v. Atlantic Richfield*
16 *Company*, 901 F. Supp. 294 (N.D. Cal. 1995) (stating that most cases where 30-50 percent was awarded
17 involved “smaller” settlement funds of under \$10 million).

18 While this is not a class action, the custom and practice in class actions is to award approximately
19 one-third of a fund as a fee award. See *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66, n.11 (2008)
20 (“Empirical studies show that, regardless whether the percentage method or the lodestar method is used,
21 fee awards in class actions average around **one-third** of the recovery.”) (emphasis added). The proposed
22 attorney fee award here is 33.3% of the Gross Settlement Amount minus the General Release Payment,
23 an amount reasonably comparable to “average” fees awarded in California state court class action cases
24 used for comparison purposes here. *Chavez*, 162 Cal. App. 4th at 66 n. 11. Again, this is **not** a class
25 action. It is more akin to contingent representation with an additional requirement of Court review due to
26 the qui tam nature of a PAGA claim.

27 As a PAGA claim is unique to California, it is also appropriate to consider how California treats
28 common fund recoveries. The California Supreme Court removed all doubt about the use of the

percentage of the fund method to award attorneys' fees in California, stating, "We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created." *Laffitte v. Robert Half Intern. Inc.*, 1 Cal. 5th 480, 503 (2016).⁵

Thus, Ninth Circuit and California state courts regard circumstances in which class counsel's work is wholly contingent, such as in class actions and other common fund type cases, as a factor weighing in favor of approving a negotiated fee award that approximates market rates. *Ketchum v. Moses*, 24 Cal. 4th 1122, 1132-33 (2001). This matter has been litigated by Plaintiff's Counsel in a manner that is reasonable, diligent, and efficient. The actual lodestar incurred by Plaintiff's Counsel to date is no less than \$67,025.00 not including at least \$2,750.00 in estimated future work. (Tunyan Decl., ¶¶ 39-41.) Attorneys for Plaintiff invested substantial amounts of time evaluating data before the mediation in this matter, revising damage models, and in preparing for the mediation. Those efforts led to this reasonable settlement. (Tunyan Decl., ¶ 20-24.) Plaintiff's Counsel requests \$23,333.33, as specified in the Settlement, which constitutes a **negative lodestar** multiplier of 2.9 when compared to recorded and estimated future lodestar of \$69,775.00. (Tunyan Decl., ¶ 41.)

The Agreement also provides for the award of actual costs, up to \$9,000, based on Plaintiff's Counsel's actual out of pocket expenses in taking on representation in this Lawsuit on a contingency basis. (Tunyan Decl., ¶ 42.) Plaintiff requests an award of \$6,731.45 in actual costs which include the future motion, final report and Case Management Conference Statement filing fees. (Tunyan Decl., ¶ 42.)

2. Administration Fees Are Very Reasonable

Administration will be completed by ILYM Group, Inc. for \$3,350.00, a very reasonable amount for the services rendered. (Tunyan Decl., ¶ 43.)

⁵ The Supreme Court also corrected the misconception that *Dunk* should be viewed as expressing doubt about the use of the percentage method: "The *Dunk* court, while finding the percentage method inapplicable to the settlement before it due to the lack of a readily valued common fund, did not purport to bar its usage generally in common fund cases." *Laffitte*, at 501.

1 **IX. CONCLUSION**

2 For the above reasons in fact and law, Plaintiff requests this court enter an order approving the
3 settlement memorialized in the Agreement.

4 Respectfully submitted,

5 Dated: May 15, 2024

TUNYAN LAW, APC

6
7 By: _____

Lilit Tunyan

Artur Tunyan

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9 Attorneys for Plaintiff CARL EMPY
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1 **PROOF OF SERVICE**

2
3 STATE OF CALIFORNIA)
4) ss
5 COUNTY OF LOS ANGELES)

6 I am employed in the county of Los Angeles, State of California. I am over the age of 18
7 and not a party to the within action; my business address is 535 N Brand Blvd. Suite 285
8 Glendale, California 91203. On May 15, 2024, I served the foregoing document described as:

9 On the date indicated below, I served the document described as: **PLAINTIFF'S NOTICE OF**
10 **MOTION AND MOTION FOR AN ORDER APPROVING SETTLEMENT OF CLAIMS**
11 **BROUGHT PURSUANT TO THE PRIVATE ATTORNEYS GENERAL ACT OF 2004;**
12 **MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by
13 sending a true copy thereof to interested parties as follows and as stated on the attached service list:

14 John Wu
15 jwu@ohaganmeyer.com
16 Thalia Rofos
17 trofos@ohaganmeyer.com
18 Lisa Kupfer
19 lkupfer@ohaganmeyer.com
20 **O'HAGAN MEYER**
21 4695 MacArthur Ct., Suite 900
22 Newport Beach, California 92660
23 Telephone: (949)942-8537

24 *Attorneys for Defendant 24 Woodward Ave LLC*

25 [✓] **BY E-MAIL:** I hereby certify that this document was served from Glendale, California,
26 by e-mail delivery on the parties listed herein at their most recent known e-mail address
27 or e-mail of record in this action.

28 [✓] **BY ELECTRONIC SERVICE:** Based on an agreement of the parties to accept electronic
service, I caused the documents to be sent to the persons at the electronic service addresses listed
above via electronic mail. I did not receive an error message.

I declare under penalty of perjury under the laws of the State of California that the
above is true and correct. Executed on May 15, 2024 at Glendale, California.

29
30 Lilit Tunyan

31 Name



32 Signature