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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **COUNTY OF STANISLAUS**

12 **LUCIA LOPEZ-MARTINEZ, an**
13 **individual,**

14 **Plaintiff,**

15 **vs.**

16 **PCV MODESTO 1, LLC d/b/a**
17 **PLANET FITNESS, a limited liability**
18 **corporation, and DOES 1-100,**
19 **inclusive,**

20 **Defendants.**

21 **CASE NO: CV-23-002478**

22 **MEMORANDUM OF POINTS AND**
23 **AUTHORITIES IN SUPPORT OF MOTION**
24 **TO APPROVE PAGA SETTLEMENT AND**
25 **DISMISS ACTION WITH PREJUDICE**

26 **Date:**

27 **Time:**

28 **Dept.: 24**

Table of Contents

I.	INTRODUCTION	1
II.	STATEMENT OF the CASE AND THE SETTLEMENT.....	2
A.	Pertinent Facts and Procedural History.....	2
B.	The Proposed Settlement.....	3
III.	LEGAL ARGUMENT	4
A.	Standards for Approval of a PAGA Settlement	4
B.	The Settlement Meets the Criteria for Approval.....	6
1.	The Factors Giving Rise to a Presumption of Fairness Exist.....	6
2.	The Proposed Settlement Furthers the Purposes of the PAGA, Taking into Consideration Defendant’s Defenses and Mitigating Factors, and Should Be Approved.	6
a.	Meal Period Claim.....	6
b.	Wage Statement Claim.....	6
c.	Sick Time Claim.....	7
d.	Waiting Time Penalty Claim.....	8
e.	Business Expense Claim.....	8
f.	Total PAGA Exposure and Settlement Value.....	9
g.	Defendant’s Defenses.....	9
3.	The Scope of the Release is Appropriately Tailored	10
4.	Plaintiff’s Requested Fees and Costs Are Reasonable.....	10
IV.	CONCLUSION	11

Table of Authorities

CASES

<i>Anderson v. Nextel Retail Stores, LLC</i> (C.D. Cal. Apr. 12, 2010) 2010 U.S. Dist. LEXIS 43377	6
<i>Arias v. Superior Court</i> (2009), 46 Cal. 4 th 969.....	10
<i>Bowen v. Jea Senior Living Health and Welfare Benefit Plan, LLC</i> (E.D. Cal, Dec. 8, 2023) 2023 WL 8527732	9
<i>Carrington v. Starbucks</i> (2018) 30 Cal.App.5 th 504.....	9
<i>Culley v. Lincare, Inc.</i> (E.D. Cal 2017), 236 F.Supp.3d 1184.....	8
<i>Gutilla v. Aerotek, Inc.</i> (E.D. Cal. 2017) 2017 WL 2729864	4
<i>Hernandez v. Best Buy Stores, LP</i> (S.D. Cal. 2017) 2017 WL 2445438	4
<i>In re TD Ameritrade Account Holder Litig.</i> (N.D. Cal. Sept. 12, 2011) 2011 U.S. Dist. LEXIS 103222.....	5
<i>Manzo v. McDonald’s Restaurants of California, Inc.</i> (E.D. Cal., Sep. 29, 2022) 2022 WL 4586236	5, 9
<i>Mendez v. Tween Brands, Inc.</i> (E.D. Cal. June 30, 2010) 2010 U.S. Dist. LEXIS 66454.....	5
<i>Moniz v. Adecco USA, Inc.</i> (2021) 72 Cal.App.5 th 56.....	4
<i>Noori v. Countrywide Payroll & HR Solutions, Inc.</i> (2019) 43 Cal.App.5 th 957	7
<i>Ochoa-Hernandez v. CAJDER Foods, Inc.</i> (N.D. Cal. Apr. 2, 2010) 2010 U.S. Dist. LEXIS 32774.....	5
<i>Officers for Justice v. Civil Service Com.</i> (9 th Cir., 1982) 688 F.2d 615	5
<i>Raines v. Coastal Pacific Food Distributors, Inc.</i> (2018) 23 Cal.App.5 th 667	7
<i>Raziano v. Albertsons LLC</i> (C.D. Cal. Dec. 13, 2019) 2019 WL 9464279	8
<i>Rodriguez v. Danell Custom Harvesting, LLC</i> (E.D. Cal. 2018) 293 F.Supp.3d 1117.....	9
<i>Wood v. Kaiser Foundation Hospitals</i> (2023) 88 Cal.App.5 th 742.....	7
<i>ZB, NA v. Superior Court</i> (2019) 8 Cal.5 th 175.....	7

STATUTES

Labor Code § 201	1, 3, 8
Labor Code § 202.....	1, 3, 8
Labor Code § 226(a)	1, 2, 3, 7
Labor Code § 226.3.....	7
Labor Code § 226.7.....	1, 3
Labor Code § 233.....	1, 3
Labor Code §§ 245 <i>et seq.</i>	1, 3, 7
Labor Code § 248.5.....	7
Labor Code § 256.....	8

1	Labor Code § 512.....	1, 3
2	Labor Code § 558.....	6
3	Labor Code §§ 2698 <i>et seq.</i> ("PAGA").....	<i>passim</i>
4	Labor Code § 2699(f).....	7, 8
5	Labor Code § 2699(g)(1)	10
6	Labor Code § 2699(l)(2)	4
7	Labor Code § 2699(e)(2).....	10
8	Labor Code § 2802.....	1, 2, 3, 8

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2 **I. INTRODUCTION**

3 Plaintiff Lucia Lopez-Martinez (“Plaintiff”) respectfully moves this Court for an Order
4 granting approval of the proposed PAGA Settlement with Defendant PCV Modesto 1, LLC d/b/a
5 Planet Fitness. (“Defendant”). Following exchange of formal and informal discovery, Plaintiff and
6 Defendant reached a resolution of all of Plaintiff’s claims in this Action, which include her
7 individual claims under the Labor Code, her individual claims for civil penalties under the PAGA,
8 and her non-individual claims for civil penalties under the PAGA on behalf of other alleged
9 aggrieved employees. The PAGA portion of the settlement resolves claims for PAGA penalties
10 involving 36 employees, including Plaintiff (“Aggrieved Employees”) from July 22, 2022, through
11 the present (“PAGA Period”), with an estimated maximum value of \$69,700. The PAGA
12 Settlement amount of \$5,000 sought to be approved therefore represents 7.2% of the theoretical
13 maximum penalty and is in line with other PAGA settlements approved by courts.

14 The PAGA portion of this case addresses alleged violations of Labor Code Sections 201,
15 202, 226(a), 226.7, 233, 245 *et seq.*, 512, and 2802. Relevant to that claim, Plaintiff alleges that
16 Defendant: 1) failed to pay accrued sick time on request and/or retaliated against employees for
17 requesting to use paid sick time, 2) improperly included hours attributed to meal period premiums
18 in total hours worked listed on wage statements; 3) failed to furnish all required compliant meal
19 periods; and 4) failed to reimburse employees for work-related cell phone usage. Plaintiff asserts
20 these violations, and derivative violations stemming from same, as the basis for her PAGA claim.

21 As set forth herein, the proposed Settlement embodies all of the features of an appropriate
22 settlement as it is the product of (1) arms-length negotiations, (2) negotiated by attorneys
23 experienced in wage and hour issues following formal and informal discovery, and (3) it reflects a
24 reasoned compromise based directly on the relative strength and value of the PAGA claim, as well
25 as the risks, expense, complexity and likely duration of further litigation.

1 The value achieved by the Settlement Agreement may be gleaned from the fact that the
2 LWDA and the Aggrieved Employees encompassed by the Settlement Agreement will receive a
3 penalty that is well within the range regularly approved by courts for PAGA settlements.

4 It is also important to underscore that all penalty amounts paid to Aggrieved Employees
5 will be an unexpected windfall, as civil penalties are normally collected solely by the Labor
6 Commissioner and are not distributed to employees, serve as a penalty against the employer and
7 are not designed to compensate employees, and do not impact any Aggrieved Employees' potential
8 individual claims.

9 For these reasons, as set forth more fully herein, Plaintiff respectfully requests that this
10 Court enter the Order submitted herewith.

11 **II. STATEMENT OF THE CASE AND THE SETTLEMENT**

12 **A. Pertinent Facts and Procedural History.**

13 Plaintiff worked as an hourly, non-exempt employee for Defendant from approximately
14 April 25, 2022, through February 3, 2023. During her employment, Plaintiff alleges that she
15 informed Defendant she needed to use paid sick leave on two occasions but did not receive paid
16 sick leave for those days. Plaintiff also alleges that some of her wage statements included meal
17 period penalty payments, which do not represent hours worked, in the number reported to
18 employees as total hours worked. Plaintiff alleges this to be a violation of Labor Code section
19 226(a)(2). Plaintiff also alleges that she did not receive all compliant meal periods to which she
20 was entitled, as evidenced by payment of meal period penalties by Defendant. Plaintiff alleges
21 that she was required to utilize her personal cellular phone for work purposes but was not
22 reimbursed for this work-related use in violation of Labor Code section 2802. Finally, plaintiff
23 alleges that because she was not paid sick pay to which she was entitled when she was terminated,
24 Defendant violated Labor Code section 201.

25 Plaintiff filed a notice with the Labor and Workforce Development Agency ("LWDA"),
26 on July 7, 2023, and simultaneously served a copy on Defendant by certified mail. The LWDA
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1 Notice included potential PAGA claims under Labor Code sections 201, 202, 226(a), 226.7, 233,
2 245 *et seq.*, 512, and 2802. VJK Decl., ¶ 6. The LWDA did not provide notice within 65 days of
3 Plaintiff's filing of her LWDA Notice that it intended to investigate her allegations. Following
4 expiration of the required 65-day waiting period pursuant to Labor Code section 2699.3, Plaintiff
5 amended her complaint to add, *inter alia*, claims for civil penalties under PAGA. *Ibid.*

6 Defendant and Plaintiff formally and informally exchanged discovery and information and
7 ultimately negotiated a settlement of the PAGA claim. VJK Decl., ¶ 4, Exhibit 1.

8 Plaintiff submitted a copy of the PAGA settlement agreement and these moving papers to
9 the LWDA concurrently with the filing of this motion. VJK Decl., ¶ 5, Exhibit 2.

10 **B. The Proposed Settlement**

11 The Parties jointly prepared and executed the Settlement Agreement. VJK Decl., Exhibit
12 1. The Settlement Agreement sets forth the terms of the Settlement reached by the Parties,
13 including the following key points:

14 1. Defendant agrees to settle the PAGA claim for the payment of five thousand dollars
15 (\$5,000.00) (hereinafter the "Gross Settlement Amount"). *See* PAGA Settlement Agreement, at §
16 1.7.

17 2. Plaintiff's counsel is requesting payment of one thousand, six hundred sixty-six
18 dollars and sixty-seven cents (\$1,666.67), or one-third of the Gross Settlement Amount, as
19 attorneys' fees for prosecuting the PAGA claim. *See* PAGA Settlement Agreement at § 3.2.1.

20 3. Plaintiff's counsel is requesting payment of two hundred forty-six dollars and sixty-
21 two cents (\$246.62) as reimbursement for costs directly related to the PAGA claim. *Ibid.*

22 4. The remaining balance after deduction of fees and costs is \$3,086.71. Seventy-five
23 percent (75%) of the balance, or \$2,315.03, shall be distributed to the LWDA and the remaining
24 twenty-five percent (25%) of this amount, or \$771.68, shall be distributed to the Aggrieved
25 Employees. *See* PAGA Settlement Agreement, at § 3.2.2.

26 5. All Aggrieved Employees will receive a pro rata share of the \$771.68 allocated to
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1 them, based on the number of pay periods that he or she was employed by Defendant during the
2 PAGA Period. *See* PAGA Settlement Agreement, at § 3.2.2.1.

3 6. In exchange for the above settlement consideration, Defendants and all Released
4 Parties (as defined in § 1.22 of the PAGA Settlement Agreement) shall be entitled to a release from
5 each Aggrieved Employee, including Plaintiff, of all claims for civil penalties under the PAGA that
6 were set forth, or could have been set forth based on the facts alleged in the Action, for penalties
7 pursuant to PAGA for violations of Labor Code sections 201-204, 226, 226.7, 233, 246, 246.5, 512,
8 558, and 2802. *See* PAGA Settlement Agreement, §§ 1.21, 5.2.

9 **III. LEGAL ARGUMENT**

10 **A. Standards for Approval of a PAGA Settlement**

11 The settlement of a PAGA claim requires court approval pursuant to the operative PAGA
12 statute, which states that the “[t]he superior court shall review and approve any settlement of any
13 civil action filed pursuant to this part.” *See Labor Code* § 2699(l)(2). This involves a review of
14 whether the settlement is “fair, adequate, and reasonable under all the circumstances.” *Moniz v.*
15 *Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76-77. This is not the same standard in the PAGA
16 context as it is with class actions, because the trial court need not “act as a fiduciary for aggrieved
17 employees.” *Ibid.* However, the Court is to use a standard of review for settlements that “prevents
18 fraud, collusion or unfairness [citation], and protects the interests of the public and the LWDA in
19 the enforcement of state labor laws.” *Ibid.* (internal quotations and citations omitted).

20 In general, courts have determined that a settlement which serves the deterrent and punitive
21 functions of the PAGA statute is appropriately approved. E.g. *Moniz, supra*, 72 Cal.App.5th at 77;
22 *Hernandez v. Best Buy Stores, LP*, 2017 WL 2445438 *2 (S.D. Cal. 2017); *Gutilla v. Aerotek, Inc.*,
23 2017 WL 2729864 * 3 (E.D. Cal. 2017). Here, the purposes of the PAGA are being well-served
24 by the resolution.

25 As with any settlement, the Court must be mindful in conducting its inquiry that
26 “[s]ettlement is a compromise, which balances the possible recovery against the risks inherent in
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1 litigating further.” *See In re TD Ameritrade Account Holder Litig.*, 2011 U.S. Dist. LEXIS 103222,
2 24 (N.D. Cal. Sept. 12, 2011). Indeed, “the very essence of a settlement is ... ‘a yielding of
3 absolutes and an abandoning of highest hopes” [*Officers for Justice v. Civil Service Com.*, 688
4 F.2d 615, 624 (9th Cir., 1982)], as “it is the very uncertainty of outcome in litigation and avoidance
5 of wasteful and expensive litigation that induce consensual settlements.” *Id.*, at 625. As such, “the
6 settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits” or
7 “judged against a hypothetical or speculative measure of what might have been achieved by the
8 negotiators.” *Id.*

9 When evaluating the fairness, adequacy, and reasonableness of a PAGA penalty, courts
10 compare the potential penalty amount (its verdict value, as some courts refer to it) with the actual
11 recovery under the settlement. There is no express or even baseline percentage of recovery
12 required. Under the express terms of the PAGA, a verdict value is not guaranteed even if the
13 plaintiff prevails, as courts have discretion to lower the amount of penalties based on the
14 circumstances of a particular case. *Manzo v. McDonald’s Restaurants of California, Inc.* (E.D.
15 Cal., Sep. 29, 2022) 2022 WL 4586236, *6 (approving settlement of less than 1% of “verdict value”
16 of PAGA claims). Further, while “[a PAGA] action is ... designed to protect the public and
17 penalize the employer for past illegal conduct” [*Mendez v. Tween Brands, Inc.*, 2010 U.S. Dist.
18 LEXIS 66454 (E.D. Cal. June 30, 2010), at 11], a reviewing Court must take into account the fact
19 that settlement of a PAGA claim – like any settlement – involves a “compromise” that stops short
20 of rendering findings of liability and damages. Moreover, the Court must not lose sight of the fact
21 that “[u]nlike a class action seeking damages or injunctive relief for injured employees, the purpose
22 of PAGA is to incentivize private parties to recover civil penalties for the government that otherwise
23 may not have been assessed and collected by overburdened state enforcement agencies.” *See*
24 *Ochoa-Hernandez v. CAJDER Foods, Inc.* (N.D. Cal. Apr. 2, 2010) 2010 U.S. Dist. LEXIS 32774,
25 at 12.

1 **B. The Settlement Meets the Criteria for Approval**

2 **1. The Factors Giving Rise to a Presumption of Fairness Exist**

3 In conducting a review of a settlement, it is generally recognized that an “agreement ...
4 reached through arms-length negotiation between experienced parties . . . is entitled to a
5 presumption of fairness.” *See Anderson v. Nextel Retail Stores, LLC*, 2010 U.S. Dist. LEXIS 43377,
6 44 (C.D. Cal. Apr. 12, 2010). A presumption of fairness exists here, as the proposed Settlement
7 (1) is the product of arms-length negotiations [VJK Decl., ¶ 4], (2) that was negotiated by Counsel
8 with significant experience in similar wage and hour litigation [*Id.*, ¶¶ 10-12], (3) which occurred
9 after Counsel had conducted sufficient investigation to evaluate the strength and potential value of
10 the PAGA claims, as well as evaluating the risks of litigating this claim through trial. *Id.*, at ¶¶ 7-
11 8. Based thereon, the court should give considerable weight to the competency and integrity of
12 counsel in assuring itself that the Settlement Agreement represents an arm’s-length transaction
13 entered without self-dealing or other potential misconduct.

14 **2. The Proposed Settlement Furthers the Purposes of the PAGA, Taking into**
15 **Consideration Defendant’s Defenses and Mitigating Factors, and Should Be**
16 **Approved.**

17 a. Meal Period Claim

18 Plaintiff’s meal period claim is based on the allegation that in each pay period where
19 Plaintiff received meal penalties, she was denied a compliant meal period, as were any of the other
20 Aggrieved employees whenever they were paid meal premium penalties. This occurred during a
21 total of 18 overall pay periods during the PAGA Period. VJK Decl., ¶ 7.c.i. The civil penalty for
22 non-complaint meal periods is found at Labor Code section 558 and is \$50 per employee per pay
23 period. Accordingly, the maximum value of these claims is \$900 (\$50 x 18 violations).

24 b. Wage Statement Claim

25 The wage statement allegations in this claim are derivative of the above facts. In short,
26 Plaintiff alleged that in every pay period in which an employee was paid a meal period premium,
27 the wage statement issued to that employee failed to accurately state the total hours worked, because
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1 the hour's additional pay per meal penalty was included in that total despite not representing an
2 hour worked, thus causing the wage statements to violate Labor Code section 226(a)(2).

3 With respect to the maximum penalty exposure on this claim, it should first be noted that
4 California courts have not clearly determined whether the applicable penalty for noncompliant
5 wage statements is found under Labor Code section 226.3 or Labor Code section 2699(f). *See*
6 *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 673-674 (indicating
7 the \$250 penalty under Labor Code section 226.3 applies in all instances); *but see, Noori v.*
8 *Countrywide Payroll & HR Solutions, Inc.* (2019) 43 Cal.App.5th 957, 971 fn. 13 (indicating civil
9 penalties for noncompliant wage statements are available pursuant to 2699(f)). Given the lack of
10 clarity among the courts, and the explicit language of Labor Code section 226.3 stating that its
11 penalty applies where "the employer fails to provide the employee a wage deduction statement or
12 fails to keep the records required in subdivision (a) of Section 226," the appropriate measure of
13 maximum exposure should be the \$100 "default" penalty set forth in Labor Code section 2699(f).
14 Using that amount, the maximum exposure faced by Defendant was \$1,800 (18 pay periods x \$100).
15 VJK Decl., ¶ 7.c.iii.

16 c. Sick Time Claim

17 Plaintiff's sick time pay claim is premised on the allegations that on two occasions where
18 she sought to utilize paid sick leave, she was denied same. Though a California Court has recently
19 held that a Plaintiff may seek PAGA penalties for violations of Labor Code sections 245 *et seq.*
20 (*Wood v. Kaiser Foundation Hospitals* (2023) 88 Cal.App.5th 742), no case yet holds what the
21 applicable civil penalty is. While Labor Code section 248.5 provides for imposition of an
22 "administrative penalty," the amount so provided is computed based upon an individualized
23 assessment of the actual amount of sick pay withheld (see Labor Code section 248.5(b)(2)). In
24 light of the California Supreme Court's holding in *ZB, NA v. Superior Court* (2019) 8 Cal.5th 175,
25 193 that such "compensatory" sums do not constitute civil penalties for PAGA purposes, it is
26 unclear whether Labor Code section 248.5's penalty provisions are recoverable under PAGA.
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1 Rather, it is more likely that the “default” penalty provision of Labor Code section 2699(f) will
2 apply, which is \$100 per employee per pay period.

3 Here, Plaintiff alleges she was denied sick pay twice. Further, formal and informal
4 discovery determined that Plaintiff was the only individual to have suffered the alleged violations
5 during the PAGA period. VJK Decl., ¶ 7.c.iv. Accordingly, the maximum value of this claim is
6 \$200 (2 x \$100).

7
8 d. Waiting Time Penalty Claim

9 Under Labor Code sections 201 and 202, Defendant was required to pay employees for all
10 wages earned and unpaid at termination or within 72 hours of resignation. This claim is derivative
11 of Plaintiff’s sick pay claim. The civil penalty for violation of Labor Code sections 201 and/or 202
12 is found at Labor Code section 2699(f), and is \$100 per employee per pay period, as there is no
13 civil penalty defined for violations of these code sections¹. Because Plaintiff was the sole former
14 employee who during the PAGA period was denied sick pay, Defendant faced a maximum potential
15 penalty liability of \$100 (1 * \$100). VJK Decl., ¶ 7.c.v.

16 e. Business Expense Claim

17 Plaintiff alleged that Defendant required Plaintiff and other employees to utilize their
18 personal cellular phones for business purposes, but without pro-rata reimbursement for same, in
19 violation of Labor Code section 2802. The PAGA period covered a total of 667 overall pay periods
20 for all employees. VJK Decl., ¶ 7.c.vi. The penalty for violations of Labor Code section 2802 is
21 found at Labor Code section 2699(f) and is \$100 per employee per pay period. While Defendant
22 denies these allegations, assuming that violations occurred during each pay period covered by the
23 PAGA Period, the maximum penalties that could be assessed for this claim is \$66,700 (667 x \$100).

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26 ¹ See *Culley v. Lincare, Inc.* (E.D. Cal 2017), 236 F.Supp.3d 1184, 1191 (Holding that Labor Code section 256 does
27 not apply to claims of violations of Labor Code sections 201/202 for employees other than seasonal workers);
28 *Raziano v. Albertsons LLC* (C.D. Cal. Dec. 13, 2019) 2019 WL 9464279, *8 (same).

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f. Total PAGA Exposure and Settlement Value

Based on the facts set forth above, the maximum exposure for the alleged PAGA violations would be \$66,700. VJK Decl., ¶ 7.d. The PAGA settlement amount of \$5,000 represents approximately 7.2% of the maximum PAGA exposure in this case.

Even without examining Defendant's defenses, the settlement amount is well within the range of PAGA settlements approved by courts. Courts have regularly approved PAGA settlements representing less than 5% of the maximum exposure. *See Bowen v. Jea Senior Living Health and Welfare Benefit Plan, LLC* (E.D. Cal, Dec. 8, 2023) 2023 WL 8527732 at *9-10 (approving PAGA settlement of approximately 3% of maximum liability); *Manzo v. McDonald's Restaurants of California, Inc.* (E.D. Cal. Sep. 29, 2022) at *7 (approving PAGA settlement of less than 1% of maximum liability); *Rodriguez v. Danell Custom Harvesting, LLC* (E.D. Cal. 2018) 293 F.Supp.3d 1117, 1133 (approving PAGA settlement representing 0.6% of maximum liability); Indeed, as low as 0.2 percent of total value has been approved. *Carrington v. Starbucks* (2018) 30 Cal.App.5th 504, 517 (\$150,000 approved where maximum value was \$75,000,000).

g. Defendant's Defenses

The largest potential PAGA exposure by far in this case is that relating to the expense reimbursement claims based on use of personal cellular phones. Defendant strongly contested these allegations, contending that employees who did use their cellular phones were not required to do so, that to the extent such usage occurred it was solely for the employee's convenience and by their own initiative and not mandated by Defendant. Had Defendant prevailed in its position, the vast majority of potential PAGA penalties would have been wiped out. Defendant also contended that its wage statements did not inappropriately incorporate meal penalties into hours worked because employees could determine themselves by way of "simple math" what their actual hours worked were. Defendant contended that payment of meal penalties was automatic and not actually based upon whether an employee was in fact denied a reasonable opportunity to take a

1 compliant meal period. Finally, Defendant contended that Plaintiff never explicitly requested to
2 take paid sick leave and was therefore not denied same. Success on any of these fronts would
3 have reduced or eliminated the potential PAGA exposure. VJK Decl., § 7.e.

4 Second, PAGA claims never carry full value, as the Legislature has empowered courts to
5 reduce PAGA awards while there is no required formula for the discount of PAGA awards that
6 are “unjust, arbitrary, and oppressive, or confiscatory.” Labor Code §2699(e)(2).

7 For these reasons, Plaintiff concluded the \$5,000.00 PAGA settlement is fair, reasonable,
8 and just. VJK Decl., ¶ 8.

9
10 **3. The Scope of the Release is Appropriately Tailored**

11 The California Supreme Court has concluded that in the context of PAGA “the nonparty
12 employees, because they were not given notice of the action or afforded any opportunity to be
13 heard, would not be bound by the judgment as to remedies other than civil penalties.” *Arias v.*
14 *Superior Court* (2009), 46 Cal. 4th 969, 987. Thus, the scope of the release provided in exchange
15 for the foregoing consideration is limited to the claims for civil penalties that were alleged, or
16 reasonably could have been alleged, based on the facts stated in the Complaint and Plaintiff’s
17 PAGA Notice under Labor Code §§ 2698 *et seq.* See Settlement Agreement, at § 5.2. This
18 settlement does not encompass or settle claims for damages under the Labor Code for nonparties.

19 **4. Plaintiff’s Requested Fees and Costs Are Reasonable**

20 PAGA provides for recovery of fees and costs for a prevailing plaintiff. Labor Code §
21 2699(g)(1). Plaintiff requests one-third of the overall settlement as fees, for a total of \$1,666.67.
22 Plaintiff also requests \$246.62 in declared costs incurred in the prosecution of this action. As set
23 forth in detail in the accompanying declaration of Vladimir J. Kozina, this modest fee and cost
24 request is reasonable and should be approved. VJK Decl., ¶ 9.

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1 **IV. CONCLUSION**

2 For all the reasons set forth above, Plaintiff respectfully requests that this Court grant the
3 instant motion and approve the PAGA Settlement as fair, reasonable, and adequate.
4

5 Dated: May 31, 2024

Respectfully submitted,

6 MAYALL HURLEY, P.C.

7 By: 
8 VLADIMIR J. KOZINA
9 Attorneys for Plaintiff