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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

BRUCE WILLIAM BALLINGER, an
individual, on behalf of the State of
California, as a private attorney general,

PLAINTIFF,

v.

B & B TRANSPORT, INC.; and DOES 1
thru 50, inclusive,

DEFENDANTS.

Case No. 23STCV00452

[Case Assigned for All Purposes to Hon. Helena
Stephen P. Pfahler in Dept. 68]

**NOTICE OF MOTION AND MOTION
FOR APPROVAL OF REPRESENTATIVE
ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

*[Filed concurrently with Declarations of Liane
Katzenstein Ly, Taylor Mitzner of Phoenix Class
Action Administration Solutions, and Plaintiff
Bruce William Ballinger in Support of Plaintiff's
Motion for Approval of Representative Action
Settlement; [Proposed] Order, and Judgment]*

Date: November 19, 2024

Time: 8:30 a.m.

Dept.: 68

Reservation No.: 383934066669

Complaint Filed: January 9, 2023

Trial Date: None Set

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

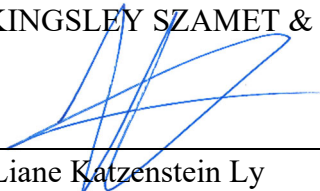
2 **PLEASE TAKE NOTICE** that on November 19, 2024 at 8:30 a.m. in Department 68 of
3 the above-entitled court, Plaintiff BRUCE WILLIAM BALLINGER will move the Court for an
4 Order Granting Approval of Representative Action Settlement.

5 The Motion will be made on the grounds that the proposed Settlement is fair, adequate,
6 reasonable, and in the best interest of Plaintiff, all aggrieved employees, and the Parties.

7 The Motion will be based on this Notice of Motion, the attached Memorandum of Points
8 and Authorities, the Declaration of Liane Katzenstein Ly, the PAGA Settlement Agreement
9 (Exhibit "1" to the concurrently filed Ly Declaration), all other papers and records on file in this
10 action, and on such oral and documentary evidence as may be presented at the hearing on this
11 Motion.

12
13 DATED: August 8, 2024

KINGSLEY SZAMET & LY

14
15 By: 

Liane Katzenstein Ly

Jessica Bulaon

Attorneys for Plaintiff and all aggrieved employees

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Bruce William Ballinger (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiff and
5 Defendant B & B TRANSPORT, INC. (“Defendant”) (collectively, the “Parties”) have reached a
6 proposed settlement documented in the PAGA Settlement Agreement (“Settlement” or
7 “Agreement”), attached to the concurrently-filed declaration of Liane Katzenstein Ly.¹

8 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699,
9 et seq. (“PAGA”). The Gross Settlement Amount is \$145,000.00. After deduction of attorney’s
10 fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration
11 costs as discussed in the Agreement, the remaining amount to be divided between the Labor and
12 Workforce Development Agency (“LWDA”) and the aggrieved employees as required by Labor
13 Code section 2699(i) is \$57,666.67, with \$43,250.00 (or 75%) going to the LWDA and
14 \$14,416.67 (or 25%) distributed to the aggrieved employees.²

15 Plaintiff requests that the Court “review and approve any settlement of any civil action
16 filed pursuant to this part” (*See* Lab. Code § 2699(1)(2).) If the Court deems the Settlement fair
17 and acceptable, Plaintiff requests that the Court: (1) enter an order approving the Settlement and
18 ordering the Parties to carry the terms of the Settlement Agreement; and (2) and enter a Final
19 Judgement thereon.³

20 **II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY**

21 A. Litigation Overview and Procedural History

22 This matter was initiated as a class action lawsuit that was removed to the federal court,
23 with a representative PAGA action that remained in the superior court.

24
25 ¹ The Parties also entered into a separate confidential settlement for Plaintiff Bruce William Ballinger’s individual
26 claims. Plaintiff had additional claims for wage and hour violations that were resolved and subject to a full release
27 of all Plaintiff’s individual claims, excluding PAGA.

28 ² Pursuant to PAGA, civil penalties recovered by aggrieved employees shall be distributed 75 percent to the
Labor and Workforce Development Agency (“LWDA”) and 25 percent to the aggrieved employee(s). Lab.
Code § 2699(i).

³ Plaintiff’s Motion for Approval of Representative Action Settlement will be concurrently uploaded to the
LWDA’s website on the date this Motion is filed. Proof of submission of Plaintiff’s Motion for Approval of
Representative Action Settlement, all related documents, and copy of the email from the LWDA confirming
receipt can be provided to the Court upon request. (Ly Decl. ¶5.)

1 Plaintiff initially filed a putative Class Action Complaint on October 26, 2022, against
2 Defendant in the Los Angeles Superior Court, Case No. 22STCV34391 entitled *BRUCE WILLIAM*
3 *BALLINGER, an individual, on behalf of himself and others similarly situated, PLAINTIFF v. B*
4 *& B TRANSPORT, INC.; and DOES 1 thru 50, inclusive, DEFENDANTS.*, alleging that Defendant:
5 1) failed to reimburse expenses pursuant to Labor Code § 2802; 2) violated Labor Code § 226(a)
6 by failing to provide accurate itemized wage statements; 3) is liable for penalties pursuant to Labor
7 Code § 221; and 4) violated Business & Professions Code § 17200. On the same day, Plaintiff
8 filed a PAGA Claim Notice to the LWDA, in compliance with Labor Code § 2699.3(a)(1).
9 (Hereafter, the “Class Action”.) (Declaration of Liane Katzenstein Ly ¶6 (“Ly Decl.”).)

10 On December 15, 2022, Defendant filed a Notice of Removal of the Class Action,
11 removing the Class Action to the United States District Court, Eastern District of California. (Ly
12 Decl. ¶7.)

13 Because no response was received by Plaintiff within 65 calendar days from the LWDA
14 evidencing its intention to investigate Plaintiff’s allegations, on January 9, 2023, Plaintiff filed a
15 Representative Action Defendant in the Los Angeles Superior Court, Case No. 23STCV00452
16 entitled *BRUCE WILLIAM BALLINGER, an individual, on behalf of himself and others similarly*
17 *situated, PLAINTIFF v. B & B TRANSPORT, INC.; and DOES 1 thru 50, inclusive,*
18 *DEFENDANTS.*, alleging a single representative cause of action for penalties pursuant to Labor
19 Code §2699, et seq. (hereafter, “PAGA”) seeking penalties based on Defendant’s alleged
20 violations of Labor Code §§ 2802, 226(a), 221, and 17200. (Hereafter, the “PAGA Action”.) (Ly
21 Decl. ¶8.)

22 Ultimately, the district court denied Plaintiff’s motion to remand the Class Action. (Ly
23 Decl. ¶9.)

24 On March 8, 2024, the Parties attended a mediation with mediator Steven Rottman. (Ly
25 Decl. ¶10.) The Parties reached an agreement in principle which contemplates a resolution on a
26 representative action basis and the dismissal of the federal action. (*Id.*)

27 B. The Discovery Process

28 After the matter was at issue, the Parties began to engage in fact discovery and exchange

1 pertinent information to understand the nature of the allegations and the scope of potential liability.
2 (Ly Decl. ¶11.) Plaintiff served his first set of Requests for Production of Documents and Special
3 Interrogatories to Defendant on March 28, 2023. (Ly Decl. ¶12.) Defendant served its responses on
4 April 28, 2023, with supplemental responses served on June 30, 2023. (*Id.*) Defendant formally
5 produced its handbooks, policies and pay data. (*Id.*)

6 The parties decided to focus on mediation and, for mediation purposes, Defendant informally
7 produced Plaintiff's personnel file and extensive time and pay data. (Ly Decl. ¶13.) Through the
8 exchange of information and attendant discussions between the Parties, Plaintiff learned that the
9 number of Aggrieved Employees is no more than 275 (including Plaintiff) and there is a maximum
10 of 15,250 PAGA Pay Periods at issue. (*Id.*; Ex. 1, ¶8.) Plaintiff asserts that the maximum potential
11 exposure for the PAGA claims for Aggrieved Employees is \$1,525,000.00 (15,250 PAGA Pay
12 Periods at issue × \$100 = \$1,525,000.00). (*Id.*)

13 Thereafter, the Parties engaged in good faith, arms-length negotiations with Defendant
14 concerning possible resolution of the claims asserted in the Litigation. (Ly Decl. ¶14) The Parties
15 were able to reach a tentative settlement, with the aid of an experienced mediator, subject to
16 finalization of a formal PAGA Settlement Agreement and the approval of the Court. (*Id.*) The
17 Parties negotiated the terms and conditions of the Settlement and now present the agreed-upon
18 Settlement to the Court for Approval. (Ly Decl. ¶15)

19 Although Defendant denies that it violated any pertinent law, it recognized the risks and
20 attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to
21 finalization of a formal PAGA Settlement Agreement and the approval of the Court. (Ly Decl.
22 ¶16.) The Parties negotiated the terms and conditions of the Agreement and now present the
23 agreed-upon Settlement to the Court for Approval. (*Id.*)

24 **III. PAGA ACTIONS AND THE REQUIREMENTS**

25 **A. The PAGA Statutory Scheme**

26 PAGA creates a means of “deputizing” citizens as private attorney generals to enforce the
27 Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489,
28 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A

1 plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own
2 behalf as an individual claim, but “as the proxy or agent of the state’s labor law enforcement
3 agencies.” *Id.*, at 986; *see also Reyes v. Macy’s, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011);
4 *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380).

5 When an aggrieved employee brings a PAGA claim, “the government is always the real
6 party in interest.” *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th
7 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) (“[A]
8 PAGA action is a dispute between an employer and the State agency.”). Accordingly, a plaintiff
9 that brings a PAGA claim represents “the same legal right and interest as state labor law
10 enforcement agencies,” in that the plaintiff is seeking to recover those civil penalties that otherwise
11 would have been assessed and collected by the LWDA. *Arias, supra*, 46 Cal.4th at 986; Lab. Code
12 § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D.
13 Cal. 2015) 523 B.R. 820, 825 (holding “PAGA plaintiffs do not have property rights in their
14 cases.”). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties
15 recovered; thus, recoveries are principally for the state and only secondarily for aggrieved
16 employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a PAGA claim, he or she is
17 properly conceived of as a private attorney general prosecuting violations of California’s labor
18 laws on behalf of the state.

19 An employee may commence a PAGA action by fulfilling the requirements of Cal. Lab.
20 Code § 2699.3 (a)(1), which simply states:

21 “The aggrieved employee or representative shall give written notice by
22 certified mail to the Labor and Workforce Development Agency and the
23 employer of the specific provisions of this code alleged to have been
violated, including the facts and theories to support the alleged violation.”

24 Lab. Code § 2699.3 (a)(1)

25 As explained above, Plaintiff has complied with the notice requirements and has properly
26 pled a PAGA cause of action.

27 B. The Court Has Discretion When Awarding the Amount of Penalties

28 PAGA provides for penalties in the amount of one hundred dollars (\$100) for each

1 aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for
2 each aggrieved employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2).

3 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a showing
4 that Defendant violated the Labor Code.⁴ *Amaral v. Cintas Corp.* No. 2 163 Cal. App. 4th 1157,
5 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL
6 1650942, at *3.

7 However, PAGA does provide the Court with discretion when it awards these penalties.
8 Labor Code §2699(e)(2) states that “a court may award a lesser amount than the maximum civil
9 penalty amount specified by this part if, based on the facts and circumstances of the particular case,
10 to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.”
11 Here, Defendant denies that it violated any law or that it engaged in any knowing or intentional
12 conduct giving rise to liability, and expressly deny that any employees suffered harm.

13 C. Standards for Settlement Approval

14 When approving a settlement of a PAGA action, the statute simply requires the Court to
15 “review and approve any settlement of any civil action filed pursuant to this part.” (Lab. Code §
16 2699(l)(2).) PAGA does not set forth standards for evaluating such settlements, and the California
17 appellate courts have not weighed in on the issue. However, trial courts have approved PAGA
18 settlements where the penalties are “genuine and meaningful” and “consistent with the underlying
19 purpose” of the statute. (See *O'Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F. Supp. 3d
20 1110, 1113.) Additionally, as explained in *Arias v. Superior Court* (2009) 46 Cal.4th 969, class
21 action procedural rules do not apply in PAGA cases, including the two-step preliminary and final
22 approval process. Rather, the approval process consists of one step where the court decides if the
23 settlement should go into effect.

24 IV. THE SETTLEMENT

25 Defendant will pay the total sum of \$145,000.00 in full and final settlement of the PAGA
26 claims alleged. (Ly Decl. ¶17., Exhibit 1, ¶3.) Per the Agreement, the amount is allocated as
27 follows:

28 ⁴ See also *Willner v. Manpower Inc.*, *supra*. 35 F. Supp. 3d at 1136; *McKenzie v. Federal Exp. Corp.*, *supra*, 765 F.Supp.2d at 1232.

Gross Settlement Amount:	\$145,000.00	
PAGA Counsel Fees Payment:	\$48,333.33	
PAGA Counsel Litigation Expenses Payment:	\$25,000.00 ⁵	
Administrator Expenses Payment:	\$9,000.00	
Named Plaintiff Enhancement:	\$5,000.00	
PAGA Penalties:	\$57,666.67 <i>(\$43,250.00 to the LWDA; \$14,416.67 to remain in the Net Settlement Amount)</i>	

(Ly Decl. ¶18; *Id.*)

Each aggrieved employee shall receive a pro-rata portion of the remaining amount in PAGA penalties based by dividing the amount of the aggrieved employees' 25% share of PAGA Penalties by the total number of PAGA Pay Periods worked by all aggrieved employees during the PAGA Period⁶, and then multiplying the result by each aggrieved employee's PAGA Pay Periods. (Ly Decl. ¶19, Ex. 1, ¶3.2.4.1.)

For settlement purposes, the Aggrieved Employees are defined as: "all individuals who are employed or have been employed by B & B TRANSPORT, INC., in the State of California during the Release Period" ("Aggrieved Employee"). (Ly Decl. ¶21, Ex. 1, ¶1.4.)

V. ARGUMENT

A. The Court Should Approve the Agreement

The Parties recognize that in accordance with Labor Code §2699(l), Court approval is required in the event of a settlement of a PAGA action on a representative basis. However, as explained in *Arias v. Superior Court* 46 Cal.4th 969 (2009), the Parties are not obligated to follow the class action procedural rules in PAGA cases and therefore need not obtain approval of the PAGA settlement through a motion for primary or final approval. Nonetheless, in order to comply with the requirements of Labor Code §2699, the Parties submit the instant Motion and the

⁵ The Agreement provided for counsel to receive cost reimbursement up to \$25,000.00. However, counsel's final costs come to \$20,926.46. This amount is including the estimated \$157.15 in future costs for filing this motion and supporting documents. The extra \$4,073.54 will remain in the net settlement fund, causing the net amount for distribution to the LWDA and Aggrieved Employees to be slightly higher than the \$57,666.67 contemplated in the settlement agreement. Specifically, \$61,740.21 will be allocated as PAGA Penalties, with 75% (\$46,305.16) to the LWDA and 25% (\$15,435.05) to the Aggrieved Employees.

⁶ The PAGA Period means the period from October 26, 2021 to March 8, 2024. (Ly Decl. ¶20, Ex 1, ¶1.20)

Agreement (Exhibit “1” to the Ly Declaration) for Court approval.

B. The Risks of Moving Forward with Plaintiff’s PAGA Claim

To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation and discount taken follows. (Ly Decl. ¶22.) Plaintiff believed that Defendant may persuasively argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether waive any penalties under PAGA. (Ly Decl. ¶23.) Pursuant to Labor Code §226.3, the Labor Commissioner has the discretion to “decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake.” (Ly Decl. ¶24.) And in accordance with PAGA, the court in a PAGA action has the same discretion “to assess a civil penalty” that the Labor Commissioner would have, as well as complete discretion to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] 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.” (Labor Code § 2699(e)(1) and (e)(2)). (Ly Decl. ¶25.)

PAGA Counsel anticipated that, at trial, Counsel for Defendant could make a potentially persuasive argument that Defendant: (1) the Aggrieved Employees were properly paid wages and/or reimbursed in accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate the Aggrieved Employees was the result of inadvertence and clerical error; (2) until this Action was filed, no employees had compliance about any alleged failure to pay wages, reimburse expenses, and issue accurate itemized wage statements; and, (3) none of Defendant’s employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff’s allegations. (Ly Decl. ¶26.) All of which, Counsel for Defendant would argue, should mitigate in factor of significantly reducing or waiving any PAGA penalties. (*Id.*) While Plaintiff disagrees that this analysis is legal correct or persuasive, PAGA Counsel had to consider the foregoing facts and arguments and how they might impact any judgment ultimately awarded to Aggrieved Employees if the Court were persuaded by them. (Ly Decl. ¶27.)

1. The Risks Associated with the Reimbursement Claim

Labor Code section 2802 provides that an employer must “indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the

1 discharge of his or her duties” (Lab. Code, § 2802, subd. (a).)

2 On a regular and consistent basis, Defendant has failed to reimburse Plaintiff and the
3 Aggrieved Employees the cost of using their personal cell phones and protective gear for business
4 related purposes. (Ly Decl. ¶28.) Plaintiff alleges that Defendant required that Plaintiff and the
5 Aggrieved Employees be available by cell phone while working, and this was necessary to perform
6 their job duties. Plaintiff contends that he used his cell phone to communicate with supervisors
7 and dispatch throughout his shift and sometimes even after hours. (Ly Decl. ¶29.)

8 Plaintiff maintains that he was required to download numerous software applications onto
9 his phone such as Samsara, other applications for shippers and receivers, and a tracking
10 application. (Ly Decl. ¶30.) Despite the constant use of his personal cell phone for business
11 purposes, Plaintiff was never reimbursed for this expense.

12 Plaintiff contends that he and Aggrieved Employees were also required to purchase
13 equipment such as protective gear, and this was necessary to perform their job duties. Plaintiff was
14 required to purchase safety glasses and gloves, which cost him approximately \$200-300 per year.
15 (Ly Decl. ¶31.)

16 Plaintiff maintains that these cell phones were not provided by Defendant, and Defendant
17 failed to reimburse Plaintiff and the Aggrieved Employees for the costs associated with using these
18 personal cell phones and protective gear.

19 Thus, Defendant owes penalties under PAGA for violations of Labor Code section 2802.

20 One risk that Plaintiff considered was the fact that not all Aggrieved Employees used their
21 cell phones and not all used them for every pay period. (Ly Decl. ¶32.) This meant that the damages
22 were relatively small. (Ly Decl. ¶33.)

23 2. The Risks Associated with the Wage Statement Claims

24 California Labor Code §226(a) requires Defendant to issue wage statements that accurately
25 report total hours worked, show the number of piece-rate units earned, and accurately report
26 appropriate rates of pay and the corresponding number of hours worked at each hourly rate. (Labor
27 Code §§ 226(a)(2), (3), and (9).

28 Here, Plaintiff contends that Defendant furnishes Plaintiff and the Aggrieved Employees

1 with itemized wage statements that do not accurately show total hours worked. (Ly Decl. ¶34.)
2 Defendant furnishes Plaintiff and the Aggrieved Employees with itemized wage statements that
3 do not accurately show all applicable hourly rates in effect during the pay period and the
4 corresponding number of hours worked at each hourly rate. (Ly Decl. ¶35.) Defendant also issued
5 wage statements that do not properly include the number of piece-rate units earned and any
6 applicable piece rate. (Ly Decl. ¶36.)

7 Defendant's failure to provide accurate itemized wages statements according to Labor
8 Code § 226(a) was all done on a regular and consistent basis. Thus, Defendant owes the Aggrieved
9 Employees penalties under PAGA for failing to provide accurate and itemized wage statements.
10 Defendant argued that the wage statements accurately reflected all required information. (Ly Decl.
11 ¶37.)

12 **3. The Risks Associated with the Unlawful Deductions Claim**

13 California Labor Code § 221 provides, "It shall be unlawful for any employer to collect or
14 receive from an employee any part of wages theretofore paid by said employees to said employee."
15 Plaintiff contends that he and the Aggrieved Employees were subject to deductions from their
16 wages by Defendant. (Ly Decl. ¶38.)

17 Here, there are after-tax deductions on wage statements labeled "advanced deduct." These
18 "deductions" are various fees charged upon Defendant by its clients such as lump sum fees, washer
19 fees, loading fees, etc. Defendant provided guaranteed checks to Plaintiff and the Aggrieved
20 Employees to give to clients for these fees. (Ly Decl. ¶39.) In return, Plaintiff maintains that
21 Plaintiff and the Aggrieved Employees were required to submit receipts to Defendant
22 acknowledging receipt of the guaranteed checks. (*Ibid.*) However, if any employee failed to return
23 the receipt to Defendant, Defendant would deduct the fees from their wages. (*Ibid.*)

24 Defendant argued that it was not its common practice to make these deductions and any
25 deductions made were authorized.

26 In light of all these significant risks and given that PAGA gives the Court broad discretion to
27 reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement
28 Amount of \$145,000.00 was fair and reasonable. (Ly Decl. ¶40.)

1 D. A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty
2 Awarded for Technical Violations of the Labor Code

3 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a
4 showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp.* No. 2 163 Cal. App 4th
5 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007
6 WL 1650942, at *3.

7 However, PAGA does provide the Court with discretion when it awards these penalties.
8 Labor Code section 2699(e)(2) states that “a court may award a lesser amount than the maximum
9 civil penalty amount specified by this part if, based on the facts and circumstances of the particular
10 case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or
11 confiscatory.”

12 In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, the
13 Court exercised its discretion to reduce the PAGA penalty amount. There, the plaintiff brought a
14 PAGA claim for violations of section 226(a) based on the following issues: (a) the statements did
15 not show either an employee identification number or the last four digits of the social security
16 number of the employee; (b) the statements did not show the beginning date of the pay period for
17 which the employee was paid; (c) the statements identified Covidien as the employee’s employer.
18 (*Id.* At *2). There were approximately 28,000 wage statements at issue. (*Id.* at *3). The *Fleming*
19 court calculated the maximum potential civil penalty exposure at \$2.8 million (\$100 per wage
20 statement). (*Ibid*; see also Labor Code § 2699(f)(2)). After a bench trial, the Court elected to
21 exercise its discretion to reduce the civil penalty per wage statement to \$18 per wage statements,
22 reflecting 18% of the potential exposure. (*Id.* at *4). The Court reasoned:

23 Here, the aggrieved employees suffered no injury due to the erroneous wage
24 statements, and made no complaint of the errors or omissions contained
25 therein prior to filing suit. Also, Defendants were not aware that the wage
26 statements violated the law and took prompt steps to correct all violations
27 once notified. Given these circumstances, the Court finds a \$2.8 million
28 penalty unjust according to § 2699(e)(2). Accordingly, in its discretion, the
Court reduces the penalty to \$500,000.

Id. at *4. A court exercising its discretion to significantly reduce the civil penalty awarded under

PAGA is not a rare occurrence. *See e.g., Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbucks’ “good faith attempts” to comply and because the violations were minimal).

Here, as explained above, Plaintiff’s counsel anticipated that, at trial, Counsel for Defendant would argue that: (1) the Aggrieved Employees were properly paid wages and/or reimbursed in accordance with Defendant’s lawful policies and practices, and that any alleged failure to compensate the Aggrieved Employees was the result of inadvertence and clerical error; (2) until this Action was filed, no employees had compliance about any alleged failure to pay wages, reimburse expenses, and issue accurate itemized wage statements; and, (3) none of Defendant’s employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff’s allegations. All of which, Counsel for Defendant would argue, should mitigate in favor of significantly reducing the civil penalty.

After engaging in pertinent informal discovery in this Action, Plaintiff’s counsel determined that a settlement of \$145,000.00 is reasonable given the above risks.

C. Based on the Risks Above and the Analysis of the Maximum Penalties Available, Plaintiff Believes this Settlement is Fair and Reasonable

Based on these figures, the maximum potential exposure for the PAGA claims for the Aggrieved Employees is \$1,525,000.00 (15,250 pay periods at issue multiplied by \$100 a pay period). If the Court permits stacking, given that there are three Labor Code provisions included in the PAGA Notice, the maximum exposure would be \$4,575,000.00, but in light of the immense discretion available, Plaintiff believes the Settlement is reasonable.

VI. THE REQUEST FOR ATTORNEYS’ FEES AND COSTS

As detailed fully in the Settlement, the settlement provides for Defendant to create a Gross Settlement Amount of \$145,000.00. (Ly Decl. ¶45; Ex. 1 at ¶3.) From that fund, Plaintiff requests an award of attorneys’ fees for PAGA Counsel in the amount of \$48,333.33, or 33.33% of the Gross Settlement Amount, and \$25,000.00 in reimbursement for litigation costs. (*Ibid.*)

A. Plaintiff’s Counsel are Entitled to a Fee from the Common Fund

On August 11, 2016, the California Supreme Court decided *Laffitte v. Robert Half*

1 *International*, which addressed the correct methodology for awarding fees in a class action
2 settlement. (*Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 205 Cal.Rptr.3d 555, 573.) The *Laffitte*
3 Court approved awarding fees as a percentage of the settlement fund in cases like the present one,
4 where a settlement results in the creation of a common fund on behalf of a class:

5 We join the overwhelming majority of federal and state courts in
6 holding that when class action litigation establishes a monetary fund
7 for the benefit of the class members, and the trial court in its
8 equitable powers awards Class Counsel a fee out of that fund, the
9 court may determine the amount of a reasonable fee by choosing an
10 appropriate percentage of the fund created.

11 (*Id.* at 573.) The Court then set out several reasons why the percentage-of-the-fund method is
12 preferred over the alternative lodestar-multiplier approach in California courts:

13 The recognized advantages of the percentage method—including relative ease of
14 calculation, alignment of incentives between counsel and the class, a better
15 approximation of market conditions in a contingency case, and the encouragement
16 it provides counsel to seek an early settlement and avoid unnecessarily prolonging
17 the litigation [citations]—convince us the percentage method is a valuable tool that
18 should not be denied our trial courts.

19 (*Id.* at 573.)

20 An award of 33.33% of the common fund is appropriate here under the “substantial benefit”
21 theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer,*
22 *Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a
23 representative capacity to recover fees when the litigant’s efforts have created a substantial, actual,
24 and concrete benefit for members of an ascertainable class and the court’s jurisdiction over the
25 subject matter makes possible an award which spreads the cost proportionately among the
26 members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th
27 563, 578.)

28 This doctrine rests on the understanding that attorneys should normally be paid by their
clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted from
the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979)
23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent
this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees against

1 the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano*
2 *III*, 20 Cal.3d at p. 35.) “A court, in the exercise of its equitable discretion, may decree that those
3 receiving the benefit should contribute to the costs of its production.” (*Save El Toro Assn., supra*,
4 98 Cal.App.3d at 548.) As this approach “better approximates the workings of the marketplace
5 than the lodestar approach,” there is “a greater judicial willingness to evaluate a fee award as a
6 percentage of the recovery” in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82
7 Cal.App.4th 19, 31, 48.)

8 B. The Attorneys’ Fees Request Are Well Within the Range of Fees in Comparable
9 Cases

10 Courts historically award fees in the twenty-to-fifty percent range, depending on the
11 circumstances of the case. As stated in Newberg:

12 No general rule can be articulated on what is a reasonable percentage
13 of a common fund. Usually 50% of the fund is the upper limit on a
14 reasonable fee award from a common fund in order to assure that
15 the fees do not consume a disproportionate part of the recovery
obtained for the Class, although somewhat larger percentages are
not unprecedented.

16 (Newberg on Class Actions, 3rd Ed., 1992, § 14.03; and see *Chavez v. Netflix, Inc.* (2008) 162
17 Cal.App.4th 43, 66, fn 11 [“Empirical studies show that, regardless whether the percentage method
18 or the lodestar method is used, fee awards in class actions average around one-third of the
19 recovery.”].) Thus, PAGA Counsel’s requested fee of 33.33% is not only well within the range of
20 reasonableness, but lower than the average fee award of 35% and is fair compensation for
21 undertaking this complex, risky, expensive, and time-consuming litigation on a contingent basis.

22 C. PAGA Counsel’s Fee Request is Reasonable Under a Lodestar Crosscheck

23 Courts may “cross-check” the results of the common fund method against the lodestar
24 method. (See *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.) The lodestar is
25 calculated by multiplying the reasonable hours expended by a reasonable hourly rate. (*Serrano v.*
26 *Priest*, 20 Cal.3d 25, 48-49 (1977) (“*Serrano III*”).) Those rates reflect “the general local hourly
27 rate for a fee-bearing case” and do “not include any compensation for contingent risk,
28 extraordinary skill, or any other factors.” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138.) The

1 court may then enhance the lodestar with a multiplier. (*Wershba, supra*, 91 Cal.App.4th at 254;
2 *Serrano III, supra*, 20 Cal.3d at 49.)

3 i. No Multiplier is Requested

4 The purpose of using the lodestar/multiplier method is to mirror the legal marketplace.
5 Counsel will not handle cases for straight hourly fees payable only if they win; therefore, an
6 enhancement is often awarded so that the fee received is commensurate with what attorneys could
7 expect to be compensated for services in similar circumstances. (*See Tulare Valley Audubon Soc.,*
8 *Inc. v. County of Tulare* (1984) 155 Cal.App.3d 738, 755 [an award must be large enough “to
9 entice competent counsel to undertake difficult public interest cases”].) No specific findings
10 reflecting the court’s calculations are required. (*Wershba, supra*, 91 Cal.App.4th at 254; *Rebney,*
11 *supra*, 232 Cal.App.3d at p. 1349.) “The record need only show that the attorney fees were awarded
12 according to the ‘lodestar’ or ‘touchstone’ approach.” (*Ibid.*)

13 Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Ly Decl.
14 ¶46.) PAGA Counsel have an aggregate lodestar in the amount of \$56,345.00 which represents
15 90.20 hours of attorney work on this litigation from its inception through the date of this filing of
16 Plaintiff’s instant Motion, and 10 future hours. (*Id.*) As such, PAGA Counsel has billed more
17 hours than they are requesting. (Ly Decl. ¶47.)

18 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF**
19 **COSTS**

20 In addition to their request for fees, PAGA Counsel further request reimbursement of the
21 reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this
22 litigation, in the amount of \$20,926.46. (Ly Decl. ¶84.) To date, PAGA Counsel has incurred
23 \$20,769.31 in costs. (Ly Decl. ¶85.) PAGA Counsel anticipates incurring an additional \$157.15 in
24 costs to file and serve this motion. (Ly Decl. ¶86.) As such, counsel is requesting a cost
25 reimbursement of \$20,926.46. (Ly Decl. ¶87.)

26 All of the requested costs are reasonable in amount and were necessarily incurred by PAGA
27 Counsel in prosecuting this litigation. (Ly Decl. ¶88.); Exhibit 5 [Cost Report].) Expenses in this
28 matter to date include costs for filing fees, research, mediation, and additional costs for the

1 prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Liane
2 Katzenstein Ly. All of these costs have been incurred in the course of this litigation, and all costs
3 advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of
4 filing the present motion. (Ly Decl. ¶89.)

5 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
6 advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court
7 should approve the request for reimbursement in the amount of \$20,926.46. (Ly Decl. ¶90.)

8 **VIII. ENHANCEMENT TO PLAINTIFF**

9 The Settlement calls for an enhancement payment of \$5,000.00 to the named Plaintiff, to
10 be paid from the Gross Settlement Amount. (Ly Decl. ¶91; Ex. 1 at ¶3.2.2.) Incentive awards “are
11 intended to compensate class representatives for work done on behalf of the class, to make up for
12 financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their
13 willingness to act as a private attorney general.” (*Rodriguez v. West Publishing Corp.* (9th Cir.
14 2009) 563 F.3d 948, 958-59. “[I]t is established that named plaintiffs are eligible for reasonable
15 incentive payments to compensate them for the expense or risk they have incurred in conferring a
16 benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
17 (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175
18 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

19 Here, the enhancement takes into consideration the time, effort, and expense incurred by
20 Plaintiff in coming forward to litigate this matter on behalf of the Aggrieved Employees. The time
21 spent by Bruce William Ballinger includes identifying competent counsel, providing information
22 to PAGA Counsel regarding Plaintiff’s relevant employment experiences, compiling documents,
23 meeting with PAGA Counsel frequently to discuss the status of the case and the theories of
24 liability, reviewing settlement documents, and making himself available for a full day of
25 mediation. (Ly Decl. ¶92.)

26 PAGA Counsel considers this to be a fair and reasonable enhancement. (Ly Decl. ¶93.)
27 The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiff
28 in coming forward to litigate this matter on behalf of the Aggrieved Employees. (Ly Decl. ¶94.)

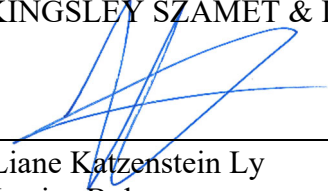
1 Accordingly, Plaintiff should be awarded the agreed-upon enhancement of \$5,000.00.

2 **IX. CONCLUSION**

3 Plaintiff and Plaintiff's Counsel submit that the proposed Settlement as documented in the
4 Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the State of
5 California. Plaintiff respectfully requests that the Court approve the Settlement and Order that the
6 Settlement is carried out according to the terms of the Agreement.

7
8 DATED: August 8, 2024

KINGSLEY SZAMET & LY

9
10 By: 

Liane Katzenstein Ly

Jessica Bulaon

Attorneys for Plaintiff and all aggrieved employees

(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On August 8, 2024, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

O'HAGAN MEYER LLP

Katherine Den Bleyker
KDenbleyker@ohaganmeyer.com

John D. Wu
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Chris Cho
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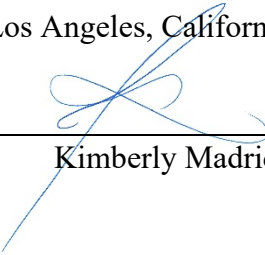
D. LAW, INC.
400 N. Brand Blvd, 7th Floor
Glendale, CA 91203

[XX] BY ELECTRONIC SERVICE: I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (<https://dir.tfaforms.net/315>) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] (BY ELECTRONIC MAIL TRANSMISSION): I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[XX] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 8, 2024, at Los Angeles, California.



Kimberly Madrid



Journal Technologies Court Portal

Make a Reservation

BRUCE WILLIAM BALLINGER vs B & B TRANSPORT, INC.

Case Number: 23STCV00452 Case Type: Civil Unlimited Category: Breach of Rental /Lease Contract (COVID-19 Rental Debt)

Date Filed: 2023-01-09 Location: Stanley Mosk Courthouse - Department 68

Reservation

Case Name:

BRUCE WILLIAM BALLINGER vs B & B TRANSPORT, INC.

Case Number:

23STCV00452

Type:

Motion re: (Motion for Approval of Representative Action Settlement)

Status:

RESERVED

Filing Party:

Bruce William Ballinger (Plaintiff)

Location:

Stanley Mosk Courthouse - Department 68

Date/Time:

11/19/2024 8:30 AM

Number of Motions:

1

Reservation ID:

383934066669

Confirmation Code:

CR-HMUBZNCJPKDMMSSKN

Fees

Description	Fee	Qty	Amount
Motion re: (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:

n/a

Print Receipt

[Reserve Another Hearing](#)

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