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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN JOAQUIN

ROBERT MARK WATERHOUSE, an individual, on behalf of the State of California, as a private attorney general, PLAINTIFF, v. GEMINI MOTOR TRANSPORT; and DOES 1 thru 50, inclusive, DEFENDANTS.	Case No. STK-CV-UOE-2024-5386 [Case Assigned for All Purposes to Hon. Esmeralda Zendejas in Dept. 11A] **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** *[Filed concurrently with Declarations of Kelsey M. Szamet; Jodey Lawrence of Phoenix Class Action Administration, and Plaintiff Robert Mark-Waterhouse in Support of Plaintiff's Motion for Approval of Representative Action Settlement; [Proposed] Order, and Judgment]* Date: Time: Dept.: Complaint Filed: May 6, 2024 Trial Date: None Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on ________________ at _______________ in Department 11A of the above-entitled court, Plaintiff ROBERT MARK-WATERHOUSE will move the Court for an Order Granting Approval of Representative Action Settlement.

The Motion will be made on the grounds that the proposed Settlement is fair, adequate, reasonable, and in the best interest of Plaintiff, all aggrieved employees, and the Parties. Defendant does not oppose this motion.

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

DATED: May 1, 2025

KINGSLEY SZAMET EMPLOYMENT LAWYERS

By: ______________________

Kelsey M. Szamet
Attorneys for Plaintiff ROBERT MARK-WATERHOUSE and all aggrieved employees

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff ROBERT MARK-WATERHOUSE ("Plaintiff") submits this Memorandum of Points and Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiff ROBERT MARK-WATERHOUSE and Defendant GEMINI MOTOR TRANSPORT, L.P. ("Defendant") (collectively, the "Parties") have reached a proposed settlement documented in the PAGA Settlement Agreement ("Settlement" or "Agreement"), attached to the concurrently-filed declaration of Kelsey M. Szamet.

This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699, et seq. ("PAGA"). The Gross Settlement Amount is $100,000. After deduction of attorney's fees and litigation expenses, litigation enhancement to Plaintiff, and settlement administration costs as discussed in the Agreement, the remaining amount to be divided between the Labor and Workforce Development Agency ("LWDA") and the aggrieved employees as required by Labor Code section 2699(i) is, with (or 75%) going to the LWDA and (or 25%) distributed to the aggrieved employees.[1]

Plaintiff requests that the Court "review and approve any settlement of any civil action filed pursuant to this part" (*See* Lab. Code § 2699(1)(2).) If the Court deems the Settlement fair and acceptable, Plaintiff requests that the Court: (1) enter an order approving the Settlement and ordering the Parties to carry out the terms of the Settlement Agreement; and (2) and enter a Final Judgement thereon.[2] Defendant does not oppose this motion. (Declaration of Kelsey M. Szamet ¶ 5, "Szamet Decl.")

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Litigation Overview and Procedural History

On February 8, 2024, Plaintiff submitted a PAGA Claim Notice to the Labor & Workforce

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[1] 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).

[2] 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. (Szamet Decl. ¶87.)

Development Agency ("LWDA"), describing Defendant's conduct in violation of § 432.5, and 2802, and mailed by certified mail to Defendant setting forth the specific facts and theories of the violations alleged against Defendant. (Szamet Decl. ¶6.) Pursuant to Labor Code §2699.3(a)(2)(A), no notice was received by Plaintiff from the LWDA evidencing its intention to investigate within 65 calendar days of the postmark date of the notice. (Szamet Decl. ¶7.) Therefore, Plaintiff was entitled to commence a civil action as though the LWDA has chosen not to investigate. (*Id.*)

On May 6, 2024, Plaintiff filed a representative action complaint against Defendant in San Joaquin County Superior Court, Case No. STK-CV-UOE-2024-5386, entitled ROBERT MARK-WATERHOUSE, an individual, on behalf of the State of California, as a private attorney general, PLAINTIFF, v. GEMINI MOTOR TRANSPORT, L.P.; and DOES 1 thru 50, inclusive, DEFENDANTS (the "Action"), alleging a single cause of action for penalties pursuant to Labor Code §2699, et seq. for violations of Labor Code §§ 432.5 and 2802. (Szamet Decl. ¶8.)

Plaintiff brings the representative action on behalf of a group of aggrieved employees defined as: "All persons who are employed or have been employed as non-exempt drivers by Gemini Motor Transport, L.P. in the State of California who worked one or more pay periods since one (1) year prior to the date of this letter and continuing to the present. ("Proposed Class")." (Szamet Decl. ¶9.)

B. <u>The Discovery Process</u>

The Parties have informally produced documents and aggrieved employee data for purposes of mediation. (Szamet Decl. ¶10.) Plaintiff has produced numerous text messages and phone bills, demonstrating the frequency in which he used his cell phone for work-related purposes. (*Id.*) Defendant has also produced relevant policies and communications to employees, along with a written declaration indicating that it took actions to cure any alleged violations of Labor Code Sections 432.5 and 2802. Defendant's signed declaration from its HR Business Partner indicated that it cured any Section 432.5 violation no later than June 11, 2024. (*Id.*) Defendant also contends that it cured any Section 2802 violations on and after October 1, 2024, when Defendant began reimbursing its employees for business use of their cell phones at a set dollar amount per month. (*Id.*)

Although Defendant denies that it violated any pertinent law, the Parties recognized the risks and attendant costs of litigation and were able to reach a tentative settlement subject to finalization of a formal PAGA Settlement Agreement and the approval of the Court. (Szamet Decl. ¶11.) The Parties negotiated the terms and conditions of the Agreement and now present the agreed-upon Settlement to the Court for Approval. ((Szamet Decl. ¶12.)

III. PAGA ACTIONS AND THE REQUIREMENTS

A. <u>The PAGA Statutory Scheme</u>

PAGA creates a means of "deputizing" citizens as private attorney generals to enforce the Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own behalf as an individual claim, but "as the proxy or agent of the state's labor law enforcement agencies." *Id.*, at 986; *see also Reyes v. Macy's, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011); *Iskanian v. CLS Transp. Los Angeles*, LLC, 59 Cal. 4th 348, 380).

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

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

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

Lab. Code § 2699.3 (a)(1)

As explained above, Plaintiff has complied with the notice requirements and has properly pled a PAGA cause of action. (Ex. 1, ¶ 2.1.)

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

PAGA provides for penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2).

"PAGA penalties...are mandatory, not discretionary" and must be awarded upon a showing that Defendant violated the Labor Code.[3] *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code §2699(e)(2) states that "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." Here, Defendant denies that it violated any law or that it engaged in any knowing or intentional conduct giving rise to liability and expressly denies that any employees suffered harm.

C. Standards for Settlement Approval

When approving a settlement of a PAGA action, the statute simply requires the Court to "review and approve any settlement of any civil action filed pursuant to this part." (Lab. Code § 2699(*l*)(2).) PAGA does not set forth standards for evaluating such settlements, and the California appellate courts have not weighed in on the issue. However, trial courts have approved PAGA settlements where the penalties are "genuine and meaningful" and "consistent with the underlying

[3] *See also McKenzie v. Federal Exp. Corp*, *supra*, 765 F.Supp.2d at 1232.

purpose" of the statute. (See *Arias v. Superior Court* (2009) 46 Cal.4th 969, class action procedural rules do not apply in PAGA cases, including the two-step preliminary and final approval process. Rather, the approval process consists of one step where the court decides if the settlement should go into effect.

IV. THE SETTLEMENT

Defendant will pay the total sum of $100,000.00 in full and final settlement of the PAGA claims alleged. (Szamet Decl. ¶14., Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount:	$100,000.00
PAGA Counsel Fees Payment:	$35,000.00
PAGA Counsel Litigation Expenses Payment:	$8,988.91[4]
Administrator Expenses Payment:	$2,950.00
Named Plaintiff Enhancement:	$5,000.00
PAGA Penalties:	$48,061.09 *($36,045.82 to the LWDA; $12,015.27 to remain in the Net Settlement Amount)*

(Szamet Decl. ¶15., Exhibit 1, ¶3.)

Each aggrieved employee shall receive a pro-rata portion of the remaining amount in PAGA penalties based by (a) dividing the amount of the Aggrieved Employees' 25% share of PAGA Penalties ($12,015.27 based on the projected Net Settlement Amount) by the total number of PAGA Period Pay Periods worked by all Aggrieved Employees during the PAGA Period and (b) multiplying the result by each Aggrieved Employee's PAGA Period Pay Periods. Aggrieved Employees assume full responsibility and liability for any taxes owed on their Individual PAGA Payment. (Szamet Decl. ¶16, Exhibit 1, ¶3.2.4.1.)

For settlement purposes, the Aggrieved Employees are defined as: all drivers employed by

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[4] The Agreement provided for counsel to receive cost reimbursement up to $12,000.00. (Szamet Decl., Ex. 1, ¶3.2.1). However, counsel's final costs come to $8,682.91. Plaintiff anticipates incurring an additional $306 in future costs associated with filing this motion, appearing at the hearing, etc. and requested costs of $8,988.91. The difference (delta) 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 $45,050.00 contemplated in the settlement agreement. (Szamet Decl., Ex. 1, ¶3.2.4)

Gemini Motor Transport, L.P. in the State of California from February 8, 2023 to April 22, 2025 or the date of entry of an order approving the settlement, whichever comes first. ("Aggrieved Employee"). (Szamet Decl. ¶17., Exhibit 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 Agreement (Exhibit "1" to the Szamet 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. (Szamet Decl. ¶18.) 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. (Szamet Decl. ¶19.) 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." (Szamet Decl. ¶20.) 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)). (Szamet Decl. ¶21.)

This is not a "typical" PAGA case involving allegations of unpaid wages, missed meal and rest periods, or other similar allegations. Instead, it is a limited case, alleging that Defendant maintained an unlawful policy relating to withholding of wages at termination, and that Defendant failed to reimburse its drivers for cell phone expenses. PAGA Counsel anticipated that, at trial, Counsel for Defendant could make a potentially persuasive argument that Defendant: (1) the Aggrieved Employees were properly not required to use their cell phones for work purposes and thus, were not required to be reimbursed and/or that any employee who did need to use their cell phones for work could have requested a reimbursement 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; and (2) until this Action was filed, no employees had complained about any alleged failure to pay wages at termination or reimburse expenses; 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. (Szamet Decl. ¶22.) 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 legally 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. (Szamet Decl. ¶23.)

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

Plaintiff alleged that on a regular and consistent basis, Defendant failed to reimburse Plaintiff and the Aggrieved Employees the cost of using their personal cell phones for business related purposes. (Szamet Decl. ¶24.) Plaintiff alleged that these personal cell phones were a necessary part of Plaintiff and the Aggrieved Employees' job duties because Defendant required that Plaintiff and the aggrieved employees be available by cell phone and answer/use their cell phones while working as a primary method of communication, and this was necessary to perform their job duties. (*Id.*) These cell phones were not provided by Defendant, and Defendant failed to reimburse Plaintiff and the Aggrieved Employees for all costs associated with using these personal cell phones for business related purposes. (*Id.*) Thus, Plaintiff contended that Defendant owed penalties under PAGA for violations of Labor Code section 2802.

Defendant vigorously contested this claim. (Szamet Decl. ¶25.) First, Defendant provided a signed declaration from its Human Resources Business Partner that as of October 1, 2024, Defendant began reimbursing its employees a set amount per month for their business use of their personal cell phones. (Szamet Decl. ¶26) As such, Defendant argued that its liability for this claim is limited to the beginning of the PAGA period to October 1, 2024. (*Id.*) Second, Defendant argued that cell phone reimbursements are typically issued once per month, rather than each pay period, and thus the penalty should only apply once per month as opposed to each pay period, further limiting PAGA penalties. (*Id.*) Third, while PAGA penalties are generally considered on a per pay period basis, Plaintiff also considered not all Aggrieved Employees used their cell phones for every pay period. (*Id.*) This, in addition to Defendant's remedial measures, meant that the actual damages and penalties were relatively small. (Szamet Decl. ¶27.)

2. The Risks Associated with the Labor Code § 432.5 Claim

Labor Code § 432.5 provides that no employer shall require any employee to agree, in writing, to any term or condition which is known by the employer to be prohibited by law.

Here, Plaintiff alleged that he and the Aggrieved Employees were required to sign an agreement as a term of condition of employment that contained terms that were known by Defendant to be prohibited by law. (Szamet Decl. ¶28.) Defendant's Company Property Return/Payback Agreement, which Plaintiff alleged he and the Aggrieved Employees were forced to sign, includes the following terms that were prohibited by the Labor Code:

a. Withholding of a final settlement of employee's pay until all items (including but not limited to uniforms, name tags, files, records, keys, electronic equipment, etc.)

b. Deduction of the cost of replacing non-returned items, as well as outstanding financial obligations owed to the Company, from the employee's final paycheck.

(*Id.*) Plaintiff contends that the withholding of an employees' wages actually violates Labor Code §§ 201-203 and 2802. (Szamet Decl. ¶29.)

Defendant also vigorously contested this claim. (Szamet Decl. ¶30.) Defendant's signed declaration states that between June 11, 2024 and June 17, 2024, it mailed letters to its California employees informing them that the Company Property Return/Payback Agreement was not applicable to them nor was it enforced against the employees. (*Id.*) Defendant also provided a copy of this letter to Plaintiff. (*Id.*) It further asserted that it stopped distributing this agreement to California employees after Plaintiff filed the instant Action. (*Id.*) As such, Defendant argued again that it had remedied any purported violation, and further asserted that there had not been any actual injury to any Aggrieved Employee since it was not enforced. (*Id.*) While Plaintiff does not agree that these arguments are legally correct or persuasive, it nonetheless posed a risk to the ultimate exposure of PAGA penalties for this claim. (*Id.*)

In light of all these significant risks and given that PAGA gives the Court broad discretion to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement Amount of $100,000.00 was fair and reasonable. (Szamet Decl. ¶31, Exhibit 1, ¶3.1.)

C. <u>A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty Awarded for Technical Violations of the Labor Code</u>

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

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code section 2699(e)(2) states that "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."

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

> Here, the aggrieved employees suffered no injury due to the erroneous wage statements, and made no complaint of the errors or omissions contained therein prior to filing suit. Also, Defendants were not aware that the wage statements violated the law and took prompt steps to correct all violations once notified. Given these circumstances, the Court finds a $2.8 million 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 Starbuck's "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 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 complained about any alleged failure to pay wages at termination or reimburse expenses; or (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 these claims is reasonable given the above risks.

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

Defendant provided that the total number of PAGA pay periods from February 8, 2023 (the beginning of the PAGA period) through to December 16, 2024 was 6,308 weekly pay periods.

(Szamet Decl. ¶32.) Plaintiff extrapolated to 60 days after mediation for a total of approximately 7,212 pay periods. (*Id*.) However, based on Defendant's arguments and assertions that it has fully remedied the alleged violations, it estimated that there were 4,385 weekly pay periods for the Section 432.5 claim and 5,256 pay periods for the Section 2802 to claim. (*Id*.)

Based on these figures, the maximum potential exposure for the PAGA claims for the Aggrieved Employees is $721,120 (7,212 pay periods within the PAGA period multiplied by $100 a pay period, based on Plaintiff's extrapolation). (Szamet Decl. ¶33.) While there is no authority available on this issue, a court could conceivably "stack" per pay period violations and the maximum value could balloon up to $1,442,361. (*Id*.) However, given the lack of caselaw for doing so, Defendant's maximum exposure at trial would actually be $721,120. (*Id*.) From there, a court has further discretion to reduce the amount accordingly. (*Id*.)

Furthermore, in consideration of Defendant's arguments against the alleged violations and its remedial actions, Plaintiff believes that a court could calculate Defendant's maximum exposure to be $525,600 based on the maximum number of weekly pay periods where an alleged violation actually occurred. (Szamet Decl. ¶34.) As stated above, cell phone reimbursements typically occur on a monthly basis and it's possible that not every Aggrieved Employee used his or her personal cell phone for each and every pay period. (*Id*.) Moreover, Defendant would argue that the penalty should only apply to one pay period per month, which would drastically reduce the number of pay periods actually at issue. (*Id*.) Based on these risks, Plaintiff believes it was appropriate to discount this claim dramatically for settlement purposes. (*Id*.)

Given that this Settlement is for $100,000, Plaintiff believes this is a very fair and reasonable settlement.

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 $100,000.00. (Szamet Decl. ¶39; Ex. 1 at ¶¶3.1.) From that fund, Plaintiff requests an award of attorneys' fees for PAGA Counsel in the amount of $35,000.00, or 35% of the Gross Settlement Amount, and $8,988.91. in reimbursement for litigation costs. (*Id*; Ex. 1 at ¶3.2.)

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

> 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.

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

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

(*Id.* at 573.)

An award of 35% of the common fund is appropriate here under the "substantial benefit" theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a representative capacity to recover fees when the litigant's efforts have created a substantial, actual, and concrete benefit for members of an ascertainable class and the court's jurisdiction over the subject matter makes possible an award which spreads the cost proportionately among the members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th 563, 578.)

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

B. <u>The Attorneys' Fees Request Are Well Within the Range of Fees in Comparable Cases</u>

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

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

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

C. <u>PAGA Counsel's Fee Request is Reasonable Under a Lodestar Crosscheck</u>

Courts may "cross-check" the results of the common fund method against the lodestar method. (*See In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.) The lodestar is calculated by multiplying the reasonable hours expended by a reasonable hourly rate. (*Serrano v.*

Priest, 20 Cal.3d 25, 48-49 (1977) *("Serrano III").*) Those rates reflect "the general local hourly rate for a fee-bearing case" and do "not include any compensation for contingent risk, extraordinary skill, or any other factors." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138.) The court may then enhance the lodestar with a multiplier. (*Wershba, supra*, 91 Cal.App.4th at 254; *Serrano III, supra*, 20 Cal.3d at 49.)

1. Requested Multiplier

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

Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Szamet Decl. ¶48.) PAGA Counsel have an aggregate lodestar in the amount of $28,638.50 which represents 38.6 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiff's instant Motion, and 10-15 future hours. (*Id.*) As such, PAGA Counsel is asking for a lodestar multiplier of 1.22. (Szamet Decl. ¶49.) Typically, the lodestar is merely the starting point of the calculation of a reasonable fee, and courts often multiply the lodestar by a factor to account for the risk of non-payment, delay in payment, the quality of work, and the novelty and difficulty of the issues involved. (*See Radar v. Thrasher,*(1962) 57 Cal.2d 244, 253; *Beasley v. Wells Fargo Bank,* (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of Supervisors,* (1997) 76 Cal.App.3d 24 1, 251.)

This case dealt with difficult legal and factual questions. (Szamet Decl. ¶50.) Significantly, the risk attendant to the underlying claims in this matter was great considering Defendant's defenses as discussed in detail above. *(Ibid.)* Were this case to proceed, Defendant would have a strong incentive to litigate tenaciously. *(Ibid.)* There are genuine issues in dispute. *(Ibid.)* Furthermore, PAGA Counsel was able to obtain close to the full value for this case. (Szamet Decl. ¶51.)

As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades of experience who diligently prepared and litigated this matter. (Szamet Decl. ¶52.) To achieve the ultimate result in this case, my firm had to incur substantial risk and expense and were precluded from taking other fee generating employment for 38.6 hours of attorney time. (Szamet Decl. ¶53.) This matter had been handled purely on a contingency fee basis and PAGA Counsel has advanced many thousands of dollars in costs while deferring all payment of fees, with no guarantee that any of the fees incurred or costs advanced would ever be recovered, and diverting significant firm resources to prosecution of this matter. (Szamet Decl. ¶54.) PAGA Counsel believe this is an exceptional result that has been well received by the Aggrieved Employees. (Szamet Decl. ¶55.)

VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

In addition to their request for fees, PAGA Counsel further request reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this litigation, in the amount of $8,988.91 (Szamet Decl. ¶76.) To date, PAGA Counsel has incurred $8,682.91 in costs. (Szamet Decl. ¶77.) PAGA Counsel anticipates incurring an additional $306.00 in costs to file and serve this motion, but the Settlement provides for a reimbursement of litigation costs of up to $12,000.00. (Szamet Decl. ¶78.) As such, counsel is requesting a cost reimbursement of $8,988.91. (Szamet Decl. ¶79.)

All of the requested costs are reasonable in amount and were necessarily incurred by PAGA Counsel in prosecuting this litigation. (Szamet Decl. ¶80.); Exhibit 2 [Cost Report].) Expenses in this matter to date include costs for filing fees, research, mediation, and additional costs for the prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Kelsey M. Szamet. All of these costs have been incurred in the course of this litigation, and all costs advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of filing the present motion. (Szamet Decl. ¶81.)

Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court should approve the request for reimbursement in the amount of $8,988.91. (Szamet Decl. ¶82.)

VIII. ENHANCEMENT TO PLAINTIFF

The Settlement calls for an enhancement payment of $5,000.00 to the named Plaintiff Robert Mark-Waterhouse, to be paid from the Gross Settlement Amount. (Szamet Decl. ¶83; Ex. 1 at ¶3.2.2.) Incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. "[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

Here, the enhancement takes into consideration the time, effort, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of the Aggrieved Employees. The time spent by Plaintiff includes identifying competent counsel, providing information to PAGA Counsel regarding Plaintiff's relevant employment experiences, compiling documents, meeting with PAGA Counsel frequently to discuss the status of the case and the theories of liability, reviewing settlement documents, and making himself available for a full day of mediation. (Szamet Decl. ¶84.)

PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶85.) The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiff in coming forward to litigate this matter on behalf of the Aggrieved Employees. (Szamet Decl. ¶86.) Accordingly, Plaintiff should be awarded the agreed-upon enhancement of $5,000.00.

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IX. CONCLUSION

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

DATED: May 1, 2025

KINGSLEY SZAMET EMPLOYMENT LAWYERS

By: ______________________________

Kelsey M Szamet
Attorneys for Plaintiff ROBERT MARK-WATERHOUSE 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 May 1, 2025, I served all interested parties in this action the following documents described as: by placing a true copy thereof enclosed in a sealed envelope addressed as follows: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Ana R. Hartman
Mary P. Snyder
WILSON TURNER KOSMO LLP
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San Diego, CA 92101
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Attorneys for Defendant

[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 May 1, 2025, at Chino, California.

Leslie Sanchez