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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

KASSANDRA DIAZ, an individual, on behalf
of the State of California, as a private attorney
general,

PLAINTIFF,

v.

ASCEND HEALTHCARE, LLC; CPE HR,
INC.; and DOES 1 thru 50, inclusive,

DEFENDANTS.

Case No. 24STCV13760

[Case Assigned for All Purposes to Hon. Anne
Richardson in Dept. 40]

**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, Lisa Mullins of ILYM
Group, Inc., and Plaintiff Cassandra Diaz in
Support of Plaintiff's Motion for Approval of
Representative Action Settlement; [Proposed]
Order, and Judgment]*

Date: September 24, 2024

Time: 8:30 AM

Dept.: 40

Complaint Filed: June 3, 2024

Trial Date: None Set

Reservation No. 316197220348

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

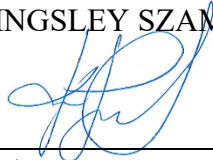
2 **PLEASE TAKE NOTICE** that on September 24, 2024, at 8:30 AM in Department 40 of
3 the above-entitled court, Plaintiff KASSANDRA DIAZ will move the Court for an Order
4 Granting Approval of Representative Action Settlement.

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 Kelsey M. Szamet, the PAGA Settlement Agreement (Exhibit
9 “1” to the concurrently filed Szamet 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 19, 2024

KINGSLEY SZAMET & LY

14
15 By: 

16 Kelsey M. Szamet
17 Attorneys for Plaintiff KASSANDRA DIAZ and all
18 Aggrieved Employees
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Kassandra Diaz (“Plaintiff”) submits this Memorandum of Points and
4 Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiff and
5 Defendants ASCEND HEALTHCARE, LLC; CPE HR, INC. (“Defendants”) (collectively, the
6 “Parties”) have reached a proposed settlement documented in the PAGA Settlement Agreement
7 (“Agreement”), attached to the concurrently-filed declaration of Kelsey M. Szamet.

8 This is a Settlement under the Private Attorneys General Act of 2004, Labor Code
9 §2699, et seq. (“PAGA”). The Gross Settlement Amount is \$123,450.00. After deduction of
10 attorney’s fees and litigation expenses, litigation enhancement to Plaintiff, and settlement
11 administration costs as discussed in the Agreement, the remaining amount to be divided between
12 the Labor and Workforce Development Agency (“LWDA”) and the Aggrieved Employees as
13 required by Labor Code section 2699(i) is \$71,727.12, with \$53,795.34 (or 75%) going to the
14 LWDA and \$17,931.78 (or 25%) distributed to the Aggrieved Employees.¹

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 Agreement; and (2) and enter a Final Judgement
19 thereon.²

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

21 **A. Litigation Overview and Procedural History**

22 Defendant Ascend HealthCare, LLC is a medical treatment center that is primarily
23 located in Los Angeles County. Defendant CPE HR, Inc. is a human resources consulting agency
24 that is primarily located in Los Angeles County. Plaintiff worked for Defendants as a non-
25

26 ¹ Pursuant to PAGA, civil penalties recovered by Aggrieved Employees shall be distributed 75 percent to the
27 Labor and Workforce Development Agency (“LWDA”) and 25 percent to the aggrieved employee(s). Lab.
Code § 2699(i).

28 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. ¶105.)

1 exempt employee from approximately April 17, 2023 to September 22, 2023.

2 On March 27, 2024, Plaintiff sent a notice letter, pursuant to Labor Code section 2699
3 (“PAGA”), to the Labor Workforce Development Agency (“LWDA”) regarding her intent to seek
4 civil penalties for violations of Labor Code §§ 201, 202, 203, 226(a), 226.7, 432.5, 510, 512,
5 1194, 1194.2, 1199, and 2802. (Declaration of Kelsey M. Szamet ¶5.) (“Szamet Decl.”) Pursuant
6 to Labor Code § 2699.3(a)(2)(A), no notice was received by Plaintiff from the LWDA
7 evidencing its intention to investigate within sixty-five (65) calendar days of March 27, 2024.
8 (*Id.*) Therefore, Plaintiff was entitled to commence a civil action as though the LWDA has
9 chosen not to investigate.

10 On June 4, 2024, Plaintiff commenced this action by filing a Representative Action
11 Complaint alleging a single cause of action against Defendants for penalties pursuant to Labor
12 Code § 2699 for violations of Labor Code §§ 201, 202, 203, 226(a), 226.7, 432.5, 510, 512,
13 1194, 1194.2, 1199, and 2802. (Szamet Decl. ¶6.)

14 B. The Discovery Process

15 The Parties engaged in informal discovery before reaching an Agreement in this matter.
16 Plaintiff obtained, through informal discovery, Plaintiff’s personnel records, as well as time and pay
17 data, relevant to both Plaintiff and the Aggrieved Employees. (Szamet Decl. ¶7.)

18 Through the exchange of information and attendant discussions between the Parties,
19 Plaintiff learned that the number of Aggrieved Employees is no more than 222 (including Plaintiff)
20 and there is a maximum of 4,115 PAGA pay periods. (Szamet Decl. ¶8; Ex. 1, ¶4.2.) As will be
21 discussed further below, Plaintiff asserts that the maximum potential exposure for the PAGA claims
22 for Aggrieved Employees is \$411,500 (4,115 itemized wage statements at issue × \$100 per pay
23 period). (*Id.*)

24 Thereafter, the Parties engaged in good faith, arms-length direct negotiations with
25 Defendants concerning possible resolution of the claims asserted in the Litigation. (Szamet
26 Decl. ¶9) The Parties were able to reach a tentative settlement subject to finalization of a formal
27 PAGA Settlement Agreement and the approval of the Court. (*Id.*) The Parties negotiated the
28 terms and conditions of the Settlement and now present the agreed-upon Settlement to the Court

1 for Approval. (Szamet Decl. ¶10.)

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

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

8 **A. The PAGA Statutory Scheme**

9 PAGA creates a means of “deputizing” citizens as private attorney generals to enforce the
10 Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489,
11 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A
12 plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own
13 behalf as an individual claim, but “as the proxy or agent of the state’s labor law enforcement
14 agencies.” *Id.*, at 986; *see also Reyes v. Macy’s, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011);
15 *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 380).

16 When an aggrieved employee brings a PAGA claim, “the government is always the real
17 party in interest.” *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234
18 Cal.App.4th 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214,
19 1222 (2015) (“[A] PAGA action is a dispute between an employer and the State agency.”).
20 Accordingly, a plaintiff that brings a PAGA claim represents “the same legal right and interest
21 as state labor law enforcement agencies,” in that the plaintiff is seeking to recover those civil
22 penalties that otherwise would have been assessed and collected by the LWDA. *Arias, supra*, 46
23 Cal.4th at 986; Lab. Code § 2699 (a) & (f); *Securitas, supra*, 234 Cal.App.4th at 1119; *see also*
24 *Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 (holding “PAGA plaintiffs do not
25 have property rights in their cases.”). This is borne out by the fact that the LWDA receives 75
26 percent of any civil penalties recovered; thus, recoveries are principally for the state and only
27 secondarily for Aggrieved Employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a
28 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, ¶ 2.2.)

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 *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 §2699i(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 deny 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 §

³ 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.

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 purpose” of the statute. (See *O’Connor v. Uber Techs., Inc.* (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1113.) Additionally, as explained in *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 \$123,450.00 in full and final settlement of the PAGA claims alleged. (Szamet Decl. ¶12., Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount:	\$123,450.00
PAGA Counsel Fees Payment:	\$41,150.00
PAGA Counsel Litigation Expenses Payment:	\$1,622.88 ⁴
Administrator Expenses Payment:	\$3,950.00 ⁵
Named Plaintiff Enhancement:	\$5,000.00
PAGA Penalties:	\$71,727.12 <i>(\$53,795.34 to the LWDA; \$17,931.78 to remain in the Net Settlement Amount)</i>

(Szamet Decl. ¶13., Exhibit 1, ¶3.)

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 Period Pay Periods worked by all Aggrieved Employees during the

⁴ The Agreement provided for counsel to receive cost reimbursement up to \$2,000.00. However, counsel’s final costs come to \$1,622.88, including an estimated \$600 in filing fees associated with this Motion. (Szamet Decl. ¶ 14.) The extra \$377.12 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 \$71,300.00 contemplated in the settlement agreement. (Szamet Decl., Ex. 1, ¶3.2.2)

⁵ The Agreement also accounted for Administrator Expenses of up to \$4,000. However, the Administrator Expenses amount comes to \$3,950.00. The extra \$50 will remain in the next settlement fund, causing the net amount for distribution to the LWDA and Aggrieved Employees to be slightly higher than the \$71,300.00 contemplated in the settlement agreement. (Szamet Decl. ¶15, Ex. 1, ¶3.2.2)

PAGA Period, and then multiplying the result by each aggrieved employee’s PAGA Period Pay Periods. (Szamet Decl. ¶16., Exhibit 1, ¶3.2.4.1.)

For settlement purposes, the Aggrieved Employees are defined as: “all persons who are employed or have been employed as a non-exempt by Ascend HealthCare, LLC; CPE HR, Inc., in the State of California who worked one or more pay periods since one (1) year prior to the date of Plaintiff’s March 27, 2024 letter to the Labor Workforce Development Agency and Defendants, to August 6, 2024. ” (“Aggrieved Employees”). (Szamet Decl. ¶17., Exhibit 1, ¶1.4.) The PAGA Period means the period from March 27, 2023, to August 6, 2024. ((Szamet Decl. ¶18, Exhibit 1, ¶1.19.)

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. ¶19.) 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. ¶20.) 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. ¶21.) 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. ¶22.)

PAGA Counsel anticipated that, at trial, Counsel for Defendant could make a potentially persuasive argument that Defendant: (1) the Aggrieved Employees were properly paid 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) the Aggrieved Employees were provided with the opportunity to take meal and rest breaks in compliance with California law; (3) until this Action was filed, no employees had compliance about any alleged failure to pay wages, provide meal and/or rest breaks, reimburse expenses, issue accurate itemized wage statements, or require employees to agree to illegal terms or conditions; (4) 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. ¶23.) 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. (Szamet Decl. ¶24.)

1. The Risks Associated with the Wages/Overtime Claim

“California employees are entitled to compensation for all hours worked, which means “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” (Title 8 Cal. Code of Regs., § 11080(2)(G); *See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified on denial of reh’g (Aug. 29, 2018).) Time is compensable if an employee is “*subject to the control* of an employer” even if not working, or if an employee “*is suffered or permitted to work*” even if not “under the employer’s control, provided the employer has or should have knowledge of the employee’s work.” (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh’g denied (May 13, 2020) (citations omitted.) An employer controls an employee if the

1 employer directs an employee and the employee is unable to use their time how they wish. (*Id.* at
2 p. 1047.) Other factors courts may consider include whether the activity is required, “the location
3 of the activity, the degree of the employer’s control, whether the activity primarily benefits the
4 employee or employer, and whether the activity is enforced through disciplinary measures.” (*Id.*
5 at p. 1056; *Cf. Gibbs v. TWC Administration, LLC* (S.D. Cal., Jan. 3, 2020, No.
6 17CV01513DMSAGS) 2020 WL 42768, at *9 (denying Defendant’s motion for summary
7 judgment when plaintiff-employees conducted off-the-clock pre-shift activity in preparation to
8 start work right when they clocked in).)

9 In *Troester*, employees spent four to ten minutes completing tasks to close up the store,
10 such as setting the alarm and locking the door. (*Troester*, 5 Cal.5th 829 at p. 843.) The Court
11 held that California law prohibits employers from requiring employees to work off the clock,
12 even for minutes, without compensation. (*Id.* at p. 848.) The Court explained:

13 An employer that requires its employees to work minutes off the clock on a
14 regular basis or as a regular feature of the job may not evade the obligation to
15 compensate the employee for that time by invoking the de minimis doctrine. As
16 the facts here demonstrate, a few extra minutes of work each day can add up. . . .
What Starbucks calls “de minimis” is not de minimis at all to many ordinary
people who work for hourly wages.

17 (*Id.* at p. 847.)

18 Plaintiff alleged that Defendant violated Labor Code §§ 510, 1194, 1194.2 and 1199.
19 These statutes require an employer to compensate its employees at the minimum wage rate for
20 all hours worked and at a rate of no less than one and one-half times the regular rate of pay for
21 any work in excess of eight hours in one workday and any work in excess of 40 hours in any one
22 workweek. California law also requires that any compensation, including premium pay
23 (commission, bonuses, shift differentials, etc.) must be included in the regular rate of pay for the
24 purposes of determining correct overtime rates.

25 Here, Plaintiff alleges that she and the Aggrieved Employees were not properly
26 compensated at the appropriate rate of pay because Defendant failed to include Plaintiff’s and the
27 Aggrieved Employees’ premium pay when calculating their regular rate for the purpose of
28 determining the correct overtime rate in pay periods where they were paid premium pay and

1 overtime. (Szamet Decl. ¶25.) Defendant’s alleged failure to properly blend any and all premium
2 pay into the regular rate of pay resulted in the unlawful withholding of wages and/or overtime.
3 (*Id.*)

4 Plaintiff also alleges that Defendant had a consistent policy of failing to pay all wages
5 and/or overtime to Plaintiff and all Aggrieved Employees. Plaintiff contends that this was due to
6 the fact that she and the Aggrieved Employees allegedly worked “off the clock.” (Szamet Decl.
7 ¶26.) Defendant allegedly called Plaintiff and the Aggrieved Employees while they were off the
8 clock to address last minute scheduling issues and required Plaintiff and the Aggrieved
9 Employees to work extra hours. (*Id.*) Plaintiff also contends that she and the Aggrieved
10 Employees frequently worked off the clock during their meal breaks. (*Id.*) Plaintiff and the
11 Aggrieved Employees had to clock out for their meal break but continue to work, because they
12 were required to remain “on duty” during their breaks in case any issues arose. (*Id.*) Plaintiff
13 contends that she and the Aggrieved Employees are not paid any wages for this time worked.
14 (*Id.*)

15 However, Defendant denies that it ever required Plaintiff and the Aggrieved Employees
16 to work off the clock and that Plaintiff and the Aggrieved Employees were paid for all hours
17 worked. (Szamet Decl. ¶27.) Defendant maintains that at all relevant times, it kept written
18 policies that clearly prohibited any off the clock work and if it was incurred, that it must be
19 promptly reported to a supervisor. (*Id.*) Plaintiff anticipates that, at trial, Defendant would argue
20 that any calls about schedule changes were *de minimis*, both in frequency and the length of such
21 calls. (*Id.*) Plaintiff also anticipates that Defendant would likely present evidence that it
22 adequately staffed shifts such that employees did not need to remain “on duty” during their lunch
23 break, and would likely present evidence from other employees supporting its argument. (*Id.*)
24 Furthermore, Defendant would argue that Plaintiff’s theories of liability would each be
25 extremely difficult to prove on a representative basis. (*Id.*) Because there are no written time or
26 pay records that could be used by Plaintiff to substantiate this claim, Defendant argued that this
27 case would devolve into a series of mini-trials wherein Defendant would have the right to
28

question each and every allegedly aggrieved employees as to whether they contended that they worked any unpaid time and, if so, why they contend the time was not properly paid. (*Id.*)

While Plaintiff disagrees that these arguments are legally correct or persuasive, Plaintiff acknowledges this risk. (Szamet Decl. ¶28.) As such, PAGA Counsel determined that in light of these risks, the settlement reached is both fair and reasonable. (*Id.*)

2. The Risks Associated with the Meal Period Claim

Under California Labor Code section 512 and IWC Wage Order No. 5, no employer shall employ any person for a work period of more than five hours without providing a meal period of not less than thirty minutes. The first meal period must be permitted to commence no later than after five hours of work, or the start of the sixth hour of work (5.0 hours on the clock). (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1049.) The second meal period must be permitted to commence no later than after ten hours of work, or the start of the eleventh hour of work (10.0 hours on the clock). (*Ibid.*) The California Supreme Court succinctly described Section 512's mandate: "Employers must afford employees uninterrupted half-hour periods in which they are relieved of any duty or employer control and are free to come and go as they please." (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1037.)

Furthermore, Labor Code §§ 226.7 and 512 require an employer to pay an additional hour of compensation for each meal period the employer fails to provide. Employees are entitled to a first meal period of at least thirty (30) minutes for shifts over five (5) hours, to be provided within the first five (5) hours of the shift. Plaintiff alleges that Defendant failed to maintain a policy informing Plaintiff and the Aggrieved Employees of these rights.

Here, Plaintiff alleges that Defendant failed to apprise Plaintiff and the Aggrieved Employees of their rights associated with meal periods and failed to provide timely meal periods. (Szamet Decl. ¶29.) Plaintiff contends that Defendant has had a consistent policy of: (1) failing to provide Plaintiff and the Aggrieved Employees with compliant, timely, and uninterrupted meal breaks; (2) requiring Plaintiff and the Aggrieved Employees to take late meal breaks that occurred after the first five hours of each shift; and (3) failing to pay such employees one (1) hour of pay at the employees regular rate of compensation for each workday that the first meal

1 period was not provided within the first (5) hours of the shift or that a second meal period was
2 not provided. (*Id.*) As mentioned above, Plaintiff alleges that she and the Aggrieved Employees
3 were short staffed and were told by Defendant to remain “on duty” during their meal breaks, in
4 case any problems arose. (*Id.*) Plaintiff further alleges that she and the Aggrieved Employees
5 clock out for their lunch breaks, but many times, these breaks would be interrupted, and Plaintiff
6 and the Aggrieved Employees would continue working despite being on their break. (*Id.*)
7 Defendant sometimes paid a meal penalty for late meal breaks, but Plaintiff alleges that these
8 penalties were provided at an employee’s regular rate of pay, rather than the correct rate of pay
9 as required. (*Id.*)

10 In *Ferra v. Loews Hollywood Hotel, LLC*, (2021) 11 Cal. 5th 858, 863, the California
11 Supreme Court set forth the formula for calculating the one extra hour of premium pay that
12 employees are owed if an employer fails to provide a compliant meal period or rest break.
13 Specifically, the Court held that those premium payments must include the hourly value of any
14 nondiscretionary earnings (such as a nondiscretionary bonuses), and cannot simply be paid at an
15 employee’s base hourly rate. Here, when meal period premiums are provided, Defendant has had
16 a consistent policy of paying meal period premiums at the base rate and not the blended rate in
17 violation of Labor Code §§ 226.7 and 512.

18 However, Defendant denies that it ever required Plaintiff and the Aggrieved Employees
19 to work through their meal periods and that it provided a reasonable opportunity for all
20 employees to take an on-time, off duty, complaint meal period. (Szamet Decl. ¶30.) Plaintiff
21 anticipates that, at trial, Defendant would likely present evidence that it adequately staffed shifts
22 such that employees did not need to remain “on duty” during their lunch break and would likely
23 present evidence from other employees supporting its argument. (*Id.*) Plaintiff was confident that
24 Defendant would attempt to gather testimonial evidence from aggrieved employees indicating
25 that the records were accurate and either they took compliant meal breaks as reflected in the
26 records or were paid a meal period premium in lieu thereof. (*Id.*) Though Plaintiffs do not
27 believe this was the case, Plaintiff must acknowledge it poses risks at trial. (*Id.*) There is risk as
28 to both sides as to what declarations and depositions of aggrieved employees might reveal. (*Id.*)

1 Indeed, Plaintiffs had to consider that Defendant could secure several declarations from
2 aggrieved employees that all compliant breaks were “provided”, but that they may have chosen
3 to take late breaks or forego breaks on occasion. (*Id.*) Taken together, Plaintiff acknowledged
4 there was significant risk as to establishing liability on the meal period claim on a representative
5 basis. (*Id.*)

6 Moreover, Defendant would likely also argue that any purported failure to blend
7 violations were merely a result of a clerical error. (Szamet Decl. ¶31.) Defendant would likely
8 argue that it did properly pay Plaintiff and the Aggrieved Employees all wages owed, or at the
9 very least, it demonstrated good-faith in paying all wages owed. (*Id.*) Further, Defendant would
10 argue that if there was any such blending mistake made, it would result in an underpayment of
11 very small amounts such as a few cents here or there and it would not likely result in a court
12 awarding large civil penalty against it. (*Id.*) While Plaintiff disagrees that these arguments are
13 legally correct or persuasive, Plaintiff acknowledges this risk and considered such when
14 evaluating this settlement. (*Id.*)

15 **3. The Risks Associated with the Rest Period Claim**

16 Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour
17 of compensation for each workday the employer fails to provide a rest period according to law.
18 Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or
19 major fraction thereof. (Cal. Code Regs., tit. 8, § 11050, subd. 12(A).)

20 Employers must authorize and permit a net ten-minute paid rest period for every four
21 hours, or major fraction thereof, of work for its employees. If an employer does not, then the
22 employer must pay the employee one hour of pay at the employee’s regular rate of pay for each
23 workday that the rest period is not provided. (Cal. Code Regs., tit. 8, § 11050, subd. 12(B).)

24 Plaintiff alleges that the rest period claims arise from an alleged common course of conduct
25 wherein Defendant did not provide employees with the opportunity to take a 10-minute rest break
26 during their shifts in compliance with California law. (Szamet Decl. ¶32.) The California Supreme
27 Court has held: “Employees are entitled to 10 minutes’ rest for shifts from three and one-half to six
28 hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of

1 more than 10 hours up to 14 hours, and so on.” (*Brinker Rest. Corp. v. Superior Court*, supra, 53
2 Cal.4th at 1029.) In an eight-hour workday, being denied the two paid rest breaks in a day is
3 “essentially perform[ing] 20 minutes of ‘free’ work.” (*Murphy v. Kenneth Cole Productions, Inc.*
4 (2007) 40 Cal.4th 1094, 1104.)

5 Employers must authorize and permit a net ten-minute paid rest period for every four
6 hours,
7 or major fraction thereof, of work for its employees. If an employer does not, then the employer
8 must pay the employee one hour of pay at the employee’s regular rate of pay for each workday
9 that the rest period is not provided. (Cal. Code Regs., tit. 8, § 11050, subd. 12(B).)

10 Here, Plaintiff alleges that Defendant failed to maintain a lawful procedure of providing
11 rest breaks to Plaintiff and the Aggrieved Employees. (Szamet Decl. ¶33.) Defendant allegedly
12 failed to provide Plaintiff and the Aggrieved Employees with a second rest period despite
13 regularly requiring Plaintiff and the Aggrieved Employees to work over six (6) hours. (*Id.*)
14 Plaintiff contends that if she and the Aggrieved Employees were able to find some time to take a
15 few minutes for a break, these were not compliant rest breaks because they were interrupted,
16 short, late, or missed altogether. (*Id.*) Further, Plaintiff alleges that she and the Aggrieved
17 Employees were not compensated with one (1) hour of wages for each missed rest period as
18 required by Labor Code § 226.7. (*Id.*)

19 As discussed above, *Ferra* requires the rest period premium payments must include the
20 hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses), and cannot
21 simply be paid at an employee’s base hourly rate. As with meal periods, when rest premiums are
22 provided, Defendant has had a consistent policy of paying rest period premiums at the base rate
23 and not the blended rate in violation of Labor Code §§ 226.7.

24 However, Defendant again raised the defense that employees received their rest breaks
25 because they were adequately staffed. (Szamet Decl. ¶34.) Defendant would likely present
26 evidence at trial from other employees and that other employees would testify as such. In its
27 defense, Defendant also argued that Plaintiffs’ rest period claim cannot readily be proven as to
28 all Aggrieved Employees because California law does not require employees to record rest

1 periods. (*Id.*) Absent a shift-by-shift, break-by-break, employee-by-employee inquiry, Defendant
2 would have argued that there was simply no way to know (1) whether a break was taken on any
3 given day; and (2) if not, why not. (*Id.*) For each instance where an employee contends that she
4 did not take a 10-minute rest period by the end of the fourth hour of work, the trier of fact would
5 still have to determine why that particular employee had less than their full allotment of rest
6 time. (*Id.*) Defendant accordingly would have argued that rest break claims are inherently
7 individualized in nature because employers only need to “authorize and permit” breaks; they
8 need not ensure that rest breaks are taken. (*Id.*; *Brinker, supra*, 53 Cal. 4th at 1004.) To succeed,
9 “[a]n employee must show that the employer prevented the employee from taking breaks; mere
10 proof of knowledge that the employee was forgoing breaks is insufficient.” As such, Plaintiffs
11 had to acknowledge that it could potentially be easy for Defendant to defeat this claim if it was
12 able to gather testimonial evidence from aggrieved employees indicating that they were provided
13 the opportunity to take all required rest breaks each day. (*Id.*)

14 Though Plaintiff does not believe this was the case, Plaintiff must acknowledge it poses
15 serious risks as to establishing liability. (Szamet Decl. ¶35.) Just as with meal periods, there is
16 risk as to both sides as to what declarations and depositions of aggrieved employees might
17 reveal. (*Id.*)

18 **4. The Risks Associated with the Reimbursement Claim**

19 Labor Code section 2802 provides that an employer must “indemnify his or her employee
20 for all necessary expenditures or losses incurred by the employee in direct consequence of the
21 discharge of his or her duties” (Lab. Code, § 2802, subd. (a).)

22 Plaintiff alleges that Defendant has failed to reimburse employees for the cost of using
23 their personal cell phones and laptops for work-related purposes. (Szamet Decl. ¶36.) Plaintiff
24 alleges that Defendant required that her and the Aggrieved Employees be available by cell phone
25 and answer/use their cell phones to make calls to patient’s family members and communicate
26 with other employees, and this was necessary to perform their job duties. (*Id.*) Additionally,
27 Plaintiff and the Aggrieved Employees were allegedly required to use their personal cell phones
28 and laptops to clock in/clock out of work, as Defendant’s system was consistently down or slow.

1 (*Id.*) These cell phones and laptops were not provided by Defendant, and Defendant failed to
2 reimburse Plaintiff and the Aggrieved Employees for the alleged costs associated with using
3 these personal cell phones and laptops. (*Id.*)

4 Plaintiff further alleges that Defendant required her and all Aggrieved Employees to
5 travel and run errands using their personal vehicles. (Szamet Decl. ¶37.) Because Defendant did
6 not provide buses or other transportation to workers so that they could travel from job sites to job
7 sites in the middle of their shifts, Plaintiff and the Aggrieved Employees used their own vehicles
8 to run these errands. (*Id.*) Defendant did not reimburse Plaintiff and the Aggrieved Employees
9 for their vehicle use for travel to run errands for Defendant during the course of a work shift, in
10 violation of California law. (*Id.*)

11 The main risk that Plaintiff considered was the fact that not all Aggrieved Employees
12 used their cell phones, laptops, or vehicles for every pay period. (Szamet Decl. ¶38.) Defendant
13 contends that it does not require the Aggrieved Employees to use personal cell phones, laptops,
14 or vehicles at all. (*Id.*) This likely meant that the violations under Labor Code § 2802 were
15 relatively low and not triggered for every pay period. (*Id.*) Plaintiff also anticipated that
16 Defendant could argue primarily that it provided all necessary tools, but to the extent it did not,
17 any exposure was limited to a very small group of Aggrieved Employees for a short window of
18 time who may have chosen to use their personal cellphones for work related purposes out of
19 convenience. (*Id.*) If Defendant were able to establish such, there could be no recovery at all for
20 this claim. (*Id.*)

21 Based on these risks, Plaintiffs determined that discounting this claim for settlement
22 purposes was fair and reasonable. (Szamet Decl. ¶39.)

23 **5. The Risks Associated with the Wage Statement Claims**

24 California Labor Code §226(a) requires Defendant to provide its employees with an
25 accurate, itemized written wage statement that shows, in relevant part, total hours worked by the
26 employee, their name and address of the legal entity that is the employer, and all applicable
27 hourly rates and the corresponding number of hours worked. Specifically, Labor Code §226(a)
28 requires employers to furnish accurate itemized wage statements in writing that show total hours

1 worked by the employee and all applicable hourly rates in effect during the pay period and the
2 corresponding number of hours worked at each hourly rate by the employee. (Labor Code §§
3 226(a)(2) and (9) respectively.)

4 Here, Defendant furnishes Plaintiff and the Aggrieved Employees with itemized wage
5 statements that do not accurately show total hours worked. (Szamet Decl. ¶40.) Defendant
6 furnishes Plaintiff and the Aggrieved Employees with itemized wage statements that do not
7 accurately show all applicable hourly rates in effect during the pay period and the corresponding
8 number of hours worked at each hourly rate because Plaintiff and the Aggrieved Employees
9 performed work while off the clock. (*Id.*) The work performed off the clock was not recorded
10 and thus was not reflected in the Aggrieved Employees' wages and wage statements. (*Id.*)

11 Further, Plaintiff and the Aggrieved Employees are issued wage statements that do not
12 include accurate meal and rest premiums as a result of the claims alleged above. (Szamet Decl.
13 ¶41.) Plaintiff alleges that Defendant's failure to provide accurate itemized wages statements
14 according to Labor Code § 226(a) was all done on a regular and consistent basis. (*Id.*)

15 Again, the risks flow from the underlying unpaid wages and meal/rest claims, but the
16 main risk taken into account is that wage statement claims are vulnerable to an argument that
17 aggrieved employees did not suffer any harm. (Szamet Decl. ¶42.) Defendants commonly argue
18 that, without more, wage statement claims are nothing but technical violations for which a court
19 should award a dramatically reduced civil penalty, if anything at all. (*Id.*)

20 **6. The Risks Associated with the Waiting Time Penalties Claim**

21 Under Labor Code section 203, if an employer fails to provide wages at the time of an
22 employee's termination or within seventy-two (72) hours of resignation, then the employee's
23 wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203
24 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g.,
25 *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68
26 Cal.App.4th 487, 492.)

27 Here, Plaintiff and numerous Aggrieved Employees are no longer employed by
28 Defendant. Defendant failed to pay all wages owed and due upon their termination and/or

1 resignation. (Szamet Decl. ¶43.) Defendant’s actions were willful, as they have intentionally
2 failed or refused to perform an act which was required to be done. (See *Amaral v. Cintas Corp.*
3 *No. 2* (2008) 163 Cal.App.4th 1157, 1201.) “The failure to pay is willful if the employer ‘knows
4 what [it] is doing [and] intends to do what [it] is doing’, and does not also require proof that the
5 employer acted with “a deliberate evil purpose to defraud work[ers] of wages which the
6 employer knows to be due.” (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859,
7 868.)

8 Plaintiff factored in the risk of establishing that any violation was “willful” and the fact
9 that this claim is derivative. (*Id.*)

10 In light of all these significant risks and given that PAGA gives the Court broad discretion to
11 reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement
12 Amount of \$123,450.00 was fair and reasonable. (Szamet Decl. ¶44, Exhibit 1, ¶3.1.)

13 C. A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty Awarded for
14 Technical Violations of the Labor Code

15 “PAGA penalties...are mandatory, not discretionary” and must be awarded upon a
16 showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp. No. 2* 163 Cal. App 4th
17 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ,
18 2007 WL 1650942, at *3.

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

24 In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047,
25 the Court exercised its discretion to reduce the PAGA penalty amount. There, the plaintiff
26 brought a PAGA claim for violations of section 226(a) based on the following issues: (a) the
27 statements did not show either an employee identification number or the last four digits of the
28 social security number of the employee; (b) the statements did not show the beginning date of the

1 pay period for which the employee was paid; (c) the statements identified Covidien as the
2 employee's employer. (*Id.* At *2). There were approximately 28,000 wage statements at issue.
3 (*Id.* at *3). The *Fleming* court calculated the maximum potential civil penalty exposure at \$2.8
4 million (\$100 per wage statement). (*Ibid*; see also Labor Code § 2699(f)(2)). After a bench trial,
5 the Court elected to exercise its discretion to reduce the civil penalty per wage statement to \$18
6 per wage statements, reflecting 18% of the potential exposure. (*Id.* at *4). The Court reasoned:

7 Here, the Aggrieved Employees suffered no injury due to the erroneous
8 wage statements, and made no complaint of the errors or omissions
9 contained therein prior to filing suit. Also, Defendants were not aware
10 that the wage statements violated the law and took prompt steps to correct
11 all violations once notified. Given these circumstances, the Court finds a
12 \$2.8 million penalty unjust according to § 2699(e)(2). Accordingly, in its
13 discretion, the Court reduces the penalty to \$500,000.

14 *Id.* at *4. A court exercising its discretion to significantly reduce the civil penalty awarded under
15 PAGA is not a rare occurrence. See e.g., *Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th
16 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbucks's
17 "good faith attempts" to comply and because the violations were minimal).

18 Here, as explained above, Plaintiff's counsel anticipated that, at trial, Defendant would
19 argue that: (1) the Aggrieved Employees were properly paid and/or reimbursed in accordance
20 with Defendant's lawful policies and practices, and that any alleged failure to compensate the
21 Aggrieved Employees was the result of inadvertence and clerical error; (2) the Aggrieved
22 Employees were provided with the opportunity to take meal and rest breaks in compliance with
23 California law; (3) until this Action was filed, no employees had compliance about any alleged
24 failure to pay wages, provide meal and/or rest breaks, reimburse expenses, or issue accurate
25 itemized wage statements; (4) none of Defendant's employees suffered any harm from or actual
26 damage as a result of the conduct that forms the basis for Plaintiff's allegations. All of which,
27 Defendant would argue, should mitigate in favor of significantly reducing the civil penalty.

28 After engaging in pertinent informal discovery in this Action, Plaintiff's counsel determined
that a settlement of \$123,450.00 is reasonable given the above risks.

D. There is a Strong Risk the Higher \$200 Civil Penalty Triggered for "Subsequent"

1 Violations Will Not Apply

2 Plaintiff believes there is a strong risk that the Court will not award the \$200 civil penalty
3 triggered for “subsequent” violations. Labor Code section 2699(f)(2). If this case were to
4 proceed to trial, Plaintiff would argue that a “subsequent” violation simply means that Defendant
5 violated section 226(a) more than once for a given employee. Plaintiff is not aware of any case
6 law that interprets “subsequent” in the context of section 2699. However, Defendant is likely to
7 rely on *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157 (2008) because it rejected a purely
8 temporal understanding of the term “subsequent” and interpreted its use in Labor Code sections
9 210 and 225.5 to require that “the employer has been notified that it is violated a Labor Code
10 provision” before higher penalties are triggered. *Id.* at 1209. Defendant presumably will take the
11 position that it has not been notified that it actually violated section 226 until the Labor
12 Commissioner has issued a formal citation or this Court made a finding that a violation existed.

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

15 Based on these figures, the maximum potential exposure for the PAGA claims for the
16 Aggrieved Employees is \$2,469,000.00 (4,115 pay periods at issue x \$100 a pay period x each
17 Labor Code violation). While there is no authority available on this issue, a court could
18 conceivably “stack” per pay period violations as Plaintiff has done above. However, the main
19 risk taken into account with PAGA is the discretionary nature of the penalty award. (Szamet
20 Decl. ¶45.) For example, if a court were to disallow the “stacking” of PAGA penalties (given the
21 lack of caselaw doing so), then the maximum exposure would actually be approximately
22 \$411,500 (\$100 per pay period x 4,115 PAGA pay periods). (Szamet Decl. ¶46.) From there, the
23 court could reduce the penalty amount per pay period. (Szamet Decl. ¶47.)

24 A judge can award the statutory maximum of \$100 for the initial violation and \$200
25 thereafter or – in theory – one cent per wage statement. (Szamet Decl. ¶48.) Labor Code section
26 2699(e)(2) states that “a court may award a lesser amount than the maximum civil penalty
27 amount specified by this part if, based on the facts and circumstances of the particular case, to do
28 otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.” (*See*

1 *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047 [court
2 awarded \$18 per wage statement, reflecting 18% of the potential exposure]; *Carrington v.*
3 *Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 529 [awarding 10% of maximum civil penalty for
4 meal break claims in light of Starbucks’ “good faith attempts” to comply and because the
5 violations were minimal]; see also *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23
6 Cal.App.5th 667, 681 [noting that a court should consider whether a violation was inadvertent
7 when assessing penalties].) ⁶ Thus, Class Counsel also considered the possibility of an outcome
8 similar to the outcome in *Carrington*, where the court awarded a small fraction of the maximum
9 civil penalty because of Starbucks’ “good faith attempts” to comply with the Labor Code and
10 minimal violations. (Szamet Decl. ¶49.)

11 Here, Defendant would likely argue that it has made good faith attempts to comply with
12 the Labor Code thereafter to avoid future wage and hour violations, and that the actual violation
13 rates are very low. (Szamet Decl. ¶50.) The assumptions made for the derivative claims for
14 waiting time penalties and wage statement penalties would significantly decrease as well.
15 (Szamet Decl. ¶51.)

16 Again, there is little guidance for the Court here, but if the Court were ultimately to
17 award 10% of the maximum civil penalty as occurred in *Carrington, supra*, 30 Cal. App. 5th
18 504, the result here far exceeds that range as 10% of a single-stack of PAGA penalties in this
19 case would be only \$41,150, just a third of the Settlement obtained here. (Szamet Decl. ¶52.)
20 Likewise, if this Court were to ultimately award \$18 per pay period as the trial court did in
21 *Fleming v. Covidien Inc., supra*, the present Settlement is actually higher at \$30 per pay period
22 (for comparison the \$18/pay period in *Fleming* would be \$74,070 here as 4,115 pay periods x
23 \$18 = \$74,070). Thus, Plaintiff determined that accepting a substantial discount on the PAGA
24 penalties was reasonable.

25 In light of the immense discretion available, Plaintiff believes the Settlement is
26 reasonable. Given that this Settlement is for \$123,450.00, Plaintiff believes this is a very fair and
27

28 ⁶ On May 11, 2016, following a bench trial, Los Angeles Superior Court Judge John Wiley reduced PAGA penalties
from \$409,950 to \$53,294 after finding the maximum statutory penalty amount to be unjust, arbitrary, oppressive,
and/or confiscatory. (*Kaanaana et al. v. Barrett Business Serv.s Inc., et al.*, L.A. Super. Ct., Case No. BC 496090.))

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 \$123,450.00. (Szamet Decl. ¶57; Ex. 1 at ¶3.1.) From that fund, Plaintiff requests an award of attorneys' fees for PAGA Counsel in the amount of \$41,150.00, or 33.33% of the Gross Settlement Amount, and \$1,622.88 in reimbursement for litigation costs. (*Id.*; Ex. 1 at ¶3.2.2.)

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 33.33% 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,

1 actual, and concrete benefit for members of an ascertainable class and the court’s jurisdiction
2 over the subject matter makes possible an award which spreads the cost proportionately among
3 the members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25
4 Cal.App.4th 563, 578.)

5 This doctrine rests on the understanding that attorneys should normally be paid by their
6 clients, and that unless attorneys’ fees are paid out of the common fund, those who benefitted
7 from the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council*
8 (1979) 23 Cal.3d 917, 943; *Save El Toro Ass’n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To
9 prevent this unfair result, courts exercise their inherent equitable powers to assess attorneys’ fees
10 against the entire fund, thereby spreading the cost of those fees among all those who benefitted.
11 (*Serrano III*, 20 Cal.3d at p. 35.) “A court, in the exercise of its equitable discretion, may decree
12 that those receiving the benefit should contribute to the costs of its production.” (*Save El Toro*
13 *Assn., supra*, 98 Cal.App.3d at 548.) As this approach “better approximates the workings of the
14 marketplace than the lodestar approach,” there is “a greater judicial willingness to evaluate a fee
15 award as a percentage of the recovery” in common fund cases. (*Lealao v. Beneficial Calif., Inc.*
16 (2000) 82 Cal.App.4th 19, 31, 48.)

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

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

21 No general rule can be articulated on what is a reasonable
22 percentage of a common fund. Usually 50% of the fund is the
23 upper limit on a reasonable fee award from a common fund in
24 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.

25 (Newberg on Class Actions, 3rd Ed., 1992, § 14.03; and see *Chavez v. Netflix, Inc.* (2008) 162
26 Cal.App.4th 43, 66, fn 11 [“Empirical studies show that, regardless whether the percentage
27 method or the lodestar method is used, fee awards in class actions average around one-third of
28 the recovery.”].) Thus, PAGA Counsel’s requested fee of 33.33% is not only well within the

range of reasonableness, but lower than 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. PAGA Counsel's Fee Request is Reasonable Under a Lodestar Crosscheck

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.)

i. 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. ¶66.) PAGA Counsel have an aggregate lodestar in the amount of \$26,245.00 which represents 29.0 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiff’s instant Motion, and 5 future hours. (*Id.*) As such, PAGA Counsel is asking for a lodestar multiplier of 1.57. (Szamet Decl. ¶67.) Typically, the lodestar is merely the starting point of the calculation of a reasonable fee, and courts often multiply the lodestar by

1 a factor to account for the risk of non-payment, delay in payment, the quality of work, and the
2 novelty and difficulty of the issues involved. (*See Radar v. Thrasher*, (1962) 57 Cal.2d 244, 253;
3 *Beasley v. Wells Fargo Bank*, (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County*
4 *Planning v. Bd. of Supervisors*, (1997) 76 Cal.App.3d 24 1, 251.)

5 This case dealt with difficult legal and factual questions. (Szamet Decl. ¶68.)
6 Significantly, the risk attendant to the underlying claims in this matter was great considering
7 Defendant's defenses as discussed in detail above. (*Ibid.*) Were this case to proceed, Defendant
8 would have a strong incentive to litigate tenaciously. (*Ibid.*) There are genuine issues in dispute.
9 (*Ibid.*) Furthermore, PAGA Counsel was able to obtain close to the full value for this case.
10 (Szamet Decl. ¶69.)

11 As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades
12 of experience who diligently prepared and litigated this matter. (Szamet Decl. ¶70.) To achieve
13 the ultimate result in this case, my firm had to incur substantial risk and expense, and were
14 precluded from taking other fee generating employment for 29.0 hours of attorney time. (Szamet
15 Decl. ¶71.) This matter had been handled purely on a contingency fee basis and my firm has
16 advanced many thousands of dollars in costs while deferring all payment of fees, with no
17 guarantee that any of the fees incurred or costs advanced would ever be recovered, and diverting
18 significant firm resources to prosecution of this matter. (Szamet Decl. ¶72.) PAGA Counsel
19 believe this is an exceptional result that has been well received by the Aggrieved Employees.
20 (Szamet Decl. ¶73.)

21 **VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT** 22 **OF COSTS**

23 In addition to their request for fees, PAGA Counsel further request reimbursement of the
24 reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this
25 litigation, in the amount of \$1,622.88. (Szamet Decl. ¶94.) To date, PAGA Counsel has incurred
26 \$1,022.88 in costs. (Szamet Decl. ¶95.) PAGA Counsel anticipates incurring an additional
27 \$600.00 in costs to file and serve this motion, but the Settlement provides for a reimbursement of
28 litigation costs of up to \$2,000.00. (Szamet Decl. ¶96.) As such, counsel is requesting a cost

1 reimbursement of \$1,622.88. (Szamet Decl. ¶97.)

2 All of the requested costs are reasonable in amount and were necessarily incurred by
3 PAGA Counsel in prosecuting this litigation. (Szamet Decl. ¶98.); Exhibit 2 [Cost Report].)
4 Expenses in this matter to date include costs for filing fees, research, mediation, and additional
5 costs for the prosecution of this case evidenced in the costs spreadsheet attached to the
6 Declaration of Kelsey M. Szamet. All of these costs have been incurred in the course of this
7 litigation, and all costs advanced have already been paid by PAGA Counsel, with the exception
8 of the anticipated cost of filing the present motion. (Szamet Decl. ¶99.)

9 Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses
10 advanced and/or incurred is appropriate and justified as part of the overall settlement and the
11 Court should approve the request for reimbursement in the amount of \$1,622.88. (Szamet Decl.
12 ¶100.)

13 **VIII. ENHANCEMENT TO PLAINTIFF**

14 The Settlement calls for an enhancement payment of \$5,000.00 to the named Plaintiff, to
15 be paid from the Gross Settlement Amount. (Szamet Decl. ¶101; Ex. 1 at ¶3.2.1.) Incentive
16 awards “are intended to compensate class representatives for work done on behalf of the class, to
17 make up for financial or reputational risk undertaken in bringing the action, and sometimes, to
18 recognize their willingness to act as a private attorney general.” (*Rodriguez v. West Publishing*
19 *Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. “[I]t is established that named plaintiffs are eligible
20 for reasonable incentive payments to compensate them for the expense or risk they have incurred
21 in conferring a benefit on other members of the class.” (*Munoz v. BCI Coca-Cola Bottling Co. of*
22 *Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services*
23 *LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938,
24 977)).

25 Here, the enhancement takes into consideration the time, effort, and expense incurred by
26 Plaintiff in coming forward to litigate this matter on behalf of the Aggrieved Employees. The
27 time spent by Kassandra Diaz includes identifying competent counsel, providing information to
28 PAGA Counsel regarding Plaintiff’s relevant employment experiences, compiling documents,

1 meeting with PAGA Counsel frequently to discuss the status of the case and the theories of
2 liability, and reviewing settlement documents. (Szamet Decl. ¶102.)

3 PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl.
4 ¶103.) The enhancement takes into consideration the time, effort, risks, and expense incurred by
5 Plaintiff in coming forward to litigate this matter on behalf of the Aggrieved Employees.
6 (Szamet Decl. ¶104.) Accordingly, Plaintiff should be awarded the agreed-upon enhancement of
7 \$5,000.00.

8 **IX. CONCLUSION**

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

13
14 DATED: August 19, 2024

KINGSLEY SZAMET & LY

15
16 By: _____

Kelsey M. Szamet

Attorneys for Plaintiff KASSANDRA DIAZ and all
17 Aggrieved Employees
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(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 19, 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:

Jose-Manuel A. De Castro
jmdecastro@decastrolawgroup.com
DeCastro Law Group, A Professional Corporation
7590 N. Glenoaks Blvd., Suite 201
Los Angeles, CA 91504

[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 19, 2024, at Encino, California.



Michelle Tanzer



Make a Reservation

KASSANDRA DIAZ vs ASCEND HEALTHCARE, LLC, et al.
Case Number: 24STCV13760 Case Type: Civil Unlimited Category: Other Employment Complaint Case
Date Filed: 2024-06-03 Location: Stanley Mosk Courthouse - Department 40

Reservation

Case Name: KASSANDRA DIAZ vs ASCEND HEALTHCARE, LLC, et al.	Case Number: 24STCV13760
Type: Motion re: (Motion for Approval of Representative Action Settlement)	Status: RESERVED
Filing Party: Kassandra Diaz (Plaintiff)	Location: Stanley Mosk Courthouse - Department 40
Date/Time: 09/24/2024 8:30 AM	Number of Motions: 1
Reservation ID: 316197220348	Confirmation Code: CR-FDV3ONPVXSVQQVTTY

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