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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ORANGE

ALEJANDRO ESTRADA URENO, an
individual, on behalf of himself, and on behalf
of all persons similarly situated,

Plaintiff,

v.

DWWH, INC. dba WEIR CANYON HONDA,
a California corporation; and DOES 1-50,
Inclusive,

Defendants.

Case No. 30-2023-01316346-CU-OE-CXC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION TO APPROVE PAGA
SETTLEMENT**

Hearing Date: October 18, 2024
Hearing Time: 9:00 A.M.

Judge: Hon. William D. Claster
Dept.: CX104

Reservation ID: 74355182

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Alejandro Estrada Ureno (“Plaintiff”) seeks approval of the Stipulation of Settlement
4 of PAGA Claims and Release of PAGA Claims (“Agreement”)¹, which if approved, would provide
5 valuable monetary relief for 125 “Aggrieved Employees,” defined as all persons currently or formerly
6 employed by Defendants DWWH, Inc. dba Weir Canyon Honda and DWWA, Inc. dba Weir Canyon
7 Acura (“Defendants”) as non-exempt, hourly-paid employees as well as those individuals who fall
8 under the inside-salesperson exemptions in the State of California during the period between January
9 20, 2022 through March 15, 2024 (“PAGA Period”). Agreement at §§ I(B); I(P); III(A)(2). This is
10 only a settlement of the PAGA claim for civil penalties and is not a class settlement and does not
11 release the individual wage claims, if any, of the affected employees other than Plaintiff’s himself.
12 Cal. Lab. Code § 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A.*
13 *v. Superior Court*, 8 Cal. 5th 175, 182 (2019) (unpaid wages are not recoverable under PAGA).

14 If approved, the Aggrieved Employees and the California Labor Workforce and Development
15 Agency (“LWDA”) will share in a Gross Settlement Amount of One Hundred and Thirty Thousand
16 Dollars and Zero Cents (\$130,000.00). Agreement at § I(J). After deducting any Court-approved
17 PAGA Counsel Award, Service Awards, and the Claims Administration Expenses, the PAGA
18 Payment shall be distributed, 75% to the LWDA and 25% to the Aggrieved Employees. Agreement
19 at § I(L).

20 An objective evaluation of the proposed Settlement confirms that the relief negotiated on
21 behalf of the Aggrieved Employees and the LWDA is fair and reasonable. The Settlement is a product
22 of informed, adversarial, and non-collusive and mediated negotiations between experienced counsel.
23 As discussed below, the proposed Settlement satisfies all criteria for PAGA settlement approval.
24 Accordingly, Plaintiff and PAGA Counsel respectfully request this Court grant approval of the
25 Agreement. JCL Dec., at ¶ 10.

26 ///

27 _____
28 ¹ The Agreement is attached as Ex. “1” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to
the Agreement incorporate by this reference a citation to the JCL Dec., ¶ 3. Further, unless indicated otherwise, capitalized
terms used herein have the same meaning as those defined by the Agreement.

II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Exhaustion of Administrative Remedies Under PAGA

On January 20, 2023, Plaintiff Ureno, on behalf of himself and on behalf of other “Aggrieved Employees,” served Defendant DWWH, Inc. and the LWDA with a Notice of Violations (“PAGA Notice”) and draft complaint memorializing claims against Defendants for alleged violations of the California Labor Code, including causes of action for unfair competition in violation of Business & Professions Code sections 17200, *et seq.*; failure to pay minimum wages in violation of Labor Code sections 1194, 1197 and 1197.1; failure to pay overtime wages in violation of Labor Code sections 510; failure to provide required meal periods in violation of Labor Code sections 226.7 and 512; failure to provide required rest periods in violation of Labor Code sections 226.7 and 512; failure to provide accurate itemized wage statements in violation of Labor Code section 226; failure to provide wages when due in violation of Labor Code sections 201, 202, and 203; and failure to reimburse employees for required expenses in violation of Labor Code section 2802 (LWDA Case Number LWDA-CM-930537-23). JCL Dec., at ¶¶ 4-5, 11.

On March 19, 2024, Plaintiff served Defendant DWWH, Inc., Defendant DWWA, Inc. and the LWDA with an amended PAGA Notice identifying DWWH Inc. as a DOE Defendant. Following Plaintiff's submission of both the original and amended PAGA Notices, the 65-day “waiting period” on Plaintiff's right to file a civil action under PAGA, *see* Cal. Lab. Code § 2699.3(a)(2)(A), lapsed without the LWDA notifying Plaintiff that they intended to investigate the claims in the PAGA Notices. To date, the LWDA still has not advised Plaintiff of any intent to take action with respect to the claims in the respective PAGA Notices. JCL Dec., at ¶ 12.

B. Plaintiff's Civil Action Against Defendants

On March 30, 2023, Plaintiff Ureno filed a PAGA and class action complaint against Defendant DWWH, Inc. in the Superior Court for Orange, Case Number 30-2023-01316346 (the “Ureno Action”). The complaint alleged nine causes of action for (1) Unfair Competition in Violation of Cal. Bus. & Prof Code §§ 17200 *et seq.*; (2) Failure to Pay Minimum Wages in Violation of Cal. Labor Code §§ 1194, 1197 and 1197.1; (3) Failure to Pay Overtime Wages in Violation of Cal. Labor Code § 510; (4) Failure to Provide Required Meal Periods in Violation of Cal. Labor Code §§ 226.7

1 and 512; (5) Failure to Provide Required Rest Periods in Violation of Cal. Labor Code §§ 226.37 and
2 512; (6) Failure to Provide Accurate Itemized Wage Statements in Violation of Cal. Labor Code §
3 226; (7) Failure to Provide Wages When Due in Violation of Cal. Lab. Code §§ 201-203; (8) Failure
4 to Reimburse Employees for Required Expenses in Violation of Cal. Labor Code § 2802; and (9)
5 Violation of the Private Attorneys General Act. Plaintiff’s Counsel subsequently learned of the
6 existence of an arbitration agreement by and between the Parties that purportedly bars Plaintiff’s
7 proposed class action claims. Accordingly, on May 2, 2023, Plaintiff dismissed the class and
8 individual claims and filed a First Amended Complaint containing a single cause of action for
9 Violation of the Private Attorneys General Act. JCL Dec., ¶ 13.

10 On January 24, 2024, the Parties attended a full-day mediation with experienced wage and
11 hour class and PAGA action mediator, Gig Kyriacou, Esq. In advance of the mediation, Defendants
12 provided Plaintiff with sufficient information to properly evaluate Defendants’ liability exposure for
13 civil penalties to the Aggrieved Employees. The data and documents Defendants produced included,
14 but was not limited to, the total number Aggrieved Employees and pay periods, written wage and hour
15 policies, employee handbooks, and a sample of all time and payroll records for the Aggrieved
16 Employees. JCL Dec., ¶ 14.

17 At the conclusion of the mediation, and with the assistance of the mediator, the Parties reached
18 a settlement. The Parties subsequently executed a binding and enforceable Memorandum of
19 Understanding (“MOU”). After reaching an agreement in the principle, the Parties drafted and
20 negotiated a long-form Settlement which is the subject of the instant motion. The Settlement was
21 negotiated in light of all known facts and circumstances and the uncertainty associated with litigation
22 – including the risk of Plaintiff not being able to maintain representative claims, the difficulty of
23 proving Plaintiff’s claims in a manageable trial, the merits of Defendants’ potential defenses, and the
24 significant delay and potential appellate issues inherent to litigation – and was reached after extensive
25 arm’s length negotiations, with the assistance of mediator. JCL Dec., at ¶ 15.

26 On March 29, 2024, Plaintiff amended his complaint to add a Doe Defendant: Doe 1, as
27 DWWA, Inc. dba Weir Canyon Acura. JCL Dec., at ¶ 16.
28

1 The Settlement is intended to fully and finally resolve the Released PAGA Claims asserted by
2 Plaintiff on behalf of the Aggrieved Employees and State of California. This is only a settlement of
3 the PAGA claims for civil penalties and is not a class settlement and does not release the individual
4 claims, if any, of the Aggrieved Employees other than that of Plaintiff. This Settlement does not release
5 any claim that is not a PAGA claim.² Nor does this Settlement waive Defendants' right to assert *res*
6 *judicata* or other available defense to any asserted claim or lawsuit. JCL Dec., at ¶ 17.

7 Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of the
8 Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant motion
9 for settlement approval as set forth in the accompanying proof of service. Additionally, Plaintiff will
10 submit to the LWDA a copy of the Court's judgment and order approving the Settlement Agreement
11 within ten (10) days after entry of judgment or order. JCL Dec., at ¶¶ 6, 18.

12 **III. TERMS OF THE PAGA SETTLEMENT**

13 **A. The Gross Settlement Amount**

14 The PAGA Settlement is subject to Court approval consistent with Labor Code § 2699(1)(2).
15 The Settlement Agreement negotiated by the Parties provides for a "Gross Settlement Amount"
16 payment in the amount of One Hundred and Thirty Thousand Dollars and Zero Cents (\$130,000.00)
17 to resolve the Released PAGA claims. From the Gross Settlement Amount, there is a deduction of
18 attorneys' fees in the amount of \$43,333.33 (which is one-third of the Gross Settlement Amount),
19 reimbursement of incurred attorneys' expenses in an amount not to exceed \$20,000.00 (collectively,
20 "PAGA Counsel Award"), an Enhancement Payment of not more than \$10,000.00 to Plaintiff, and
21 payment of Claims Administration Costs to the Claims Administrator in an amount not to exceed
22 \$4,900.00. Agreement at §§ III(J)(8)-(9). After these deductions, the amount remaining is the "PAGA
23 Payment," which is estimated to be \$51,766.67. Agreement at § I(SL).

24 Of the "PAGA Payment," seventy-five percent (75%) shall be paid to the LWDA and the
25 remaining twenty-five percent (25%) shall be paid to the Aggrieved Employees as Individual PAGA
26 Payments. § I(L). This allocation is required by Labor Code § 2699 as explained by *ZB, N.A. v.*
27

28 ² As explained by the Supreme Court in *ZB, N.A.*, 8 Cal. 5th 175 at 196: "Nonparty employees are bound by the judgment in an action under the PAGA, but only with respect to recovery of civil penalties."

1 *Superior Court*, 8 Cal.5th 175 (2019).

2 **B. Allocation of Individual Aggrieved Employee Payments**

3 The Individual Aggrieved Employee Payments to the Aggrieved Employees shall be based on
4 the number of Pay Periods each Aggrieved Employee worked during the PAGA Period as a percentage
5 of the total Pay Periods worked by all Aggrieved Employees during the PAGA Period. Agreement at
6 § III(J)(1).

7 At the time of mediation, Defendants estimated that there were approximately 125 Aggrieved
8 Employees who worked approximately 3,436 Pay Periods during the PAGA Period based on company
9 records. Should the number of Pay Periods during the PAGA Period increase by more than 10% of
10 what was represented at the mediation, Defendants shall, at their option, either (a) increase the GSA
11 proportionally by the pay periods in excess of the 10%; or (b) cap the PAGA Release Period as of the
12 date the number of pay periods reaches but does not exceed 10%. Agreement at § III(A)(2).

13 **C. Funding and Distribution**

14 Provided that an order approving this Settlement is entered by the Court, Defendants shall fund
15 the Gross Settlement Amount within ten (10) days of the Effective Date. The Effective Date means
16 the date upon which the following has occurred: (i) the long form Settlement Agreement has been
17 executed by Plaintiff, Defendants, PAGA Counsel and Defendants' Counsel; (ii) Notice of the
18 Settlement has been sent to the LWDA; (iii) the Court has given approval to the Settlement; (v) the
19 Court has entered the Court's Final Order and Judgment; and (vi) the later of the following events: (A)
20 when the period for filing any appeal, writ or other appellate proceeding opposing the Settlement has
21 elapsed without any appeal, writ or other appellate proceeding having been filed; (B) when any appeal,
22 writ or other appellate proceeding opposing the Settlement has been dismissed finally and conclusively
23 with no right to pursue further remedies or relief; or (C) when any appeal, writ or other appellate
24 proceeding has upheld the Court's Final Order and Judgment with no right to pursue further remedies
25 or relief. Agreement at § I(F); I(I).

26 Within fifteen (15) calendar days of the date on which the Gross Settlement Amount is funded
27 in full by Defendants, in accordance with the terms of the Settlement Agreement (the "Funding Date"),
28

1 the Settlement Administrator will transmit the LWDA Payment to the LWDA as one lump sum
2 payment. Agreement at § III(J)(7).

3 No later than fifteen (15) calendar days after the Funding Date, the Settlement Administrator
4 will mail the Individual Aggrieved Employee Payments to the Aggrieved Employees by regular First-
5 Class U.S. Mail to the Aggrieved Employees' last known mailing address. § III(J)(4). Settlement
6 checks issued to Aggrieved Employees will expire one hundred eighty (180) days from the date they
7 are issued by the Settlement Administrator. Agreement at § III(J)(6). If the check remains uncashed
8 by the expiration of the 180-day period, the Settlement Administrator shall cause the aggregate sum
9 represented by those uncashed checks to be sent to the California State Controller's Office in the name
10 of the Aggrieved Employee. Agreement at § III(J)(6). The Individual Aggrieved Employee Payments
11 are 100% penalties and interest and shall be reported using IRS Form 1099s. Agreement § III(J)(2).

12 **D. Release of Claims**

13 As of the Funding Date, in exchange for the consideration set forth in this Agreement, the
14 Plaintiff, the LWDA and the State of California release the Released Parties from the Released PAGA
15 Claims for the PAGA Period. The Released Parties are defined as Defendants and all of their past,
16 present, and future respective subsidiaries, dba's, affiliates, parents, predecessors, successors,
17 investors, and their current and former employees, managing agents, servants, staffing agencies, PEOs,
18 consultants, agents, directors, officers, members, independent contractors, representatives, insurers,
19 reinsurers, and attorneys. The Released PAGA Claims include any allegations brought in the operative
20 Complaint in the Ureno Action, as well as claims included in the PAGA Notice, or any amended
21 Complaint, including a release from the State of California (to the extent Plaintiff is permitted to
22 provide such a release for the State of California for the PAGA Period) of all PAGA claims alleged or
23 that could have reasonably been alleged in the Ureno Action (which as defined includes Plaintiff's
24 PAGA Notice of Claims to the LWDA) based on the facts alleged in the Ureno Action (which as
25 defined includes Plaintiff's PAGA Notice of Claims to the LWDA) which occurred during the PAGA
26 Period. Agreement at §§ I(W) (X); III(B).

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IV. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT

Labor Code § 2699(l) requires that the Court “shall review and approve any settlement of any civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court.” Further, the Court in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 77 stated that “the trial court must review and approve a PAGA settlement (§ 2699, subd.(l)(2)), and the Supreme Court has in dictum referred to this review as a safeguard.” (Citing *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 88; internal quotations omitted.) “The Supreme Court has also observed that trial court approval ensures that any negotiated resolution is fair to those affected,” leading the Court in *Moniz* to determine that “adoption of a standard of review for settlements that prevents fraud, collusion or unfairness, and protects the interests of the public and the LWDA in the enforcement of state labor laws is warranted.” (*Moniz, supra*, 72 Cal.App.5th at 77; citing *Williams v. Superior Court* (2017) 3 Cal.5th 531, 549; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800-1801; internal citations omitted.) In other words, “[i]n review and approval of a proposed settlement under section 2699, subd. (l)(2), a trial court thus must scrutinize whether, in resolving the action, a PAGA plaintiff has adequately represented the state’s interests, and hence the public interest.” (*Moniz, supra*, 72 Cal.App.5th at 88.) Consequently, the Parties respectfully ask the Court to review and approve the Settlement of the PAGA claims and the amount to be paid as part of the proposed Settlement.

A. The Gross Settlement Amount is Fair and Reasonable

The Gross Settlement Amount of \$130,000.00 is fair and reasonable and, therefore, should be approved. JCL Dec., ¶ 19. Here, *without stacking* the PAGA penalties, Defendants’ liability exposure is estimated at approximately \$583,885.00 in PAGA penalties. JCL Dec., ¶ 20. Plaintiff’s expert consultant estimated Defendants’ exposure as follows:

Claim	Penalty Amount	Number of Pay Periods w/ Violation	Violation Rate	Total Penalties
<i>Regular Rate of Pay</i>	\$50	766	22.3%	\$38,320.00
<i>Meal Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	2,156	62.8%	\$107,812.50
<i>Rest Period Violations</i>	\$50	2,570	74.8%	\$128,512.50

Cal. Labor Code §§ 226.7 and 512				
<i>Unpaid Wages</i> Cal. Labor Code §§ 201, 202, 203, 204, 510, 1194, 1197, 1997.1 1198 and 558	\$50	1,718	50%	\$85,900.00
<i>Business Reimbursement Violations</i> Cal. Labor Code § 2802	\$50	1,718	50%	\$85,900.00
<i>Wage Statement Violations</i> Cal. Labor Code § 226(a)	\$50	2,748.8	80%	\$137,440.0 0

JCL Dec., ¶ 21.

**i. Estimated Penalties for Defendants’ Alleged Miscalculation of Regular
Rate of Pay**

Plaintiff alleges that Defendants failed to include non-discretionary incentive compensation when calculating the regular rate of pay for purposes of overtime and redeemed sick pay. Specifically, Plaintiff’s expert found additional compensation identified as “11 Other,” “25 Bonus,” “6 Commission,” “7 Bonus,” “15 EOM Bonuses (Monthly)” and “9 Special Pay (Monthly)” that were not properly included in the regular rate of pay calculation for purposes of calculating and paying overtime and sick pay. Defendants contend that not all of the additional compensation listed can be properly categorized as non-discretionary. Accordingly, Plaintiff applied a 20% discount to the projected penalties for this claim. After applying a 20% discount, Plaintiff estimates Defendant’s exposure for this claim to be \$38,320. JCL Dec., ¶ 22.

**ii. Estimated Penalties for Defendant’s Alleged Labor Code Section 226
Violations**

Plaintiff alleges that the wage statements furnished by Defendants to the Aggrieved Employees were facially non-compliant with Labor Code Section 226(a) because they failed to include the applicable hourly rates in effect with respect to compensation identified as “Regular Pay” and “Overtime”. Defendants contend that a tailored calculator was prepared for applicable Aggrieved Employees to ensure that all calculations for “Regular Pay” were performed correctly and that these calculators were attached to all applicable Aggrieved Employees paystubs thereby nullifying any

1 argument of facial non-compliance. Accordingly, Plaintiff applied a 20% discount to projected
2 penalties for this claim. After applying a 20% discount, Plaintiff estimates Defendants' exposure for
3 this claim to be \$137,440. This number was calculated by multiplying an 80% violation rate of the
4 number of total pay periods by a violation rate of \$50. JCL Dec., ¶ 23.

5 **iii. Estimated Penalties for Defendant's Alleged Meal Period Violations**

6 Plaintiff alleges that Defendants failed to provide meal periods, in violation of Labor Code
7 512. Specifically, Plaintiff alleges that as a result of understaffing, he and the Aggrieved Employees
8 often had to skip meal breaks or take these breaks after their fifth hour of work. Moreover, Plaintiff
9 alleges that his breaks and the breaks of other Aggrieved Employees were cut short or interrupted in
10 order to assist Defendants' customers. Plaintiff also alleges that second meal breaks were also never
11 offered when he or other Aggrieved Employees worked for more than 10 hours. Based on the
12 timekeeping data provided by Defendants, Plaintiff's expert estimated that over 83% of pay periods
13 included at least one unique meal break violation. Defendants contend that the Aggrieved Employees
14 had substantial control over their schedules, and to the extent non-compliant meal breaks were
15 recorded, this encompasses scenarios in which Aggrieved Employees opted to delay, shorten or skip
16 their own meal period for a variety of reasons, including to earn additional commission. To account
17 for this possibility, Plaintiff applied a 25% discount to Defendants' maximum exposure. Taking into
18 account this discount, Plaintiff estimates Defendants' exposure for this claim to be \$107,812.50. JCL
19 Dec., ¶ 24. This number was calculated by multiplying a 62.8% violation rate of the number of total
20 pay periods by a violation rate of \$50. The \$50 penalty rate was used for a number of reasons in this
21 instance. First, Defendants argued that increased civil penalties for subsequent violations do not
22 apply unless the plaintiff can present evidence that the Labor Commission or a court notified the
23 employer that it was in violation of the Labor Code. *Amaral v. Cintas Corp. No. 2* (2008) 163
24 Cal.App.4th 1157, 1209 ["Until the employer has been notified that it is violating a Labor Code
25 provision ... the employer cannot be presumed to be aware that its continuing underpayment of
26 employees is a 'violation' subject to penalties."].) Separately, Defendants also argued that courts
27 have considerable discretion to reduce the penalty awards under PAGA. *See, e.g. Carrington v.*
28 *Starbucks Corp.* (2018) 30 Cal.App.5th 504 (reducing the maximum PAGA penalty amount by 90%,

1 at \$5 per pay period). Accordingly, it is unlikely that Plaintiff would recover full penalty amounts
2 even if they prevailed in establishing the underlying Labor Code violations. Pursuant to California
3 Labor Code section 558(a)(1), an employer is subject to a penalty of \$50 for violations of a Labor
4 Code section regulating hours and days of work, including meal period and rest period violations.
5 Thus, because section 558(a)(1) specifically provides for a civil penalty, Plaintiff used a \$50 penalty
6 per violation for the meal and rest break claims. JCL Dec., ¶ 25.

7 **iv. Estimated Penalties for Defendant's Alleged Rest Period Violations**

8 Plaintiff further alleges that Defendants failed to provide rest breaks. Specifically, Plaintiff
9 alleges that Defendants never informed Aggrieved Employees of their right to take rests breaks, that
10 Defendants' rest period policy improperly stated that employees could waive rest breaks, and that
11 neither he nor the Aggrieved Employees took rest breaks. Defendants argue that its rest period policy
12 is fully compliant with California law, that employees were not asked to waive rest breaks, and that
13 Plaintiff's rest break claim would have mainly relied on the testimony of Aggrieved Employees,
14 making it a riskier claim. JCL Dec., ¶ 26. Establishing liability likely would have entailed competing
15 testimony stating either rest breaks were taken, or rest breaks were voluntarily waived. *See, e.g.,*
16 *Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the
17 competing testimony before the Court, plaintiff's evidence that defendant may have an illegal, written
18 rest break policy is insufficient for this Court to find that common issues predominate."); *Villa v.*
19 *United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed,
20 Plaintiff's own evidence confirms that the written policy does not generate uniform practices."). JCL
21 Dec., ¶ 27. In light of the defenses raised by Defendants, Plaintiff applied a 25% discount to
22 Defendants' maximum exposure. Taking into account this discount, Plaintiff estimates Defendants'
23 exposure for this claim to be \$128,512. This number was calculated by multiplying a 75% violation
24 rate of the number of total pay periods by a violation rate of \$50. A \$50 multiplier was used for the
25 same reasons as outlined above. JCL Dec., ¶ 28.

26 **v. Estimated Liability for Defendants' Violation of Labor Code §2802**

27 Plaintiff alleged that Defendants required Plaintiff and the Aggrieved Employees to use their
28 personal cell phones and personal vehicles for Defendants' benefit. Specifically, Plaintiff and

1 Aggrieved Employees were required to use their personal cell phones to communicate with
2 Defendants' supervisors and to respond to customer phone calls and emails, and Defendants did not
3 reimburse or otherwise compensate them for these expenses incurred. Defendants contend that
4 Plaintiff and Aggrieved Employees were not required to use their personal cell phones for work-related
5 purposes. In addition, post-Plaintiff's employment, Defendants contend that following upgrades
6 requiring a multi-factor authentication program to sign on to work computers with cell phones,
7 employees were provided reasonable expense reimbursements. Plaintiff estimated that Defendants'
8 total exposure for this claim was approximately \$85,900 in penalties. This was calculated by
9 multiplying a 50% violation rate by the total number of pay periods by a violation rate of \$50 per pay
10 period. Plaintiff used a 50% violation rate for this claim to reflect its belief that Aggrieved Employees
11 incurred cell phone expenses approximately once per month. JCL Dec., ¶ 29.

12 **vi. Estimated Penalties for Unpaid Wages**

13 Plaintiff alleges that Defendants failed to pay all minimum and overtime wages when he and
14 Aggrieved Employees worked off the clock. Specifically, Plaintiff alleged that his meal periods were
15 regularly interrupted, causing him to work while clocked out for his meal period. Additionally,
16 Plaintiff would regularly be called in to work on his days off without recording his time and would
17 not be properly compensated for time delivering paperwork to clients, as well as contacting clients
18 and coworkers while off the clock. Plaintiff estimates that Defendants' total exposure for this claim
19 was approximately \$85,900 in penalties. This was calculated using a 50% violation rate multiplied by
20 a \$50 penalty. JCL Dec., ¶ 30.

21 **B. The Gross Settlement Compares Favorably to The Likely Recover**

22 In light of the above, the Gross Settlement Amount is approximately 22% of Defendants'
23 potential PAGA exposure. The Gross Settlement Amount compares favorably to the likely recovery
24 of PAGA penalties through continued litigation. JCL Dec., ¶ 31.

25 Defendants' maximum exposure to PAGA penalties is not a realistic outcome of the litigation
26 because it fails to account for the risks of continued litigation including, but not limited to, Defendants'
27 defenses. Here, Defendants argue that it can only be assessed civil penalties for actual violations of
28 the Labor Code. *See* Lab. Code § 2699(f)(2). In other words, to recover any civil penalties, Plaintiff

1 would be required to prove the underlying Labor Code violations. (*Cardenas v. McLane Foodservice,*
2 *Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) [“Given the statutory language [of PAGA],
3 a plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a
4 violation of the Labor Code by the defendant.”].) To do this, Plaintiff would need to prove each
5 Aggrieved Employee was subject to the alleged Labor Code violation. JCL Decl., ¶ 32. Thus,
6 Defendants contended that Plaintiff would be required to “prove Labor Code violations with respect
7 to each and every individual on whose behalf plaintiff seeks to recover civil penalties under PAGA.”
8 *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2, 2009).

9 Lastly, the maximum penalty figure does not consider that Courts have complete discretion to
10 “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the
11 facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,
12 arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code § 2699(e)(2)). JCL Dec., ¶ 33. In fact,
13 Courts routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g.*
14 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (reducing PAGA penalties to \$5 per
15 pay period; “Although the trial court may have disagreed with Starbucks regarding the issue of
16 liability, it clearly took the circumstances proffered by Starbucks into consideration when it imposed
17 the penalty ... only \$5 per initial violation”); *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal App 5th
18 778, 788 (2018), review granted on other grounds (noting that the trial court “exercised its discretion
19 to reduce the [PAGA] penalties to 13 percent of the full amount [requested, because] [o]n average,
20 plaintiffs were deprived of 13 percent of the 30-minute meal period”); *Fleming v. Covidien, Inc.*, 2011
21 WL 7563047, *4 (C.D. Cal. 2011) (exercising discretion to reduce the maximum amount of PAGA
22 civil penalties for plaintiffs’ section 226 claims from \$2,800,000 to \$500,000 because the employees
23 suffered no injuries as a result of the erroneous wage statements and made no complaints about the
24 errors or omissions in the wage statements, thus reducing the maximum penalty by 82%); *see also,*
25 *Gola v. University of San Francisco*, San Francisco Superior Court Case No. CGC-18-5655018,
26 Proposed Statement of Decision, dated July 21, 2020, Judge Curtis A. Karnow of San Francisco
27 Complex (concluding after a full-blown bench trial that a penalty of 15% of the maximum PAGA
28 penalties was the appropriate penalty). The gross amount obtained by PAGA Counsel is reasonable

1 in light of Defendants' arguments.

2 Given Defendants' defenses to the claimed Labor Code violations at issue, and the risks and
3 costs of continued litigation, Plaintiff and PAGA Counsel believe that the Gross Settlement Amount
4 is fair and reasonable. This settlement was negotiated by experienced counsel at arm's length. JCL
5 Dec., ¶ 34. The LWDA has been provided notice of this motion and the PAGA settlement, and the
6 decision of LWDA to accept the PAGA settlement and not oppose the motion should be given
7 considerable weight. Moreover, the LWDA is a sophisticated government entity that can assert and
8 protect its own rights. JCL Dec., ¶ 35.

9 **C. The Remaining Settlement Terms Are Fair and Reasonable**

10 Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code §
11 2699(1) does not require that a court approve any other elements of the proposed settlement. Because
12 there are no class allegations for which Plaintiff seeks approval, the approval provisions applicable to
13 class settlements under Cal. Code Civil Proc. § 382 do not apply. Accordingly, the Court only needs
14 to approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as explained
15 herein, the settlement terms for attorneys' fees and costs are reasonable.

16 **i. The Attorneys' Fees and Expenses are Fair and Reasonable**

17 PAGA Counsel seeks approval of attorneys' fees in the amount of \$43,333.33 (one-third of the
18 Gross Settlement Amount) and attorneys' expenses not to exceed \$20,000.00³ for reimbursement of
19 actually incurred litigation expenses. PAGA does not have any requirements for reviewing attorneys'
20 fees, and Plaintiff's position is that the payment of attorneys' fees and costs in this Settlement is a
21 matter of contract for a contingent representation. Nevertheless, should this Court review the
22 requested attorneys' fees, the requested fees and costs are reasonable for experienced wage and hour
23 counsel. JCL Dec., ¶ 36.

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28 ³ As detailed *infra*, at the time of filing this motion, PAGA Counsel incurred \$15,586.05 litigating this matter. Plaintiff will provide the Court with a final amount of litigation costs at the time of hearing on this motion.

1
2 **V. THE ATTORNEYS' FEES AND EXPENSES ARE FAIR AND REASONABLE**

3 **A. The Requested Attorneys' Fee is Fair and Reasonable**

4 The requested attorneys' fees of \$43,333.33 and reimbursement of attorneys' expenses of up
5 to \$20,000.00 is fair, reasonable, and justified by the result achieved. PAGA Counsel negotiated a
6 recovery of \$130,000.00, and this result justifies the requested fees equal to one third of this recovery.
7 This percentage is the standard contingent recovery percentage of one-third, and this percentage is
8 what was expressly approved by the Supreme Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480,
9 504, (2016). At the time this case was brought, the result was far from certain. Defendants' defenses
10 to the merits of the case created difficulties with proof and complex legal issues for PAGA Counsel to
11 overcome. Here, as noted above in section IV(A), several defenses asserted by Defendants presents
12 serious threats to the claims of Plaintiff and the Aggrieved Employees. While Plaintiff believes that
13 these defenses could be overcome, Defendants maintains that these defenses have merit and therefore
14 present a serious risk to recovery. The Settlement was possible because, in PAGA Counsels' eyes,
15 PAGA Counsel was able to persuade Defendants that there was an appreciable risk that Plaintiff would
16 prevail on the factual and legal issues underlying liability and overcome difficulties in proof as to
17 monetary relief. JCL Dec., ¶ 37.

18 Further, the fee award is justified by the work performed. Generally, the Ninth Circuit and
19 California Courts award multipliers between 2 to 4 times the lodestar to reward counsel for accepting
20 the contingent risks of the litigation or obtaining good results. See, e.g., *Laffitte*, 1 Cal. 5th at 506
21 (approving one-third fee award with multiplier between 2.03 and 2.13); *Pellegrino v. Robert Half*
22 *Intern., Inc.*, 182 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0 are often applied
23 and affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254 (2001)
24 (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa Capital Corp.*, 8
25 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.52 multiplier of
26 lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-third
27 of fund, which was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-
28

1 LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented a
2 multiplier of 2.76 as falling within the "majority" range for risk multipliers).

3 As detailed in PAGA Counsels' time and billing records submitted herewith, PAGA Counsels'
4 current combined loadstar is \$53,942.50. JCL Dec., ¶¶38-43; Declaration of Shani Zakay ("Zakay
5 Dec.") at ¶¶ 4-6. Thus, PAGA Counsels' fee request is equal to PAGA Counsel's loadstar with a
6 *negative* multiplier of 0.8 – well below the 2.13 multiplier approved in *Laffitte* – and well within the
7 recognized multiplier range between 2 and 4. See also *Taylor v. FedEx Freight, Inc.*, 2016 U.S. Dist.
8 LEXIS 142202 (E.D. Cal. 2016) (following *Laffitte*, approved 30% fee award with cross-check
9 lodestar multiplier of 2.26); *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, 2017 U.S. Dist.
10 LEXIS 27249 (E.D. Cal. 2017) (following *Laffitte*, approved 33% fee award with cross-check
11 lodestar multiplier of 1.7).

12 **B. PAGA Counsel Are Entitled to Reimbursement of Actual and Reasonably**
13 **Incurred Litigation Costs.**

14 Attorneys who create a common fund for the benefit of a class are entitled to payment from
15 the fund of reasonable litigation expenses and costs. Common fund fee and expense awards include
16 counsel's incurred expenses because those who benefit from their effort should share in the cost. *See*
17 *Rider v. City of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992). The appropriate analysis in
18 deciding if costs are compensable is whether the costs are of the type typically billed by attorneys to
19 paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *see also*
20 *Hartless*, 273 F.R.D. at 645-46 (common fund class action settlement where court awarded litigation
21 costs for consultants, online legal research, copying, postage, long distance charges, travel expenses,
22 filing fees, mediation fees and investigation fees). Prior to incurring costs for the filing of this motion,
23 PAGA Counsel collectively expended \$15,586.05 prosecuting this action (JCL Law Firm, APC -
24 \$7,113.42; Zakay Law Group, APLC - \$8,472.63). JCL Decl. ¶¶ 8, 44; Zakay Dec., ¶¶ 7-8. PAGA
25 Counsel's out-of-pocket expenses are the types of expenses normally charged to paying clients
26 including the following: filing fees; copying; postage; factual and legal research charges; mediation
27 fees; and expert costs, which were all incurred during, and were necessary for the successful
28 prosecution of, the litigation and, therefore, should be reimbursed. JCL Dec., ¶¶ 8, 52.

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V. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests this Court approve the PAGA Settlement as set forth in the Settlement Agreement and enter the proposed order and judgment submitted herewith.

Dated: August 6, 2024

JCL LAW FIRM, APC

By: 

Jean-Claude Lapuyade, Esq.