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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF VENTURA

RICARDO RODRIGUEZ, an individual, in his
representative capacity on behalf of the State of
California and fellow Aggrieved Employees,

Plaintiff,

v.

REAL TIME STAFFING SERVICES, LLC., a
California limited liability company;
EMPLOYBRIDGE, LLC, a California limited
liability company; and DOES 1 through 50,
Inclusive;

Defendants.

Case No. 56-2021-00559039-CU-OE-VTA

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

Hearing Date: January 22, 2024

Hearing Time: 8:30 a.m.

Judge: Hon. Judge Matthew P. Guasco
Dept.: 20

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PERTINENT FACTUAL AND PROCEDURAL BACKGROUND	2
A.	Plaintiff's Exhaustion of Administrative Remedies Under PAGA and Civil Action Against Defendants	2
III.	TERMS OF THE PAGA SETTLEMENT	3
A.	The Gross Settlement Amount	3
B.	Allocation of Individual PAGA Payments	4
C.	Funding and Distribution	4
D.	Release of Claims	5
IV.	THE COURT SHOULD APPROVE THE PAGA SETTLEMENT	5
A.	The Gross Settlement Amount is Fair and Reasonable	6
i.	Estimated Liability for Unpaid Wages	7
ii.	Estimated Penalties for Meal Period Violations	7
iii.	Estimated Penalties for Rest Period Violations	8
iv.	Estimated Liability for Unreimbursed Business Expenses	9
v.	Estimated Penalties for Defendants' Inaccurate Wage Statements	9

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1 B. The Gross Settlement Compares Favorably To The Likely Recovery10

2 C. The Remaining Settlement Terms Are Fair and Reasonable

313

4 V. THE PAGA COUNSEL FEES AND EXPENSES PAYMENTS ARE FAIR AND

5 REASONABLE

613

7 A. The Requested Attorneys’ Fee is Fair and Reasonable

813

9 B. PAGA Counsel is Entitled to Reimbursement of Actual and Reasonably Incurred Litigation

10 Costs

1015

11 VI. CONCLUSION

1215

28 ///

TABLE OF AUTHORITIES

CASES

1		
2	<i>Amaral v. Cintas Corp. No. 2</i>	
3	(2008) 163 Cal.App.4th 1157, 1209	8
4	<i>Bernstein v. Virgin America, Inc.</i>	
5	(2021) 3 F.4th 1127, 1144	6, 8
6	<i>Boyd v. Bank of America,</i>	
7	2014 WL 6473804, at *11 (C.D. Cal. 2014).....	14
8	<i>Cal-Air Conditioning v. Auburn Union School Dist.,</i>	
9	21 Cal.App.4th 655, 668 (1993)	12
10	<i>Cardenas v. McLane Foodservice, Inc.,</i>	
11	2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011).....	10
12	<i>Carrington v. Starbucks Corp.</i>	
13	(2018) 30 Cal.App.5th 504	8, 11
14	<i>County of Tulare v. Campbell,</i>	
15	50 Cal. App. 4th 847, 853 (1996)	12
16	<i>Downtown Palo Alto v. City Council,</i>	
17	180 Cal.App.3d 384, 395 (1986).....	12
18	<i>Dunk v. Ford Motor Co.,</i>	
19	(1996) 48 Cal. App.4 th 1794, 1800-1801.....	6
20	<i>Emmons v. Quest Diagnostics Clinical Labs., Inc.,</i>	
21	2017 U.S. Dist. LEXIS 27249 (E.D. Cal. 2017).....	14-15
22	<i>Fleming v. Covidien, Inc.,</i>	
23	2011 WL 7563047, *4 (C.D. Cal. 2011)	11-12
24	<i>Gola v. University of San Francisco,</i>	
25	San Francisco Superior Court Case No. CGC-18-5655018.....	12
26	<i>Harris v. Marhoefer,</i>	
27	24 F.3d 16, 19 (9th Cir. 1994).....	15
28	<i>Hartless,</i>	
	273 F.R.D. at 645-46	15
	<i>Hernandez v. BCI Coca-Cola Bottling Co.,</i>	
	2012 WL 12272348, at *8 (C.D. Cal. Apr. 12, 2012), aff'd, 554 F. App'x 661 (9 th Cir. 2014)	
		12
	<i>Hibbs-Rines v. Seagate Technologies,</i>	
	2009 WL 513496, *4 (N.D. Cal. Mar. 2, 2009).....	11
	<i>Hopkins v. Stryker Sales Corp.,</i>	
	No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013).....	14
	<i>Iskanian v. CLS Transportation,</i>	
	59 Cal. 4th 348, 381 (2014).....	1
	<i>Kaanaana v. Barrett Bus. Servs., Inc.,</i>	
	29 Cal App 5th 778, 788 (2018).....	11
	<i>Kim v. Reins International California, Inc.</i>	
	(2020) 9 Cal.5th 73, 88.....	5
	<i>Laffitte v. Robert Half Int'l Inc.,</i>	
	1 Cal.5th 480, 504, 506 (2016).....	13-14
	<i>Moniz v. Adecco USA, Inc. (2021)</i>	
	72 Cal.App.5th 56, 77	5-6
	<i>Naranjo v. Spectrum Security Services, Inc.</i>	
	(2023) 88 Cal.App.5th 927)	10

1	<i>Ordonez v. Radio Shack, Inc.</i>	
2	(C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11.....	9
3	<i>Pellegrino v. Robert Half Intern., Inc.</i> ,	
4	182 Cal.App.4th 278 (2010).....	14
5	<i>Rider v. City of San Diego</i> ,	
6	11 Cal. App. 4th 1410, 1423 n.6 (1992).....	15
7	<i>Taylor v. FedEx Freight, Inc.</i> ,	
8	2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016)	14
9	<i>Vandervort v. Balboa Capital Corp.</i> ,	
10	8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014).....	14
11	<i>Viking River Cruises v. Moriana</i> ,	
12	(2022) 142 S.Ct. 1906.....	10, 12
13	<i>Villa v. United Site Servs. of California, Inc.</i>	
14	(N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8	9
15	<i>Wesson v. Staples the Off. Superstore</i> ,	
16	2021 WL 4099059, *11 (Cal. Ct. App. Sept. 9, 2021)	11-12
17	<i>Wershba v. Apple Computer, Inc.</i> ,	
18	91 Cal.App.4th 224, 254 (2001)	14
19	<i>Williams v. Superior Court</i> ,	
20	2017 3 Cal.5 th 531, 549	5
21	<i>Zayerz v. Kiewit Infrastructure West</i> ,	
22	2018 U.S. Dist. LEXIS 14918, *14 (C.D. Cal. January 18, 2018).....	10
23	<i>ZB, N.A. v. Superior Court</i> ,	
24	8 Cal. 5th 175, 182 (2019).....	1, 3-4

RULES, CODES, AND STATUTES

16	<i>Cal. Civ. Proc. Code</i> § 382.....	13
17	<i>Cal. Lab. Code</i> § 201.....	6
18	<i>Cal. Lab. Code</i> § 202.....	6
19	<i>Cal. Lab. Code</i> § 203.....	6
20	<i>Cal. Lab. Code</i> § 226.....	7, 12
21	<i>Cal. Lab. Code</i> § 226.2.....	7
22	<i>Cal. Lab. Code</i> § 226.7.....	6
23	<i>Cal. Lab. Code</i> § 512.....	6
24	<i>Cal. Lab. Code</i> § 558 <i>et seq.</i>	6, 8
25	<i>Cal. Lab. Code</i> § 1194.....	6
26	<i>Cal. Lab. Code</i> § 1197.....	6
27	<i>Cal. Lab. Code</i> § 1997.1.....	6
28	<i>Cal. Lab. Code</i> § 1198.....	6
	<i>Cal. Lab. Code</i> § 2698 <i>et seq.</i>	2
	<i>Cal. Lab. Code</i> § 2699 <i>et seq.</i>	1-6, 10, 11, 13
	<i>Cal. Lab. Code</i> § 2802 <i>et seq.</i>	7, 9

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Ricardo Rodriguez (“Plaintiff”) seeks approval of the PAGA Settlement Agreement
4 (“Agreement”)¹, which if approved, would provide valuable monetary relief for 161 “Aggrieved
5 Employees,” defined as current and former non-exempt employees of Real Time Staffing Services,
6 LLC who were placed on assignment at the Oxnard facility operated by Kenco Logistics Services,
7 LLC (“Kenco Oxnard Facility”) (“Aggrieved Employees”) between August 6, 2020, through
8 September 22, 2023 (“PAGA Period”). Agreement at §§ 1.4, 1.22. This is only a settlement of the
9 PAGA claim for civil penalties and is not a class settlement and does not release the individual
10 wage claims, if any, of the affected employees other than Plaintiff himself. Cal. Lab. Code §
11 2699(g)(1); *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior*
12 *Court*, 8 Cal. 5th 175, 182 (2019) (unpaid wages are not recoverable under PAGA).

13 If approved, the Aggrieved Employees and the California Labor Workforce and
14 Development Agency (“LWDA”) will share a payment for PAGA Penalties of Forty Six Thousand,
15 One Hundred Thirty-Three Dollars and Thirty-Four Cents (\$46,133.34). Agreement at § 1.25. After
16 deducting any Court-approved PAGA Counsel Fees and Expenses Payment and the Administration
17 Expenses Payment, the PAGA Penalties shall be distributed, 75% to the LWDA and 25% to the
18 Aggrieved Employees. Agreement at § 1.25.

19 An objective evaluation of the proposed settlement confirms that the relief negotiated on
20 behalf of the Aggrieved Employees and the LWDA is fair, reasonable, and valuable. The
21 Settlement is a product of informed, adversarial, and non-collusive and mediated negotiations
22 between experienced counsel. As discussed below, the proposed Settlement satisfies all criteria for
23 PAGA settlement approval. Accordingly, Plaintiff and PAGA Counsel respectfully request this
24 Court grant approval of the Agreement. Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 9.

25 ///

26 ///

27 ¹ The Agreement is attached as Ex “1” to the Declaration of Jean-Claude Lapuyade (“JCL Dec.”) at ¶ 3. All citations to
28 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 And Civil Action Against Defendants

On August 6, 2021, Plaintiff on behalf of himself and on behalf of other Aggrieved Employees served Defendants 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 failure to provide compliant meal and rest periods; failure to accurately compensate for missed meal and rest periods; failure to pay all minimum, regular, and overtime wages; failure to reimburse for required business expenses; failure to maintain true and accurate records; failure to provide accurate itemized wage statements; and failure to timely pay wages due during, and upon termination of employment. (LWDA Case No. LWDA-CM-840577-21). JCL Dec., at ¶ 10.

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 Notice. To date, the LWDA still has not advised Plaintiff of any intent to take action with respect to the claims in the PAGA Notice. JCL Dec., at ¶ 11.

On October 15, 2021, Plaintiff filed a representative action complaint against Defendants in the Superior Court for Ventura. Case Number 56-2021-00559039-CU-OE-VTA. The complaint alleged a single cause of action for violation of the Private Attorneys General Act at Cal. Lab. Code §§2698, *et seq.* JCL Dec., ¶ 12.

On November 29, 2021, Plaintiff filed a First Amended Complaint to limiting the scope of the Aggrieved Employee definition to those who performed work at a Procter & Gamble facility in California. JCL Dec., ¶ 13.

On July 24, 2023, the Parties participated in an all-day mediation presided over by Steven G. Mehta, Esq., an experienced mediator of wage and hour representative actions, which led to this Settlement. In advance of the with the mediation, Defendants provided Plaintiff with sufficient information to properly evaluate Defendants' potential liability exposure. Among the data and documents Defendants produced included, but was not limited to, the total number of Aggrieved

1 Employees, pay periods, employee handbooks, and over 221,000 unique cells of time and payroll
2 data. JCL Dec., ¶ 14.

3 The Parties subsequently executed a binding and enforceable Memorandum of
4 Understanding (“MOU”). After reaching an agreement in the principle, the Parties drafted and
5 negotiated a long-form settlement which is the subject of the instant motion. The Settlement was
6 negotiated in light of all known facts and circumstances and the uncertainty associated with litigation
7 – including the risk of Plaintiff not being able to maintain representative claims and establishing
8 manageability, the difficulty of proving Plaintiff’s claims in a manageable trial, the merits of
9 Defendants’ potential defenses, and the significant delay and potential appellate issues inherent to
10 litigation – and was reached after extensive arm’s length negotiations, with the assistance of
11 Mediator Mehta. JCL Dec., at ¶ 15.

12 The Settlement is intended to fully and finally resolve the Released PAGA Claims asserted
13 by Plaintiff on behalf of himself, the Aggrieved Employees, and State of California. This is only a
14 Settlement of the PAGA claims for civil penalties and is not a class settlement and does not release
15 the individual claims, if any, of the Aggrieved Employees. This Settlement does not release any
16 claim that is not a PAGA claim.² Nor does this Settlement waive Defendants’ right to assert *res*
17 *judicata* or other available defense to any asserted claim or lawsuit. JCL Dec., at ¶ 16.

18 Pursuant to California Labor Code Section 2699(1), Plaintiff is providing a copy of the
19 Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant
20 motion for settlement approval as set forth in the accompanying proof of service. Additionally,
21 Plaintiff will submit to the LWDA a copy of the Court’s judgment and order approving the
22 Settlement Agreement within ten (10) days after entry of judgment or order. JCL Dec., at ¶ 17.

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

24 **A. The Gross Settlement Amount**

25 The PAGA settlement is subject to Court approval consistent with Labor Code § 2699(1)(2).
26 The Settlement Agreement negotiated by the Parties provides for a Gross Settlement Amount
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 payment in the amount of One Hundred Ten Thousand Dollars and Zero Cents (\$110,000.00) to
2 resolve the PAGA claims. From the Gross Settlement Amount, there is a deduction of a PAGA
3 Counsel Fees Payment in the amount of \$36,666.66 (which is one-third of the Gross Settlement
4 Amount), reimbursement of incurred litigation expenses in an amount not to exceed \$20,000.00
5 (“PAGA Counsel Litigation Expenses Payment”), and Administration Expenses Payment which will
6 not exceed \$7,200.00. Agreement generally at § 3.2. After these deductions, the amount remaining
7 is the “PAGA Penalties”, which is estimated to be \$46,133.34. JCL Dec., ¶ 18.

8 The Gross Settlement Amount will be used to satisfy the Individual PAGA Payment, the
9 LWDA PAGA Payment, PAGA Counsel Fees Payment, PAGA Counsel Litigation Expenses
10 Payment, and the Administrator’s Expenses Payment. Agreement at § 1.13.

11 Of the PAGA Penalties, seventy-five percent (75%) shall be paid to the LWDA (“LWDA
12 PAGA Payment”) and the remaining twenty-five percent (25%) shall be paid to the Aggrieved
13 Employees (“Individual PAGA Payment”). Agreement at §§ 1.25, 3.2.3. This 75/25 allocation is
14 required by Labor Code § 2699 as explained by *ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019).

15 **B. Allocation of Individual PAGA Payments**

16 The Individual PAGA Payments will be calculated by dividing the amount of the Aggrieved
17 Employees’ 25% share of PAGA Penalties (\$11,533.34) by the total number of PAGA Pay Periods
18 worked by all Aggrieved Employees during the PAGA Period and then multiplying the result by
19 each Aggrieved Employee’s PAGA Pay Periods. Agreement at § 3.2.3.1. The PAGA Period is the
20 period between August 6, 2020 through September 22, 2023. Agreement at § 1.22.

21 At the time of mediation, Defendants estimated that there were approximately 161 Aggrieved
22 Employees who worked approximately 3,114 pay periods during the PAGA Period based on
23 company records. Agreement at § 4.1.

24 **C. Funding and Distribution**

25 Provided that an order approving this Settlement is entered by the Court, Defendants shall
26 fund the Gross Settlement Amount within seven (7) calendar days of the Effective Date. Agreement
27 at § 4.3. No later than five (5) calendar days after the Funding Date, the Administrator will mail the
28 Individual PAGA Member Payments via First-Class U.S. Mail to the Aggrieved Employees’ last

known mailing address, Individual PAGA Payments, the LWDA PAGA Payment, the Administration Expenses Payment, the PAGA Counsel Expenses Payment. Agreement at § 4.4. Settlement checks issued to Aggrieved Employees will expire one hundred eighty (180) days from the date they are issued by the Administrator. Agreement at § 4.4.1. If the check remains uncashed by the expiration of the 180-day period, the Administrator shall cause the aggregate sum represented by those uncashed checks to be sent to the State of California’s Controller, to be held in the name of each expired check payee. 4.4.3. The Individual PAGA Payments are 100% penalties and shall be reported using IRS Form 1099s. Agreement § 3.2.3.2.

D. Release of Claims

Upon entry of Judgment and funding of the Gross Settlement Amount, the State of California, the Aggrieved Employees, and Plaintiff shall release the Released Parties (as defined in the Agreement) from the Released PAGA Claims which include all claims arising under PAGA that were or could have reasonably been alleged based on the facts alleged in the Action through the end of the PAGA Period, including their right to bring representative PAGA claims on behalf of others. The release of claims for PAGA penalties shall bind only the named Plaintiff, the Aggrieved Employees, and the State of California. Agreement at § 1.27.

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 PAGA Penalties to be paid as part of the proposed Settlement.

A. The Gross Settlement Amount is Fair and Reasonable

The Gross Settlement Amount of \$110,000.00 is fair and reasonable and, therefore, should be approved. JCL Dec., ¶ 19. Here, *without stacking* the PAGA penalties, Defendants’ *maximum* liability exposure is estimated at approximately \$424,900 in PAGA penalties (4,249) pay periods multiplied by \$100 per pay period³). JCL Dec., ¶ 20. Assuming the Court permitted Plaintiff to stack PAGA penalties, Plaintiff’s third-party damages consultant estimated Defendants’ maximum liability exposure at approximately \$1,008,776. Plaintiff’s consultant estimated Defendants’ exposure as follows:

Claim	Penalty Amount ⁴	Number of Pay Periods w/ Violation	Violation Rate	Total Penalties
<i>Unpaid Wages Violations</i> Cal. Labor Code §§ 201, 202, 203, 204, 1194, 1197, 1997.1, 1198 and 558	\$100	1,010	100% of PAGA Pay Periods	\$101,126
<i>Meal Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	2,702	63.6% of PAGA Pay Periods	\$135,100
<i>Rest Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	2,702	99.8% of PAGA Pay Periods	\$135,100

³ California Labor Code section 2699(f)(2) provides the default penalty for PAGA violations of \$100 for initial violations and \$200 for subsequent violations.

⁴ In *Bernstein v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144, the court decided that “[u]ntil the employer has been notified that it is violating a Labor Code provision ... the employer cannot be presumed to be aware that its continuing underpayment of employees is a ‘violation’ subject to penalties.” Therefore, Plaintiff used only penalties for initial violations.

<i>Failure to Reimburse for Mandatory Business Expenses</i> Cal. Labor Code § 2802	\$100	2,124	100% of PAGA Pay Periods	\$212,450
<i>Wage Statement Violations</i> Cal. Labor Code §§ 226 and 226.2	\$100	4,249	100% of PAGA Pay Periods	\$424,900

JCL Dec., ¶ 21.

i. Estimated Liability for Unpaid Wages

One of Plaintiff's primary claims in the Action was that Defendant failed to pay for all hours worked. Specifically, Plaintiff alleged that Defendant had an unlawful rounding policy, and that it failed to pay Plaintiff and the Class Members all wages due for purposes of straight pay, overtime pay, and double-time pay. Defendants vigorously denied liability for this claim. Defendants argued, among other things, that all Aggrieved Employees were properly paid minimum and overtime compensation for all hours worked. JCL Dec., ¶ 22.

Plaintiff's expert estimated that Defendants' exposure for this claim was approximately \$270,200 in penalties. This number was calculated by multiplying the number of pay periods with a violation by a violation rate of \$100 per pay period. JCL Dec., ¶ 23.

ii. Estimated Penalties for Meal Period Violations

Plaintiff also alleges that Defendants failed to provide compliant meal periods. On average, approximately 38.2% of first meal periods were without a recorded first meal period. Further, Plaintiff's expert found that 99.7% of shifts between ten (10) and twelve (12) hours were without a recorded second meal period. Additionally, Plaintiff's expert found that approximately 99.7% of all shifts greater than twelve (12) hours were without a recorded second meal period. Consequently, Plaintiff alleges that he and other Aggrieved Employees are owed meal period premiums for meal period violations that occurred during the PAGA Period. JCL Dec., ¶ 24.

Conversely, Defendants argued that it had in place written meal period waivers applicable to Aggrieved Employees. Further, Defendants argued that it provided Aggrieved Employees with

1 the opportunity to take compliant meal periods, including second meal periods during shifts longer
2 than ten (10) hours. JCL Dec., ¶ 25.

3 **iii. Estimated Penalties for Rest Period Violations**

4 Plaintiff also alleged that Defendants failed to provide compliant rest periods. Specifically,
5 Plaintiff argued that Defendant maintained a rest period policy that required employees to remain
6 on premises during their rest periods. Further, Defendants did not pay a single rest period
7 premium during the PAGA Period. Because rest periods are not recorded, Plaintiff's expert could
8 not identify a violation rate. Plaintiff therefore made the reasonable assumption that rest period
9 violations were committed at a rate similar to that of meal period violations. JCL Dec., ¶ 26.

10 Based on an estimated violation rate which resulted in 63.6% of PAGA Pay Periods
11 containing a violation, Plaintiff contended that his claim for rest period violations was potentially
12 worth approximately \$270,200. This was calculated by multiplying the number of total pay periods
13 with a rest period violation by a violation rate of \$50 dollars. The \$50 penalty rate was used for a
14 number of reasons in this instance. First, Defendants argued that increased civil penalties for
15 subsequent violations do not apply unless the Plaintiff can present evidence that the Labor
16 Commission or a court notified the employer that it was in violation of the Labor Code. *Bernstein*
17 *v. Virgin America, Inc.* (2021) 3 F.4th 1127, 1144 citing *Amaral v. Cintas Corp. No. 2* (2008) 163
18 Cal.App.4th 1157, 1209 ["Until the employer has been notified that it is violating a Labor Code
19 provision ... the employer cannot be presumed to be aware that its continuing underpayment of
20 employees is a 'violation' subject to penalties."] Separately, Defendants also argued that courts
21 have considerable discretion to reduce the penalty awards under PAGA. See, e.g. *Carrington v.*
22 *Starbucks Corp.* (2018) 30 Cal.App.5th 504 (reducing the maximum PAGA penalty amount by
23 90%, at \$5 per pay period). Accordingly, it is unlikely that Plaintiff would recover full penalty
24 amounts even if he prevailed in establishing the underlying Labor Code violations. Pursuant to
25 California Labor Code section 558(a)(1), an employer is subject to a penalty of \$50 for violations
26 of a Labor Code section regulating hours and days of work, including meal period and rest period
27 violations. Thus, because section 558(a)(1) specifically provides for a civil penalty, Plaintiff used a
28 \$50 penalty per violation for the meal and rest break claims. JCL Dec., ¶ 27.

1 Defendants also argued that Plaintiff's rest break claim would have mainly relied on the
2 testimony of Aggrieved Employees, making it a riskier claim. Establishing liability likely would
3 have entailed competing testimony stating either rest breaks were taken, or rest breaks were
4 voluntarily waived. See, e.g., *Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL
5 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's evidence that
6 defendant may have an illegal, written rest break policy is insufficient for this Court to find that
7 common issues predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13,
8 2012) 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy
9 does not generate uniform practices."). JCL Dec., ¶ 28.

10 **iv. Estimated Liability for Unreimbursed Business Expenses**

11 Plaintiff alleged that Defendants required Plaintiff and other Aggrieved Employees to use
12 their personal cellular phones to communicate with Defendants' supervisors and other coworkers.
13 However, Defendants did not reimburse Plaintiff and other Aggrieved Employees for the costs
14 incurred in using their own personal cellular phone. California employers who require employees to
15 incur personal business expenses for work purposes must reimburse the employee for the cost
16 incurred. (See *Cal. Labor Code* § 2802(a), providing that "an employer shall indemnify his or her
17 employee for all necessary expenditures or losses incurred by the employee in direct consequence
18 of the discharge of his or her duties, or of his or her obedience to the directions of the
19 employer..."). JCL Dec., ¶ 29.

20 Plaintiff's expert estimated that Defendants' exposure for this claim was approximately
21 \$212,450 in penalties. This was calculated by multiplying the total number of pay periods by a
22 violation rate of \$100 per pay period. JCL Dec., ¶ 30.

23 **v. Estimated Penalties for Defendants' Inaccurate Wage Statements**

24 Plaintiff alleged derivative wage statement violations based Defendants' failure to provide
25 meal and rest periods. Plaintiff's expert estimated that Defendants' exposure for this claim was
26 approximately \$424,900 in penalties. This was calculated by multiplying the total number of pay
27 periods by a violation rate of \$100 per pay period. Plaintiff assumed that 100% of PAGA Pay
28 Periods contained a violation for inaccurate wage statements upon the derivative wage statement

1 penalties as a result of Defendants’ failure to provide meal and rest periods. PAGA Counsel
2 considered the arguable presence of various penalties and weighed the potential recoveries against
3 probable defenses. Specifically, Defendants could also argue that that meal and rest period violations
4 do not entitle employees like Plaintiff and the Aggrieved Employees to pursue the derivative
5 itemized wage statement penalties. (*Naranjo v. Spectrum Security Services, Inc.* (2023) 88
6 Cal.App.5th 927). Plaintiff could not give the penalty claims great weight given that they depended
7 on proving the underlying claims, which had their own risks. JCL Dec., ¶ 31.

8 **B. The Gross Settlement Compares Favorably To The Likely Recovery**

9 In light of the above, the Gross Settlement Amount is approximately 10.9% of Defendants’
10 potential PAGA exposure. The Gross Settlement Amount compares favorably to the likely recovery
11 of PAGA penalties through continued litigation. JCL Dec., ¶ 32.

12 Defendants’ maximum exposure to PAGA penalties is not a realistic outcome of the
13 litigation because it fails to account for the risks of continued litigation including, but not limited to,
14 Defendants’ defenses. *See, Zayerz v. Kiewit Infrastructure West*, 2018 U.S. Dist. LEXIS 14918, *14
15 (C.D. Cal. January 18, 2018). For instance, Defendants contended that Plaintiff’s PAGA claims
16 could be and likely would be wiped out in the light of the United States Supreme Court decision in
17 *Viking River Cruises v. Moriana*, (2022) 142 S.Ct. 1906. JCL Dec., ¶ 33.

18 In *Viking River*, the U.S. Supreme Court held that PAGA claims are preempted by the
19 Federal Arbitration Act, where, as here, arbitration agreements were signed by the employees. This
20 posed a very significant risk to Plaintiff’s case, which was ultimately realized. *See Viking River*
21 *Cruises v. Moriana*, (2022) 142 S.Ct. 1906. Therefore, Plaintiff was mindful that this case could be
22 potentially wiped because of the U.S. Supreme Court’s adverse decision. Plaintiff’s claims are
23 arguably worthless in the post-*Viking River* world. JCL Dec., ¶ 34.

24 Second, Defendants argued that it can only be assessed civil penalties for actual violations of
25 the Labor Code. *See* Lab. Code § 2699(f)(2). In other words, to recover any civil penalties, Plaintiff
26 would be required to prove the underlying Labor Code violations. (*Cardenas v. McLane*
27 *Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) [“Given the statutory
28 language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not

1 proven suffered a violation of the Labor Code by the defendant.”].) To do this, Plaintiff would need
2 to prove each Aggrieved Employee was subject to the alleged Labor Code violation, which would
3 be difficult to do, since Defendants deny any liability or wrongdoing of any kind associated with the
4 claims alleged in this action. JCL Dec., ¶ 35.

5 Thus, Defendants contended that Plaintiff would be required to “prove Labor Code violations
6 with respect to each and every individual on whose behalf Plaintiff seek to recover civil penalties
7 under PAGA.” *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2,
8 2009). When “determining whether the employer committed Labor Code violations with respect to
9 each employee” is impractical, the PAGA action can be dismissed. *Wesson v. Staples the Off.*
10 *Superstore*, 2021 WL 4099059, *11 (Cal. Ct. App. Sept. 9, 2021). JCL Dec., ¶ 36.

11 Third, a ballot initiative to eliminate PAGA has qualified for the 2024 ballot.
12 See [https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-](https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-2024-ballot/)
13 [2024-ballot/](https://news.ballotpedia.org/2022/07/26/california-ballot-initiative-to-repeal-paga-qualifies-for-2024-ballot/). If this initiative passes, it will effectively repeal PAGA by taking away the ability to
14 pursue civil penalties via a representative action. Plaintiff views this initiative as a significant
15 additional risk due to the potential limitation on their ability to recover penalties against Defendants
16 should litigation continue. JCL Dec., ¶ 37.

17 Finally, the maximum penalty figure does not consider that Courts have complete discretion
18 to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on
19 the facts and circumstances of the particular case, to do otherwise would result in an award that is
20 unjust, arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code § 2699(e)(2)). In fact, Courts
21 routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g. Carrington v.*
22 *Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (reducing PAGA penalties to \$5 per pay period;
23 “Although the trial court may have disagreed with Starbucks regarding the issue of liability, it
24 clearly took the circumstances proffered by Starbucks into consideration when it imposed the
25 penalty ... only \$5 per initial violation”); *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal App 5th 778,
26 788 (2018), review granted on other grounds (noting that the trial court “exercised its discretion to
27 reduce the [PAGA] penalties to 13 percent of the full amount [requested, because] [o]n average,
28 plaintiffs were deprived of 13 percent of the 30-minute meal period”); *Fleming v. Covidien, Inc.*,

2011 WL 7563047, *4 (C.D. Cal. 2011) (exercising discretion to reduce the maximum amount of
PAGA civil penalties for plaintiffs’ section 226 claims from \$2,800,000 to \$500,000 because the
employees suffered no injuries as a result of the erroneous wage statements and made no complaints
about the errors or omissions in the wage statements, thus reducing the maximum penalty by 82%);
see also, Gola v. University of San Francisco, San Francisco Superior Court Case No. CGC-18-
5655018, Proposed Statement of Decision, dated July 21, 2020, Judge Curtis A. Karnow of San
Francisco Complex (concluding after a full-blown bench trial that a penalty of 15% of the maximum
PAGA penalties was the appropriate penalty). The gross amount obtained by PAGA Counsel is
reasonable in light of Defendants’ arguments. Further, the adverse decisions in *Viking River Cruises*
and *Wesson* pose very significant, and even fatal, risk to Plaintiff’s case. JCL Dec., ¶ 38.

Defendants’ substantial compliance could also operate to prevent the imposition of PAGA
penalties. JCL Dec., ¶ 39. A corollary of PAGA being an enforcement action is that “substantial
compliance with statutory directives will suffice if the purpose of the statute is thereby
satisfied.” *Downtown Palo Alto v. City Council*, 180 Cal.App.3d 384, 395 (1986) (emphasis
supplied); *see also Hernandez v. BCI Coca-Cola Bottling Co.*, 2012 WL 12272348, at *8 (C.D. Cal.
Apr. 12, 2012), *aff’d*, 554 F. App’x 661 (9th Cir. 2014) (granting defendant’s motion for summary
judgment based on defendant’s “substantial compliance” with Labor Code section 226). In this
regard, “[t]he paramount consideration is the objective of the statute.” *Id.* “Where there is
compliance as to all matters of substance[,] technical deviations are not to be given the stature of
noncompliance.” *Cal-Air Conditioning v. Auburn Union School Dist.*, 21 Cal.App.4th 655, 668
(1993) (emphasis supplied). “Unless the intent of a statute can only be served by demanding strict
compliance with its terms, substantial compliance is the governing test.” *County of Tulare v.*
Campbell, 50 Cal. App. 4th 847, 853 (1996) (emphasis supplied).

Given Defendants’ defenses to the claimed Labor Code violations at issue, and the risks and
costs of continued litigation, Plaintiff and PAGA Counsel believe that the Gross Settlement Amount
is fair and reasonable. This settlement was negotiated by experienced counsel at arm’s length. JCL
Dec., ¶ 40. The LWDA has been provided with notice of this motion and the PAGA settlement, and
the decision of LWDA to accept the PAGA settlement and not oppose the motion should be given

considerable weight. Moreover, the LWDA is a sophisticated government entity that can assert and protect its own rights. JCL Dec., ¶¶ 5, 41.

C. The Remaining Settlement Terms Are Fair and Reasonable

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

V. THE PAGA COUNSEL FEES AND EXPENSES PAYMENTS ARE FAIR AND REASONABLE

PAGA Counsel seeks approval of the PAGA Counsel Fees Payment in the amount of \$36,666.66 (one-third of the Gross Settlement Amount) and PAGA Counsel Litigation Expenses Payment not to exceed \$20,000⁵ for reimbursement of actually incurred litigation expenses. PAGA does not have any requirements for reviewing attorneys' fees, and Plaintiff's position is that the payment of attorneys' fees and costs in this Settlement is a matter of contract for a contingent representation. Nevertheless, should this Court review the requested attorneys' fees, the requested fees and costs are reasonable for experience wage and hour counsel. JCL Dec., ¶ 42.

A. The Requested Attorneys' Fee is Fair and Reasonable

The requested Attorneys' Fee of \$36,666.66 and reimbursement of Attorneys' Expenses of up to \$20,000 is fair, reasonable, and justified by the result achieved. Agreement at § 3.2.1; JCL Dec., ¶ 43. PAGA Counsel negotiated a recovery of \$110,000, and this result justifies the requested fees equal to one third of this recovery. This percentage is within the standard contingent recovery percentage of one-third, and this percentage is what was expressly approved by the Supreme Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016). At the time this case was brought, the result was far from certain. Defendants' defenses to the merits of the case created difficulties with

⁵ As detailed *infra*, at the time of filing this motion, Plaintiff's Counsel incurred \$13,831.69 litigating this matter. Plaintiff will provide the Court with a final amount of litigation costs at the time of hearing on this motion.

1 proof and complex legal issues for PAGA Counsel to overcome. Here, several defenses asserted by
2 Defendants present serious threats to the claims of Plaintiff and the Aggrieved Employees.
3 Defendants asserted that its employment practices complied with all applicable labor laws. If
4 successful, Defendants' factual and legal defenses would eliminate *any recovery* to the Aggrieved
5 Employees. While Plaintiff believes that these defenses could be overcome, Defendants maintain
6 that these defenses have merit and therefore present a serious risk to recovery. The Settlement was
7 possible because, in PAGA Counsels' eyes, PAGA Counsel was able to persuade Defendants that
8 there was an appreciable risk that Plaintiff would prevail on the factual and legal issues underlying
9 liability and overcome difficulties in proof as to monetary relief. JCL Dec., ¶ 44.

10 Further, the fee award is justified by the work performed. Generally, the Ninth Circuit and
11 California Courts award multipliers between 2 to 4 times the lodestar to reward counsel for
12 accepting the contingent risks of the litigation or obtaining good results. See, e.g., *Laffitte*, 1 Cal. 5th
13 at 506 (approving one-third fee award with multiplier between 2.03 and 2.13); *Pellegrino v. Robert*
14 *Half Intern., Inc.*, 182 Cal.App.4th 278 (2010) (noting reasonable multipliers of 2.0 to 4.0 are often
15 applied and affirming 1.75 multiplier); *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 254
16 (2001) (noting that multipliers can range from 2 to 4 or higher); *Vandervort v. Balboa Capital Corp.*,
17 8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014) (awarding one-third of fund, which was a 2.52 multiplier
18 of lodestar); *Boyd v. Bank of America*, 2014 WL 6473804, at *11 (C.D. Cal. 2014) (awarding one-
19 third of fund, which was a 2.58 multiplier of lodestar); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-
20 02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013) (approving fee award that represented
21 a multiplier of 2.76 as falling within the "majority" range for risk multipliers).

22 As detailed in PAGA Counsels' time and billing records submitted herewith, PAGA
23 Counsels' current combined loadstar is \$66,866.17. JCL Dec., ¶¶ 6, 51-54; Declaration of Shani
24 Zakay ("Zakay Dec.") at ¶¶ 3-5. Thus, PAGA Counsels' fee request is equal to PAGA Counsel's
25 loadstar with a negligible multiplier of .54 – well below the 2.13 multiplier approved in *Laffitte* –
26 and well within the recognized multiplier range between 2 and 4. See also *Taylor v. FedEx Freight,*
27 *Inc.*, 2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016) (following *Laffitte*, approved 30% fee award
28 with cross-check lodestar multiplier of 2.26); *Emmons v. Quest Diagnostics Clinical Labs., Inc.*,

2017 U.S. Dist. LEXIS 27249 (E.D. Cal. 2017) (following *Laffitte*, approved 33% fee award with cross-check lodestar multiplier of 1.7).

B. PAGA Counsel is Entitled to Reimbursement of Actual and Reasonably Incurred Litigation Costs.

Attorneys who create a common fund for the benefit of a class are entitled to payment from the fund of reasonable litigation expenses and costs. Common fund fee and expense awards include counsel's incurred expenses because those who benefit from their effort should share in the cost. *See Rider v. City of San Diego*, 11 Cal. App. 4th 1410, 1423 n.6 (1992). The appropriate analysis in deciding if costs are compensable is whether the costs are of the type typically billed by attorneys to paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *see also Hartless*, 273 F.R.D. at 645-46 (common fund class action settlement where court awarded litigation costs for consultants, online legal research, copying, postage, long distance charges, travel expenses, filing fees, mediation fees and investigation fees). Prior to incurring costs for filing this motion, PAGA Counsel collectively expended \$13,831.69 prosecuting this action (JCL Law Firm, APC - \$7,968.69, Zakay Law Group, APLC - \$5,863.00). JCL Dec. ¶¶ 7, 55; Zakay Dec., ¶¶ 6-7; PAGA Counsel's out-of-pocket expenses are the types of expenses normally charged to paying clients including the following: filing fees; copying; postage; factual and legal research charges; mediation fees; and expert costs which were all incurred during, and were necessary for the successful prosecution of, the litigation and, therefore, should be reimbursed. JCL Dec. ¶¶ 7, 56.

VI. CONCLUSION

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

Dated: December 20, 2023

JCL LAW FIRM, APC

By: 
Jean-Claude Lapuyade, Esq.