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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

BILLY DANIEL JR., an individual, on behalf of
himself, and on behalf of all persons similarly
situated,

Plaintiff,

v.

THE VASQUEZ COMPANY, a California
Corporation; and DOES 1 through 50, Inclusive;

Defendants.

Case No. CIVSB2204403

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

Date: June 8, 2023

Time: 10:00 a.m.

Judge: Hon. David Cohn

Dept.: S-26

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 Defendant	2
III.	TERMS OF THE PAGA SETTLEMENT	4
	A. The Gross Settlement Amount	4
	B. Allocation of Individual PAGA Payments	4
	C. Funding and Distribution	5
	D. Release of Claims	6
IV.	THE COURT SHOULD APPROVE THE PAGA SETTLEMENT	6
	A. The Gross Settlement Amount is Fair and Reasonable	7
	i. Estimated Penalties for Rest Period Violations	7
	ii. Estimated Penalties for Meal Period Violations	9
	iii. Estimated Penalties for Defendant's Inaccurate Wage Statements	9
	1. Defendant's Alleged Unlawful On-Call Status Agreement	10
	2. Defendant's Alleged Miscalculation of Regular Rate of Pay	10
	3. Defendant's Alleged Violation of Labor Code §226(a)(8)	10

1	iv. Estimated Liability for Defendant’s Violation of Labor Code §2802	10
2		
3	v. The Gross Settlement Compares Favorable To The Likely Recovery	11
4		
5	B. The Remaining Settlement Terms Are Fair and Reasonable	14
6	V. THE ATTORNEYS’ FEES AND EXPENSES FAIR AND REASONABLE	15
7		
8	A. The Requested Attorneys’ Fee is Fair and Reasonable	15
9		
10	B. Plaintiffs’ Counsel Are Entitled to Reimbursement of Actual and Reasonably Incurred Litigation Costs	16
11		
12	VI. CONCLUSION	17

///

TABLE OF AUTHORITIES

CASES

<i>Adolph v. Uber Technologies, Inc.</i> Case No. S274671.....	11
<i>Amaral v. Cintas Corp. No. 2</i> (2008) 163 Cal.App.4th 1157, 1209.....	8
<i>Amiri v. Cox Communs. Cal., LLC</i> (C.D. Cal.) 272 F.Supp.3d 1187, 1194.....	12
<i>Boyd v. Bank of America,</i> 2014 WL 6473804, at *11 (C.D. Cal. 2014).....	16
<i>Cal-Air Conditioning v. Auburn Union School Dist.</i> 21 Cal.App.4th 655, 668 (1993).....	14
<i>Cardenas v. McLane Foodservice, Inc.</i> 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011).....	12
<i>Carrington v. Starbucks Corp.</i> 30 Cal. App. 5th 504, 529 (2018).....	8, 13
<i>Cf. Estrada v. Royalty Carpet Mills, Inc.</i> (Cal.App. 4th Dist. March 30, 2022).....	12
<i>County of Tulare v. Campbell</i> 50 Cal. App. 4th 847, 853 (1996).....	14
<i>Downtown Palo Alto v. City Council</i> 180 Cal.App.3d 384, 395 (1986).....	14
<i>Dunk v. Ford Motor Co.</i> (1996) 48 Cal.App.4th 1794, 1800-1801.....	7
<i>Emmons v. Quest Diagnostics Clinical Labs., Inc.</i> 2017 U.S. Dist. LEXIS 27249 (E.D. Cal. 2017).....	16
<i>Fleming v. Covidien, Inc.</i> 2011 WL 7563047, *4 (C.D. Cal. 2011).....	13
<i>Gola v. University of San Francisco</i> San Francisco Superior Court Case No. CGC-18-5655018.....	13
<i>Harris v. Marhoefer</i> 24 F.3d 16, 19 (9th Cir. 1994).....	17
<i>Hartless</i> 273 F.R.D. at 645-46.....	17
<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 (9th Cir. 2014)...	14
<i>Hibbs-Rines v. Seagate Technologies</i> 2009 WL 513496, *4 (N.D. Cal. Mar. 2, 2009).....	12
<i>Hopkins v. Stryker Sales Corp.</i> No. 11-CV-02786-LHK, 2013 WL 496358, at *6 (N.D. Cal. Feb. 6, 2013).....	16
<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).....	13
<i>Kim v. Reins Int'l Cal., Inc.</i> (2020) 9 Cal.5th 73, 88.....	6

///

1	<i>Laffitte v. Robert Half Int'l Inc.</i>	
2	1 Cal.5th 480, 504, 506 (2016).....	15-16
3	<i>Lifty v. Merrill Lynch & Co.</i>	
4	(C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 160448.....	12
5	<i>Moniz v. Adecco USA, Inc.</i>	
6	(2021) 72 Cal.App.5th 56, 77, 88.....	6-7
7	<i>Ordonez v. Radio Shack, Inc.</i>	
8	(C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11.....	8
9	<i>Ortiz v. CVS Caremark Corp.</i>	
10	(N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 36833.....	12
11	<i>Pellegrino v. Robert Half Intern., Inc.</i>	
12	182 Cal.App.4th 278 (2010).....	16
13	<i>Rider v. City of San Diego</i>	
14	11 Cal. App. 4th 1410, 1423 n.6 (1992).....	16
15	<i>Taylor v. FedEx Freight, Inc.</i>	
16	2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016).....	16
17	<i>Vandervort v. Balboa Capital Corp.</i>	
18	8 F.Supp. 3d 1200, 1210 (C.D. Cal. 2014).....	16
19	<i>Viking River Cruises v. Moriana,</i>	
20	(2022) 142 S.Ct. 1906.....	11
21	<i>Villa v. United Site Servs. of California, Inc.</i>	
22	(N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8.....	8, 13
23	<i>Wershba v. Apple Computer, Inc.</i>	
24	91 Cal.App.4th 224, 254 (2001).....	16
25	<i>Wesson v. Staples the Off. Superstore</i>	
26	2021 WL 4099059, *11 (Cal. Ct. App. Sept. 9, 2021).....	12, 13
27	<i>Wesson v. Staples the Office Superstore</i>	
28	(2021) 68 Cal.App.5th 746.....	12, 13
29	<i>Williams v. Superior Court</i>	
30	(2017) 3 Cal.5th 531, 549.....	7
31	<i>Zayerz v. Kiewit Infrastructure West</i>	
32	2018 U.S. Dist. LEXIS 14918, *14 (C.D. Cal. January 18, 2018).....	11
33	<i>ZB, N.A. v. Superior Court</i>	
34	8 Cal. 5th 175, 182, 196 (2019).....	1, 4

RULES, CODES & STATUTES

22	<i>Cal. Bus. & Prof. Code</i> §§ 17200.....	2
23	<i>Cal. Code of Civ. Proc.</i> § 382.....	14
24	<i>Cal. Lab. Code</i> § 201.....	2, 6
25	<i>Cal. Lab. Code</i> § 201.3.....	6
26	<i>Cal. Lab. Code</i> § 202.....	2, 6
27	<i>Cal. Lab. Code</i> § 203.....	2, 6
28	<i>Cal. Lab. Code</i> § 204.....	6
29	<i>Cal. Lab. Code</i> § 210.....	6
30	<i>Cal. Lab. Code</i> § 218.5.....	6
31	<i>Cal. Lab. Code</i> § 218.6.....	6
32	<i>Cal. Lab. Code</i> § 226.....	6, 13-14
33	<i>Cal. Lab. Code</i> § 226(a)(8).....	10

1	<i>Cal. Lab. Code</i> § 226.2.....	6
	<i>Cal. Lab. Code</i> § 226.3.....	6
2	<i>Cal. Lab. Code</i> § 226.7.....	2, 6
	<i>Cal. Lab. Code</i> § 226.7(c).....	7
3	<i>Cal. Lab. Code</i> § 510, <i>et seq</i>	2, 6
	<i>Cal. Lab. Code</i> § 512.....	2, 6
4	<i>Cal. Lab. Code</i> § 558.....	6
	<i>Cal. Lab. Code</i> § 558(a)(1).....	9
5	<i>Cal. Lab. Code</i> § 1174(d).....	6
6	<i>Cal. Lab. Code</i> § 1174.5.....	6
	<i>Cal. Lab. Code</i> § 1194.....	2, 6
7	<i>Cal. Lab. Code</i> § 1197.....	2, 6
	<i>Cal. Lab. Code</i> § 1197.1.....	2, 6
8	<i>Cal. Lab. Code</i> § 1197.14.....	6
	<i>Cal. Lab. Code</i> § 1198.....	6
9	<i>Cal. Lab. Code</i> § 1199.....	6
10	<i>Cal. Lab. Code</i> § 2699.....	4, 6
	<i>Cal. Lab. Code</i> § 2699(1).....	4, 6, 14
11	<i>Cal. Lab. Code</i> § 2699(1)(2).....	4, 7
	<i>Cal. Lab. Code</i> § 2699(e)(2).....	13
12	<i>Cal. Lab. Code</i> § 2699(f)(2).....	11
	<i>Cal. Lab. Code</i> § 2699(g)(1).....	1
13	<i>Cal. Lab. Code</i> § 2699.3(a)(2)(A).....	3
14	<i>Cal. Lab. Code</i> § 2802.....	2, 6
	<i>Cal. Lab. Code</i> § 2804.....	6

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Billy Daniel Jr. and Plaintiff Jessica Pereabras (collectively “Plaintiffs”) seek
4 approval of the PAGA Settlement Agreement (“Agreement”)¹, which if approved, would provide
5 valuable monetary relief for approximately 1,393 “Aggrieved Employees,” defined as all non-
6 exempt hourly paid employees of Defendant The Vasquez Company (“Defendant”) employed in
7 California during the period between February 7, 2021, to January 21, 2023 (“PAGA Period”).
8 Agreement at §§ I(O); III(A)(2). This is only a settlement of Plaintiffs’ PAGA claims for civil
9 penalties and is not a class settlement and does not release the individual wage claims, if any, of the
10 affected employees other than Plaintiffs themselves. Cal. Lab. Code § 2699(g)(1); *Iskanian v. CLS*
11 *Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 182 (2019)
12 (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 in a Gross Settlement Amount of Four Hundred Ten
15 Dollars and Zero Cents (\$410,000.00). Agreement at § III(A)(1). After deducting any Court-
16 approved Attorneys’ Fees, Attorneys’ Expenses and the Claims Administration Expenses, the Net
17 Settlement Amount shall be distributed, 75% to the LWDA and 25% to the Aggrieved Employees.
18 Agreement at § I(J).

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 and reasonable. The Settlement is a
21 product of informed, adversarial, and non-collusive and mediated negotiations between experienced
22 counsel. As discussed below, the proposed Settlement satisfies all criteria for PAGA settlement
23 approval. Accordingly, Plaintiffs and Plaintiffs’ Counsel respectfully request this Court grant
24 approval of the Agreement. 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. Plaintiffs' Exhaustion of Administrative Remedies Under PAGA And Civil Action Against Defendant

On February 7, 2022, Plaintiff Pereabras, on behalf of herself other Aggrieved Employees sent Defendant and the LWDA a Notice of Violations ("PAGA Notice") memorializing claims against Defendant for alleged violations of the California Labor Code (LWDA Case Number LWDA-CM-866996-22). Boyamian Dec., at ¶ 12.

On February 24, 2022, Plaintiff Daniel, on behalf of himself and other Aggrieved Employees sent Defendant and the LWDA a PAGA Notice memorializing claims against Defendant for alleged violations of the California Labor Code (LWDA Case Number LWDA-CM-869993-22). JCL Dec., at ¶ 10.

On April 28, 2022, Plaintiff Daniel filed a class action complaint against Defendant alleging eight causes of action for violations of the California Labor Code for the following: 1) Unfair Competition in Violation of Cal. Bus. & Prof. Code § 17200; 2) Failure to Pay Minimum Wages in Violation of Cal. Lab. Code§ 1194, 1197, 1197.1; 3) Failure to Pay Overtime Wages in Violation of Cal. Lab. Code§§ 510, et seq.; 4) Failure to Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 & 512; 5) Failure to Provide Required Rest Periods in Violation of Cal. Lab. Code§§ 226.7 & 512; 6) Failure to Provide Accurate Itemized Wage Statements in Violation of Cal. Lab. Code § 226; 7) Failure to Provide Wages When Due in Violation of Cal. Lab. Code§§ 201, 202, & 203; and 8) Failure to Reimburse Employees for Requires Expenses in Violation of Cal. Lab. Code § 2802.

On April 22, 2022, Plaintiff Pereabras filed an action against Defendant alleging a single cause of action for violations of PAGA for the following: 1) Failure to Provide Complaint Meal and Rest Periods; 2) Failure to Pay Minimum Wages; 3) Failure to Pay Overtime Wages; 4) Failure to Reimburse for Required Business Expenses; 5) Failure to Pay All Wages When Due; and 6) Failure to Provide Accurate Itemized Wage Statements. Boyamian Dec., at ¶ 12.

On June 21, 2022, Plaintiff Daniel filed a First Amended Complaint dismissing the class claims and alleging a single cause of action for violations of PAGA. On March 2, 2023, Defendant,

1 Plaintiff Daniel and Plaintiff Pereabras stipulated to allow Plaintiff Daniel to file a Second Amended
2 Complaint to add Plaintiff Pereabras as a named plaintiff and incorporate related claims and factual
3 allegations for violations of the PAGA.

4 The 65-day “waiting period” on Plaintiffs’ rights to file a civil action under PAGA, *see* Cal.
5 Lab. Code § 2699.3(a)(2)(A), lapsed without the LWDA notifying either Plaintiff that they intended
6 to investigate the claims in their respective PAGA Notices. To date, the LWDA still has not advised
7 either Plaintiff of any intent to take action with respect to the claims in the PAGA Notice. JCL Dec.,
8 at ¶ 11.

9 On December 5, 2022, the Parties attended a full-day mediation with experienced wage and
10 hour class and PAGA action mediator Tripper Ortman, Esq. In advance of the with the mediation,
11 Defendant provided Plaintiffs with sufficient information to properly evaluate Defendant’s liability
12 exposure for civil penalties to the Aggrieved Employees. Among the data and documents Defendant
13 produced included, but was not limited to, the total number Aggrieved Employees, pay periods,
14 written wage and hour policies, employee handbooks, and time and payroll records for Aggrieved
15 Employees. JCL Dec., ¶ 14.

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

26 The Settlement is intended to fully and finally resolve the Released PAGA Claims asserted
27 by Plaintiffs on behalf of the Aggrieved Employees and State of California. This is only a
28 Settlement of the PAGA claims for civil penalties and is not a class settlement and does not release

1 the individual claims, if any, of the Aggrieved Employees. This Settlement does not release any
2 claim that is not a PAGA claim.² Nor does this Settlement waive Defendant's right to assert *res*
3 *judicata* or other available defenses to any asserted claim or lawsuit. JCL Dec., at ¶ 16.

4 Pursuant to California Labor Code Section 2699(1), Plaintiffs are providing a copy of the
5 Settlement Agreement and this motion to the LWDA concurrently with the filing of the instant
6 motion for settlement approval as set forth in the accompanying proof of service. Additionally,
7 Plaintiffs will submit to the LWDA a copy of the Court's judgment and order approving the
8 Settlement Agreement within ten (10) days after entry of judgment or order. JCL Dec., at ¶¶ 5, 17.

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

10 **A. The Gross Settlement Amount**

11 The PAGA settlement is subject to Court approval consistent with Labor Code § 2699(1)(2).
12 The Settlement Agreement negotiated by the Parties provides for a "Gross Settlement Amount"
13 payment in the amount of Four Hundred Ten Thousand Dollars and Zero Cents (\$410,000.00) to
14 resolve the PAGA claims. From the Gross Settlement Amount, there is a deduction of Attorneys'
15 Fees in the amount of \$136,666.67 (which is one-third of the Gross Settlement Amount),
16 reimbursement of incurred Attorneys' Expenses in an amount not to exceed \$25,000.00, and
17 payment of Claims Administration Expenses to the Settlement Administrator in an amount not to
18 exceed \$7,000.00. Agreement at §§ III(I)(8)-(9). After these deductions, the amount remaining is
19 the "Net Settlement Amount," which is estimated to be \$241,333.33

20 Of the "Net Settlement Amount," seventy-five percent (75%) shall be paid to the LWDA and
21 the remaining twenty-five percent (25%) shall be paid to the Aggrieved Employees as Individual
22 PAGA Payments. Agreement at I(J). This allocation is required by Labor Code § 2699 as explained
23 by *ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019).

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

25 The Individual PAGA Payments to the Aggrieved Employees shall be based on the number
26 of PAGA Pay Periods each Aggrieved Employee worked during the PAGA Period as a percentage
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 of the total PAGA Pay Periods worked by all Aggrieved Employees during the PAGA Period.
2 Agreement at § III(I)(1).

3 At the time of mediation, Defendant estimated that there were approximately
4 1,393 Aggrieved Employees who worked approximately 23,292 PAGA Pay Periods during the
5 PAGA Period based on company records. Should the number of PAGA Pay Periods and/or
6 Aggrieved Employees increase by more than 10% of what was represented at the mediation (i.e., if
7 the number of Aggrieved Employees exceeds 1,532 and/or the number of PAGA Pay Periods
8 exceeds 25,621), Defendant shall either increase the Gross Settlement Amount proportionally or cut
9 off the release period to the date on which 10% above the Projected Pay Period estimate is reached.
10 Agreement at § III(2).

11 **C. Funding and Distribution**

12 Provided that an order approving this Settlement is entered by the Court, Defendant shall
13 fund the Gross Settlement Amount in three installments. Defendant shall fund the first installment
14 of \$102,500 within ten (10) days after the Effective Date. The Effective Date is the date upon which
15 both of the following have occurred: (i) approval of the PAGA Settlement is granted by the Court,
16 and (ii) the Court's Judgment approving the PAGA Settlement becomes Final. Defendant shall fund
17 the second installment of \$102,500 within three (3) months after the first installment. Defendant
18 shall fund the third installment of \$205,000 within nine (9) months after the second installment.
19 Agreement at § III(I).

20 Within fifteen (15) calendar days of its receipt of the Gross Settlement Amount in full, the
21 Settlement Administrator will transmit the LWDA Payment to the LWDA as one lump sum
22 payment. Agreement at § III(I)(7).

23 No later than five (5) calendar days after receipt of the first installment of the Gross
24 Settlement Amount, the Settlement Administrator will mail the Individual PAGA Payments to the
25 Aggrieved Employee by regular First-Class U.S. Mail to the Aggrieved Employees' last known
26 mailing address. Agreement at § III(I)(4). Settlement checks issued to Aggrieved Employees will
27 expire one hundred eighty (180) days from the date they are issued by the Settlement Administrator.
28 Agreement at § III(I)(6). If the check remains uncashed by the expiration of the 180-day period, the

1 Settlement Administrator shall cause the aggregate sum represented by those uncashed checks to be
2 sent to the State of California’s Controller, to be held in the name of each expired check payee.
3 Agreement at § §III(I)(6). The individual Aggrieved Employee Payments are 100% penalties and
4 interest and shall be reported using IRS Form 1099s. Agreement § III(I)(2).

5 **D. Release of Claims**

6 When the Gross Settlement Amount is fully funded by Defendant in accordance with the
7 terms agreed upon by the Parties, the Aggrieved Employees shall release the Released Parties from
8 the Released PAGA Claims. Agreement at §§ I(H); III(B). The Released PAGA Claims means all
9 claims for civil penalties, fees, and costs under PAGA based on the facts and theories alleged in the
10 notice letters Plaintiffs sent to the LWDA on February 7, 2022 (Pereabras) and February 24, 2022
11 (Daniel), and the operative Complaints filed in the Actions. Agreement at I(V). This includes
12 claims which are for civil penalties pursuant to Labor Code section 2699, et seq. for violations of
13 Labor Code sections 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246,
14 510, 512, 558, 1174(d), 1174.5, 1194, 1197, 1197.1, 1197.14 1198, 1199, 2802, and 2804, and
15 applicable Industrial Welfare Commission Wage Orders. The release does not include underlying
16 wage and hour claims, claims for wrongful termination, discrimination, unemployment insurance,
17 disability, and workers’ compensation, and claims outside of the PAGA Period. The PAGA Released
18 Claims do not include any claims that cannot be released as a matter of law.

19 **IV. THE COURT SHOULD APPROVE THE PAGA SETTLEMENT**

20 Labor Code § 2699(l) requires that the Court “shall review and approve any settlement of any
21 civil [PAGA] action filed pursuant to this part. The proposed settlement shall be submitted to the
22 agency at the same time that it is submitted to the court.” Further, the Court in *Moniz v. Adecco*
23 *USA, Inc.* (2021) 72 Cal.App.5th 56, 77 stated that “the trial court must review and approve a PAGA
24 settlement (§ 2699, subd.(l)(2)), and the Supreme Court has in dictum referred to this review as a
25 safeguard.” (Citing *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 88; internal
26 quotations omitted.) “The Supreme Court has also observed that trial court approval ensures that
27 any negotiated resolution is fair to those affected,” leading the Court in *Moniz* to determine that
28 “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 Net Settlement Amount to be paid as part of the proposed Settlement.

A. The Gross Settlement Amount is Fair and Reasonable

The Gross Settlement Amount of \$410,000.00 is fair and reasonable and, therefore, should be approved. JCL Dec., ¶ 18. Here, *without stacking* the PAGA penalties, Defendant’s *maximum* liability exposure is estimated at approximately \$2,796,800 in PAGA penalties. JCL Dec., ¶ 19. Plaintiffs’ consultant estimated Defendant’s exposure as follows:

Claim	Penalty Amount	Number of Pay Periods w/ Violation	Violation Rate	Total Penalties
<i>Rest Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	4,676	20.1% of PAGA Pay Periods	\$233,800
<i>Meal Period Violations</i> Cal. Labor Code §§ 226.7 and 512	\$50	4,676	20.1% of PAGA Pay Periods	\$233,800
<i>Wage Statement Violations</i> Cal. Labor Code §§ 226 and 226.2	\$100	23,292	100% of PAGA Pay Periods	\$2,329,200

JCL Dec., ¶ 20.

i. Estimated Penalties for Rest Period Violations

Plaintiffs alleged that Defendant had a policy in place which did not offer the Aggrieved Employees an additional hour of compensation for rest period violations. JCL Dec., ¶ 21. Lab. Code § 226.7(c) provides that “if an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including ... an ... order of the Industrial Welfare

Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided." Plaintiffs' expert identified a 20.1% violation rate for meal periods based upon the expert's review of time and payroll records. Plaintiffs' expert analysis did not, however, take into account instances where meal periods were non-compliant because an employee voluntarily waived a compliant break. Because rest periods are not recorded, Plaintiffs' expert could not identify a violation rate. Plaintiffs therefore made the reasonable assumption that rest period violations were committed at a rate similar to that of meal period violations. JCL Dec., ¶ 21.

Defendant argued that Plaintiffs' rest break claim would have mainly relied on the testimony of Aggrieved Employees, making it a riskier claim. Establishing liability likely would have entailed competing testimony stating either rest breaks were taken, or rest breaks were voluntarily waived. *See, e.g., Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 17, 2013) 2013 WL 210223, at *11 ("Because of the competing testimony before the Court, plaintiff's evidence that defendant may have an illegal, written rest break policy is insufficient for this Court to find that common issues predominate."); *Villa v. United Site Servs. of California, Inc.* (N.D. Cal. Nov. 13, 2012) 2012 WL 5503550, at *8 ("Indeed, Plaintiff's own evidence confirms that the written policy does not generate uniform practices."). JCL Dec., ¶ 22.

Based on an estimated 20.1% violation rate, Plaintiffs contended that their claim for rest period violations was potentially worth approximately \$233,800. This was calculated by multiplying 20.1% of the number of total pay periods by a violation rate of \$50. The \$50 penalty rate was used for a number of reasons in this instance. First, Defendant argued that increased civil penalties for subsequent violations do not apply unless the Plaintiffs can present evidence that the Labor Commission or a court notified the employer that it was in violation of the Labor Code. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1209 ["Until 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."].) Separately, Defendant also argued that courts have considerable discretion to reduce the penalty awards under PAGA. *See, e.g. Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504 (reducing the maximum

1 PAGA penalty amount by 90%, at \$5 per pay period). Accordingly, it is unlikely that Plaintiffs
2 would recover full penalty amounts even if they prevailed in establishing the underlying Labor Code
3 violations. Pursuant to California Labor Code section 558(a)(1), an employer is subject to a penalty
4 of \$50 for violations of a Labor Code section regulating hours and days of work, including meal
5 period and rest period violations. Thus, because section 558(a)(1) specifically provides for a civil
6 penalty, Plaintiffs used a \$50 penalty per violation for the meal and rest break claims. JCL Dec., ¶
7 23.

8 **ii. Estimated Penalties for Meal Period Violations**

9 Plaintiffs also allege that Defendant's time records reflected non-compliant meal periods, and
10 also time-rounding on meal periods, which gave rise to a presumption of violations. Conversely,
11 Defendant asserted that it maintained facially compliant meal period policies and practices
12 throughout the PAGA Period. Moreover, Defendant argued that it did not engage in time rounding,
13 but that instead, employees often manually entered their meal break time-punches, resulting in
14 artificial rounding by the employees themselves. Thus, Defendant argued that there was no potential
15 liability for Plaintiffs' alleged meal period violations. Plaintiffs estimated the damages for this claim
16 at \$233,800. This number was calculated by multiplying 20.1% of the number of total pay periods
17 by a violation rate of \$50. The \$50 penalty rate was used for the same reasons as stated above. JCL
18 Dec., ¶ 24.

19 **iii. Estimated Penalties for Defendant's Inaccurate Wage Statements**

20 Plaintiffs alleged inaccurate wage statements based on a number of theories, as detailed
21 below. Plaintiffs' expert estimated that Defendant's exposure for this claim was approximately
22 \$2,329,200 in penalties. This was calculated by multiplying the total number of pay periods by a
23 violation rate of \$100 per pay period. Plaintiffs assumed a 100% violation rate for inaccurate wage
24 statements upon the various theories asserted below under which Plaintiffs alleged that the wage
25 statements of the Aggrieved Employees were inaccurate including: 1) failure to properly compensate
26 Aggrieved Employees pursuant to Defendant's reporting time pay policy; 2) failure to properly
27 compensate Aggrieved Employees their regular rate of pay purposes of overtime, doubletime, and
28

1 sick time; and 3) a facial defect on all wage statements of failure to include the proper employer
2 address on all wage statements pursuant to Labor Code Section 226(a)(8). JCL Dec., ¶ 25.

3 **1. Defendant's Alleged Unlawful On-Call Status Agreement**

4 Plaintiffs alleged that throughout the PAGA Period, Defendant had in place an unlawful On-
5 Call Status Agreement that required Plaintiffs and Aggrieved Employees to report to work by
6 remaining on-call and available to work when Defendant needed them to answer questions and
7 address concerns. Yet, Defendant failed to provide them with half of their scheduled days' worth of
8 work, in violation of the applicable Wage Order's provision on "Reporting Time Pay". Defendant
9 argued that during those shifts when employees were not furnished with work for at least half of
10 their scheduled shift, they were compensated with reporting time pay accordingly, and thus received
11 accurate wage statements. JCL Dec., ¶ 26.

12 **2. Defendant's Alleged Miscalculation of Regular Rate of Pay**

13 Plaintiffs also allege that Defendant miscalculated the regular rate of pay for purposes of
14 overtime, doubletime, sick time. Pursuant to Defendant's On-Call Status Agreement, Plaintiffs and
15 Aggrieved Employees were entitled to earned non-discretionary bonuses during those time when
16 they remained on-call. Plaintiffs alleged that Defendant failed to include the on-call bonus when
17 calculating the regular rate of pay for purposes of overtime, double time, and sick time
18 compensation. JCL Dec., ¶ 27.

19 **3. Defendant's Alleged Violation of Labor Code §226(a)(8)**

20 Plaintiffs also allege that Defendant violated Labor Code §226 by issuing wage statements
21 that listed an incorrect employer address. Defendant contends that the address listed on the
22 Aggrieved Employee wage statements properly complies with the requirements of §226(a)(8), and
23 moreover, that even if the address were improper, employees suffered no injuries as a result of the
24 alleged error. JCL Dec., ¶ 28.

25 **iv. Estimated Liability for Defendant's Violation of Labor Code §2802**

26 Plaintiffs alleged that Defendant required Plaintiffs and the Aggrieved Employees to
27 maintain clean uniforms. In order to do so, Plaintiffs and the Aggrieved Employees were required to
28 incur additional expenses and spend time off-the-clock to maintain the uniforms for which they were

1 not reimbursed or compensated. Further, Plaintiffs alleged that pursuant to Defendant's On-Call
2 Status Agreement, employees could be contacted via their personal cell phones to answer questions
3 and address concerns, however Defendant did not compensate or reimburse Aggrieved Employees
4 for the use of their personal cell phones. Defendant denied any liability for this claim. Defendant
5 argued that on the rare occasions where employees did incur business expenses, these expenses were
6 fully reimbursed. JCL Dec., ¶ 29.

7 **v. The Gross Settlement Compares Favorably To The Likely Recovery**

8 In light of the above, the Gross Settlement Amount is approximately 15% of Defendant's
9 potential PAGA exposure. The Gross Settlement Amount compares favorably to the likely recovery
10 of PAGA penalties through continued litigation. JCL Dec., ¶30.

11 Defendant's maximum exposure to PAGA penalties is not a realistic outcome of the
12 litigation because it fails to account for the risks of continued litigation including, but not limited to,
13 Defendant's defenses. *See, Zayerz v. Kiewit Infrastructure West*, 2018 U.S. Dist. LEXIS 14918, *14
14 (C.D. Cal. January 18, 2018). For instance, Defendant contended that Plaintiffs' PAGA claims
15 could be and likely would be wiped out in the light of the United States Supreme Court decision in
16 *Viking River Cruises v. Moriana*, (2022) 142 S.Ct. 1906. JCL Dec., ¶ 31.

17 In *Viking River*, the U.S. Supreme Court held that PAGA claims are preempted by the
18 Federal Arbitration Act, where, as here, arbitration agreements were signed by the employees. This
19 posed a very significant risk to Plaintiffs' case which was ultimately realized. *See Viking River*
20 *Cruises v. Moriana*, (2022) 142 S.Ct. 1906. Therefore, Plaintiffs were mindful that their case could
21 be potentially wiped because of the U.S. Supreme Court's adverse decision. Plaintiffs' claims are
22 arguably worthless in the post-*Viking River* world. *Cf. Adolph v. Uber Technologies* (California
23 Supreme Court has agreed to examine if SCOTUS relied on an incorrect understanding of California
24 state law in *Viking River*. Specifically, whether the representative side of the PAGA claim can, under
25 state law, continue even if the individual portion of the claim, if any exists, is compelled to
26 arbitration). *Id.* JCL Dec., ¶ 32.

27 Second, Defendant argued 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,

1 Plaintiffs would be required to prove the underlying Labor Code violations. (*Cardenas v. McLane*
2 *Foodservice, Inc.*, 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) [“Given the statutory
3 language [of PAGA], a plaintiff cannot recover on behalf of individuals whom the plaintiff has not
4 proven suffered a violation of the Labor Code by the defendant.”].) To do this, Plaintiffs would
5 need to prove each Aggrieved Employee was subject to the alleged Labor Code violation, which
6 would be difficult to do, since Defendant denies any liability or wrongdoing of any kind associated
7 with the claims alleged in this action. JCL Dec., ¶ 33.

8 Thus, Defendant contended that Plaintiffs would be required to “prove Labor Code violations
9 with respect to each and every individual on whose behalf Plaintiffs seek to recover civil penalties
10 under PAGA.” *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2,
11 2009). When “determining whether the employer committed Labor Code violations with respect to
12 each employee” is impractical, the PAGA action can be dismissed. *Wesson v. Staples the Off.*
13 *Superstore*, 2021 WL 4099059, *11 (Cal. Ct. App. Sept. 9, 2021). JCL Dec., ¶ 34.

14 Third, Defendant contended that PAGA actions with numerous employees, many locations,
15 and different types of employees are not manageable and may be dismissed on that basis. *See,*
16 *Wesson v. Staples the Office Superstore*, (2021) 68 Cal.App.5th 746 (holding that courts can dismiss
17 PAGA claims if significant variation exists among aggrieved employees, who have unique factual
18 situations) *see also*, *Ortiz v. CVS Caremark Corp.* (N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 36833
19 (dismissing PAGA claim as unmanageable because “a multitude of individualized assessments
20 would be necessary”); *Lifty v. Merrill Lynch & Co.* (C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 160448
21 (striking PAGA claim as unmanageable because “individualized issues predominate in this action”
22 and a “multitude of individualized assessments would be necessary”); *Amiri v. Cox Communs. Cal.,*
23 *LLC* (C.D. Cal.) 272 F.Supp.3d 1187, 1194 (striking PAGA claim as unmanageable). Here, with
24 over 1,000 Aggrieved Employees working in different types of jobs, Defendant asserted that
25 Plaintiffs’ theories were unmanageable. *Cf. Estrada v. Royalty Carpet Mills, Inc.*, (Cal.App. 4th Dist.
26 March 30, 2022) (disagreeing with *Wesson* and creating a split among the Courts of Appeal on
27 whether manageability is a prerequisite to bringing a PAGA claim). JCL Dec., ¶ 35.

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1 Fourth, a ballot initiative to eliminate PAGA has qualified for the 2024 ballot.
2 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/)
3 [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
4 pursue civil penalties via a representative action. Plaintiffs view this initiative as a significant
5 additional risk due to the potential limitation on their ability to recover penalties against Defendant
6 should litigation continue. JCL Dec., ¶ 36.

7 Finally, the maximum penalty figure does not consider that Courts have complete discretion
8 to “award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on
9 the facts and circumstances of the particular case, to do otherwise would result in an award that is
10 unjust, arbitrary and oppressive, or confiscatory.” (Cal. Lab. Code § 2699(e)(2)). In fact, Courts
11 routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g. Carrington v.*
12 *Starbucks Corp.*, 30 Cal. App. 5th 504, 529 (2018) (reducing PAGA penalties to \$5 per pay period;
13 “Although the trial court may have disagreed with Starbucks regarding the issue of liability, it
14 clearly took the circumstances proffered by Starbucks into consideration when it imposed the
15 penalty ... only \$5 per initial violation”); *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal App 5th 778,
16 788 (2018), review granted on other grounds (noting that the trial court “exercised its discretion to
17 reduce the [PAGA] penalties to 13 percent of the full amount [requested, because] [o]n average,
18 plaintiffs were deprived of 13 percent of the 30-minute meal period”); *Fleming v. Covidien, Inc.*,
19 2011 WL 7563047, *4 (C.D. Cal. 2011) (exercising discretion to reduce the maximum amount of
20 PAGA civil penalties for plaintiffs’ section 226 claims from \$2,800,000 to \$500,000 because the
21 employees suffered no injuries as a result of the erroneous wage statements and made no complaints
22 about the errors or omissions in the wage statements, thus reducing the maximum penalty by 82%);
23 *see also, Gola v. University of San Francisco*, San Francisco Superior Court Case No. CGC-18-
24 5655018, Proposed Statement of Decision, dated July 21, 2020, Judge Curtis A. Karnow of San
25 Francisco Complex (concluding after a full-blown bench trial that a penalty of 15% of the maximum
26 PAGA penalties was the appropriate penalty). The gross amount obtained by Plaintiffs’ Counsel is
27 reasonable in light Defendant’s arguments. Further, the adverse decisions in *Viking River Cruises*
28 and *Wesson* pose very significant, and even fatal, risk to Plaintiffs’ case. JCL Dec., ¶ 37

1 Defendant's substantial compliance could also operate to prevent the imposition of PAGA
2 penalties. JCL Dec., ¶ 38. A corollary of PAGA being an enforcement action is that "substantial
3 compliance with statutory directives will suffice if the purpose of the statute is thereby
4 satisfied." *Downtown Palo Alto v. City Council*, 180 Cal.App.3d 384, 395 (1986) (emphasis
5 supplied); *see also Hernandez v. BCI Coca-Cola Bottling Co.*, 2012 WL 12272348, at *8 (C.D. Cal.
6 Apr. 12, 2012), *aff'd*, 554 F. App'x 661 (9th Cir. 2014) (granting defendant's motion for summary
7 judgment based on defendant's "substantial compliance" with Labor Code section 226). In this
8 regard, "[t]he paramount consideration is the objective of the statute." *Id.* "Where there is
9 compliance as to all matters of substance[,] technical deviations are not to be given the stature of
10 noncompliance." *Cal-Air Conditioning v. Auburn Union School Dist.*, 21 Cal.App.4th 655, 668
11 (1993) (emphasis supplied). "Unless the intent of a statute can only be served by demanding strict
12 compliance with its terms, substantial compliance is the governing test." *County of Tulare v.*
13 *Campbell*, 50 Cal. App. 4th 847, 853 (1996) (emphasis supplied).

14 Given Defendant's defenses to the claimed Labor Code violations at issue, and the risks and
15 costs of continued litigation, Plaintiffs and Plaintiffs' Counsel believe that the Gross Settlement
16 Amount is fair and reasonable. This settlement was negotiated by experienced counsel at arm's
17 length. JCL Dec., ¶ 39. The LWDA has been provided notice of this motion and the PAGA
18 settlement, and the decision of LWDA to accept the PAGA settlement and not oppose the motion
19 should be given considerable weight. Moreover, the LWDA is a sophisticated government entity that
20 can assert and protect its own rights. JCL Dec., ¶¶ 5, 40.

21 **B. The Remaining Settlement Terms Are Fair and Reasonable**

22 Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code §
23 2699(1) does not require that a court approve any other elements of the proposed settlement.
24 Because there are no class allegations for which Plaintiffs seek approval, the approval provisions
25 applicable to class settlements under Cal. Code Civil Proc. § 382 do not apply. Accordingly, the
26 Court only needs to approve the settlement of the civil penalties sought in the PAGA claim.
27 Nevertheless, as explained herein, the settlement terms for attorneys' fees and costs are reasonable.

28 ///

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

2 Plaintiffs' Counsel seeks approval of Attorneys' Fees in the amount of \$136,666.67 (one-
3 third of the Gross Settlement Amount) and Attorneys' Expenses not to exceed \$25,000.00³ for
4 reimbursement of actually incurred litigation expenses. PAGA does not have any requirements for
5 reviewing attorneys' fees, and Plaintiffs' position is that the payment of attorneys' fees and costs in
6 this Settlement is a matter of contract for a contingent representation. Nevertheless, should this
7 Court review the requested attorneys' fees, the requested fees and costs are reasonable for
8 experience wage and hour counsel. JCL Dec., ¶ 31.

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

10 The requested Attorneys' Fee of \$136,666.67 and reimbursement of Attorneys' Expenses of
11 up to \$25,000.00 is fair, reasonable, and justified by the result achieved. Agreement at § III(I)(8);
12 JCL Dec., ¶ 41. Plaintiffs' Counsel negotiated a recovery of \$410,000.00, and this result justifies the
13 requested fees equal to one third of this recovery. This percentage is within the standard contingent
14 recovery percentage of one-third, and this percentage is what was expressly approved by the
15 Supreme Court in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal.5th 480, 504, (2016). At the time this case
16 was brought, the result was far from certain. Defendant's defenses to the merits of the case created
17 difficulties with proof and complex legal issues for Plaintiffs' Counsel to overcome. Here, several
18 defenses asserted by Defendant present serious threats to the claims of Plaintiffs and the Aggrieved
19 Employees. Defendant asserted that its employment practices complied with all applicable Labor
20 laws. If successful, Defendant's factual and legal defenses would eliminate *any recovery* to the
21 Aggrieved Employees. While Plaintiffs believe that these defenses could be overcome, Defendant
22 maintains that these defenses have merit and therefore present a serious risk to recovery. The
23 Settlement was possible because, in Plaintiffs' Counsels' eyes, Plaintiffs' Counsel was able to
24 persuade Defendant that there was an appreciable risk that Plaintiffs would prevail on the factual and
25 legal issues underlying liability and overcome difficulties in proof as to monetary relief. JCL Dec., ¶
26 42.

27
28 ³ As detailed *infra*, at the time of filing this motion, Plaintiffs' Counsel incurred \$19,159.18 litigating this matter. Plaintiffs will provide the Court with a final amount of litigation costs at the time of hearing on this motion.

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

As detailed in Plaintiffs' Counsels' time and billing records submitted herewith, Plaintiffs' Counsels' current combined loadstar is \$98,858.00. JCL Dec., ¶¶43-49; Declaration of Shani Zakay ("Zakay Dec.") at ¶¶ 3-5; Boyamian Dec. ¶ 20. Thus, Plaintiffs' Counsels' fee request is equal to Plaintiffs' Counsel's loadstar with a negligible multiplier of 1.38– well below the 2.13 multiplier approved in *Laffitte* – and well within the recognized multiplier range between 2 and 4. See also *Taylor v. FedEx Freight, Inc.*, 2016 U.S. Dist. LEXIS 142202 (E.D. Cal. 2016) (following *Laffitte*, approved 30% fee award 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. Plaintiffs' Counsel Are 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

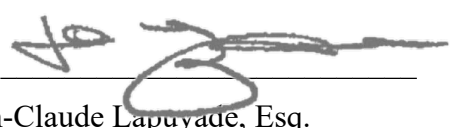
1 paying clients in the marketplace. *See Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *see also*
2 *Hartless*, 273 F.R.D. at 645-46 (common fund class action settlement where court awarded
3 litigation costs for consultants, online legal research, copying, postage, long distance charges, travel
4 expenses, filing fees, mediation fees and investigation fees). Prior to incurring costs for filing of this
5 motion, Plaintiffs' Counsel collectively expended \$19,159.18 prosecuting this action (JCL Law
6 Firm, APC - \$7,516.58, Zakay Law Group, APLC - \$9,402.30 and Boyamian Law, Inc.-
7 \$2,240.30). JCL Dec. ¶¶ 7, 39; Zakay Dec., ¶¶ 7-8; Boyamian Dec. ¶ 20. Plaintiffs' Counsel's out-
8 of-pocket expenses are the types of expenses normally charged to paying clients including the
9 following: filing fees; copying; postage; factual and legal research charges; mediation fees; and
10 expert costs which were all incurred during, and were necessary for the successful prosecution of,
11 the litigation and, therefore, should be reimbursed. JCL Dec. ¶¶ 6, 40.

12 VI. CONCLUSION

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

16 Dated: April 4, 2023

JCL LAW FIRM, APC

17 By: 
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19 Jean-Claude Lapuyade, Esq.
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