

Joshua D. Gruenberg, Esq. SB #163281
Katherine D. Krebs, Esq. SB #339223
Samuel F. Rotshtein, Esq. SB #355563
GRUENBERG LAW
2155 FIRST AVENUE
SAN DIEGO, CALIFORNIA 92101-2013
TELEPHONE: (619) 230-1234
TELECOPIER: (619) 230-1074

Attorneys for Plaintiff
YESENIA MURILLO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

YESENIA MURILLO, individually, and in a
representative capacity on behalf of members
of the public similarly situated,

Plaintiff,

vs.

COSTCO WHOLESALE CORPORATION,
a Washington Corporation; REAL TIME
STAFFING SERVICES LLC dba SELECT
STAFFING, a California Limited Liability
Company; EMPLOYBRIDGE HOLDING
COMPANY dba SELECT STAFFING, a
Delaware Corporation; and DOES 1 through
10, Inclusive,

Defendant(s).

Case No. 37-2023-00055902-CU-OE-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION
FOR PAGA SETTLEMENT APPROVAL**

Action Filed: December 26, 2023

Hearing Date: December 27, 2024

Hearing Time: 8:30 a.m.

Dept.: C-74

Judge: Hon. Blaine K. Bowman

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3 **I. SUMMARY OF MOTION**

4 Plaintiff YESENIA MURILLO (“Plaintiff”), respectfully submits the following
5 Memorandum of Points and Authorities in support of her motion for an order granting approval of a
6 PAGA Settlement. This motion is **unopposed**. The LWDA was timely notified of this proposal and
7 does **not** object.

8 This case involves PAGA and individual claims. The PAGA Period begins on August 11,
9 2022. There are approximately **13,965** pay periods and **549** aggrieved employees. Declaration of
10 Samuel F. Rotshtein (“Rotshtein Decl.” herein) ¶ 3. Following a successful mediation with JAMS
11 facilitated by the Honorable Peter J. Wilson (Ret.), the parties were able to reach a settlement and
12 agreed to the terms of the proposed PAGA settlement and thereafter drafted and executed a Joint
13 Stipulation of Settlement and Release of PAGA Action. (Rotshtein Decl. ¶ 4; the “Agreement,”
14 attached hereto as **Exhibit A.**) The proposed terms of the settlement are as follows:

15	PAGA Members:	549
16	Settlement Fund (“GSA”):	\$70,000.00
17	Claims Period:	August 11, 2022 until the date of approval
18	LWDA Payment:	\$29,862.50
19	Attorney’s Fees:	\$23,333.33
20	Litigations Costs:	\$1,200.00
21	Settlement Administrator Fees:	\$5,650.00
22	Resultant Net Settlement Fund:	\$9,954.17

23 An “average” PAGA employee will receive a payment of approximately **\$18.13**. Rotshtein
24 Decl. ¶ 8.

25 On October 15, 2024, Plaintiff’s counsel uploaded via the LWDA’s electronic filing portal,
26 the PAGA Settlement Agreement. (Rotshtein Decl. ¶ 5; “LWDA Notice of Settlement,” attached
27 hereto as **Exhibit B.**) To date, Plaintiff’s counsel has not received a notice that the LWDA would
28 intervene. *Id.*

1 On October 15, Plaintiff's counsel uploaded via the LWDA's electronic filing portal, copies
2 of this entire Motion, including the Notice, this supporting Memorandum, Declaration, Proposed
3 Order & Judgment, and PAGA Settlement Agreement. (Rotshtein Decl. ¶ 6; **Exhibit B.**) To date,
4 Plaintiff's counsel has not received any opposition from the LWDA. *Id.* If the LWDA contacts
5 Plaintiff's counsel at any time prior to the December 27, 2024 hearing, Plaintiff's counsel will
6 provide an updated declaration to the Court. Rotshtein Decl. ¶ 7.

7 The settlement agreement only covers PAGA claims. Rotshtein Decl. ¶ 9; Exhibit A: 1.24.

8 The Parties now move the court for approval of the PAGA Settlement Agreement.

9 **II. CONTROLLING LAW**

10 PAGA "authorizes an employee to bring an action for civil penalties on behalf of the state
11 against his or her employer for Labor Code violations committed against the employee and fellow
12 employees." *Iskanian v. CLS Trans. Los Angeles* (2014) 59 Cal. 4th 348, 360. "To compensate for
13 the lack of [a]dequate financing of essential labor law enforcement functions" the California
14 legislature enacted PAGA to permit aggrieved employees to act as a private attorneys general to
15 collect civil penalties for violations of the Labor Code." *Sakkab v. Luxottica* (9th Cir. 2015) 803
16 F.3d 425.

17 Statutory penalties would be calculated according to Labor Code 2699(f)(2): If, at the time
18 of the alleged violation, the person employs one or more employees, the civil penalty is one
19 hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two
20 hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.
21 However, some courts have interpreted Labor Code section 2699(f)(2) to impose the enhanced
22 "subsequent violation penalty" or "heightened penalty" only after an employer has been notified that
23 its conduct violates the Labor Code. *See Trang v. Turbine Engine Components Technologies Corp.*,
24 No. CV 12-07658 DDP (RZx), 2012 WL 6618854 (C.D. Cal. Dec. 19, 2012) ("courts have held that
25 employers are not subject to heightened penalties for subsequent violations unless and until a court
26 or commissioner notifies the employer that it is in violation of the Labor Code"); *Amalgamated*
27 *Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, No. 05cv1199-IEG-CAB,

1 2009 WL 2448430 (S.D. Cal. 2009) (finding that California law imposes the "subsequent violation
2 penalty" only after an employer has been notified its conduct violates the Labor Code).

3 Further, a court may award a lesser amount than the maximum civil penalty amount if, based
4 on the facts and circumstances of the particular case, to do otherwise would result in an award that
5 is unjust, arbitrary and oppressive, or confiscatory. Lab. Code, § 2699(e)(2); *Amaral vs. Cintas*
6 *Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1213-1214; *See e.g., Fleming v. Covidien Inc.*, 2011 WL
7 7563047, at *4 (C.D. Cal. Aug. 12, 2011)

8 “The superior court shall review and approve any settlement of any civil action filed
9 pursuant to [PAGA].” Cal. Lab. Code § 2699(l). In doing so, the Court must consider whether the
10 proposed “PAGA settlement is fair and adequate in view of the purposes and policies of the
11 statute.” *O’Conner v. Uber Techs., Inc.* 201 F. Supp. 3d 1110, 1135 (N.D. Cal. 2016). Those
12 purposes and policies include “benefit[ing] the public by augmenting the state’s enforcement
13 capabilities, encouraging compliance with Labor Code provisions, and deterring noncompliance,”
14 *Id.* at 1132-33; *Accord Syed v. M-I LLC*, 2017 WL 714367 at *13 (E.D. Cal. Feb. 22, 2017)(
15 concluding the “settlement related to plaintiffs’ PAGA claims is fair, reasonable, and adequate in
16 light of the public policy goals of PAGA.”)

17 Recently the Court of Appeal has given guidance to trial courts in reviewing a PAGA
18 settlement:

19 We therefore hold **that a trial court should evaluate a PAGA settlement to**
20 **determine whether it is fair, reasonable, and adequate in view of PAGA's**
21 **purposes to remediate present labor law violations, deter future ones, and to**
22 **maximize enforcement of state labor laws.** (See *Williams* , *supra* , 3 Cal.5th at
23 p. 546, 220 Cal.Rptr.3d 472, 398 P.3d 69 [PAGA "sought to remediate present
24 violations and deter future ones"]; *Arias* , *supra* , 46 Cal.4th at p. 980, 95
Cal.Rptr.3d 588, 209 P.3d 923 [the declared purpose of PAGA was to augment
state enforcement efforts to achieve maximum compliance with labor laws].)
Moniz v. Adecco USA, Inc., (2021) 72 Cal. App. 4th 56, 77.

25 Prior to *Moniz*, Other Courts have followed the rationale in *O’Connor v. Uber Techs., Inc.*,
26 201 F.Supp.3d 1110, 132-35 (N.D. Cal. 2016), which states a court is permitted to approve a PAGA
27 settlement if the settlement is “fair and adequate in view of the purposes and policies of the statute.”
28 *Id.*

1 In deciding whether the settlement was “fair and adequate,” the *Flores* court sought how the
2 parties divvied up the civil penalties under Section 2699(i) of the California Labor Code. *Flores* at
3 1076-77. As the court felt the parties’ division of penalties was fair and adequate pursuant to the
4 statute, the court approved the settlement. *Id.*

5 **III. DISCUSSION**

6 The Parties reached the terms of their proposed PAGA Settlement Agreement, following
7 their successful mediation efforts. Rotshtein Decl. ¶ 10. The Parties submit the proposed settlement
8 of PAGA penalties is fair, adequate, and reasonable. *Id.* The Parties are unaware of any other cases
9 that may be impacted by the PAGA Settlement. *Id.*

10 **A. Settlement Terms**

11 The group of allegedly aggrieved employees is defined as all current and former non-exempt
12 employees of Real Time Defendants who were placed on assignment at the Costco Optical
13 Laboratory in California (the “Aggrieved Employees”) during the PAGA limitations period from
14 August 11, 2022, through the date of the Court’s Order granting approval of the PAGA Settlement.
15 Rotshtein Decl. ¶ 4; Exhibit A: 1.16.

16 Upon the Effective Date (Rotshtein Decl. ¶ 4; Exhibit A: 1.8.), Defendants agree to pay the
17 settlement amount of \$70,000.00 in connection with the PAGA Settlement (“Gross Settlement
18 Amount”). Apart from the employer’s share of payroll taxes, Defendants shall not be required to
19 pay more than the Gross Settlement Amount in connection with the PAGA Settlement. The Gross
20 Settlement Amount is broken down as follows:

- 21 • \$5,650.00 Settlement Administrator Fees;
- 22 • \$23,333.33 Attorneys’ Fees (1/3 of Gross Settlement Amount)
- 23 • \$1,200.00 Costs of Litigation (Rotshtein Decl. ¶ 8.)

24 After deducting the proposed amounts for Plaintiff’s counsel’s Attorneys’ Fees and Costs
25 and the Settlement Administration Costs from the Gross Settlement Amount, the amount remaining
26 is defined as the “PAGA Payment.” One hundred percent (100%) of the PAGA Payment shall be
27 allocated to the payment of civil penalties under the PAGA (the “PAGA Payment”). Pursuant to the
28 PAGA, seventy-five percent (75%) of the PAGA Payment, or Twenty-Nine Thousand Eight

1 Hundred and Sixty-Two Dollars and Fifty Cents (\$29,862.50) shall be allocated to the State of
2 California Labor and Workforce Development Agency (the “LWDA PAGA Payment”), with the
3 remaining twenty-five percent (25%) or Nine Thousand Nine Hundred and Fifty-Four Dollars and
4 Seventeen Cents (\$9,954.17), allocated to the PAGA Employees (“Aggrieved Employees PAGA
5 Payments”). Rotshtein Decl. ¶ 11.

6 Given the above, the average payment to each individual PAGA Employee will be
7 approximately Eighteen Dollars and thirteen Cents (\$18.13). Rotshtein Decl. ¶ 8. Pursuant to the
8 PAGA Settlement Agreement, any funds not collected within one hundred eighty days (180) from
9 the date of issuance will be sent to the Controller of the State of California to be held pursuant to the
10 Unclaimed Property Law. Rotshtein Decl. ¶ 4; Exhibit A § 7.3.

11 Each PAGA Employee’s pro rata share shall be determined based on the number of Eligible
12 Pay Periods that he or she worked for Defendants during the PAGA Period, and shall be calculated
13 as follows: (1) for PAGA Employees, the Aggrieved Employees PAGA Payments will be divided
14 by the total number of eligible pay periods worked by all PAGA Employees during the PAGA
15 Period, and the resulting figure will be referred to as the “Multiplier,” and (2) each PAGA
16 Employee’s pro rata share of the Aggrieved Employees PAGA Payments will be determined by
17 multiplying the Eligible Pay Periods that the PAGA Employee worked during the PAGA Period by
18 the multiplier. Rotshtein Decl. ¶ 4; Exhibit A: 1.10. That amount shall be referred to as the PAGA
19 Employee’s “Individual Settlement Payments.” Rotshtein Decl. ¶ 4; Exhibit A: 1.10.

20 Further, the Settlement only covers PAGA claims. Rotshtein Decl. ¶ 4; Exhibit A: 1.24
21 (“Released Claims”).

22 The proposed notice of the PAGA Settlement to be sent to the allegedly aggrieved
23 employees (the “Notice”) along with his or her Individual PAGA Payment is attached to the
24 Declaration of Samuel F. Rotshtein as **Exhibit C**, ¶ 12. Due to the nature of Defendants’ workforce,
25 the Notice will be provided in English and Spanish. *Id.*

26 The Settlement Administrator shall be responsible for: (a) processing the data provided by
27 Defendants to be used in calculating PAGA Employees’ Individual PAGA Payments; (b) preparing,
28 printing and mailing the Notice to PAGA Employees, as well as following up with reasonable skip

1 tracing; (c) calculating and mailing Individual PAGA Payments to PAGA Employees; (d)
2 calculating and paying the employer's share of the applicable federal and state withholding tax; (e)
3 filing any required federal and state tax forms and related agency reporting; (f) filing any required
4 reports with the Court; and (g) any and all such tasks to which the Parties mutually agree, or which
5 the Court orders the Settlement Administrator to perform. Rotshtein Decl. ¶ 13.

6 The Court will retain jurisdiction of this matter to enforce the settlement pursuant to C.C.P.
7 section 664.6. Rotshtein Decl. ¶ 4; Exhibit A §§ III.11, V.8.

8 **B. The Nature and Scope of the Alleged Violations**

9 The Complaint alleges Labor Code violations which triggered penalties under the PAGA
10 statute (Labor Code §2698 et seq.) (See ROA #1.) Plaintiff's theories of liability alleged all
11 employees were denied compliant meal and rest periods, minimum wages, overtime, accurate wage
12 statements, and suffered waiting time violations. *Id.* Specifically, Plaintiff alleged she—and other
13 employees—were not properly compensated due to Defendants' standard practice to only
14 compensate employees for their scheduled work time as opposed to their actual work time. *Id.*

15 **C. Analysis of Potential Liability, on a Representative Basis**

16 One of the main issues of this litigation concerned allegations that Plaintiff was denied
17 legally compliant meal and rest periods and was not paid for all overtime hours worked. Rotshtein
18 Decl. ¶ 16. Defendants argued employees received compliant rest and meal breaks, and were
19 properly paid overtime. *Id.*

20 Plaintiff's counsel is aware of the Court's discretion to mitigate penalties pursuant to
21 California Labor Code section 2699(e)(2). Rotshtein Decl. ¶ 17. Plaintiff's counsel agrees with the
22 provision of the Labor Code, that penalties should be mitigated where violations are minimal (or
23 rare), or where the employer makes significant efforts to comply with the Labor Code. Rotshtein
24 Decl. ¶ 18. Given Defendants' arguments that they provided legally compliant meal and rest
25 periods, and paid employees for all hours worked, including overtime, the Parties believe the
26 settlement represents a fair and adequate payment. *Id.*

27 **D. Allocation of Penalties and *Limited Release* of Claims**

1 While Labor Code section 2699(l) requires a court to “review and approve any penalty
2 sought as part of the proposed settlement agreement,” it does not provide any guidance as to what is
3 considered an ‘adequate’ allocation of these penalties. However, the California Court of Appeal has
4 upheld than an allocation of **zero dollars** to resolve PAGA claims may be appropriate:

5 The Nordstrom Commission Cases settlement agreement identifies liability for PAGA
6 penalties as a claim against Nordstrom and includes the following language: “The
7 Parties allocate \$0 to any Private Attorney General Act penalty claim under Labor Code
8 § 2699 et seq., for penalty claims based on the Released Claims. During the Class
9 Period, Nordstrom paid Putative Class Members’ commissions pursuant to a
10 commission plan that it contends was approved by the United States District Court in
11 *Rios*, and consequently Nordstrom contends no claim for penalties of any nature is
12 valid.” Thus, the PAGA penalty claims were at issue, and were resolved as part of the
13 overall settlement of the case. We find no abuse of discretion in the trial court’s
14 approval of the settlement agreement containing these terms.

15 *Nordstrom Com’n Cases* (2010) 186 Cal.App.4th 576, 589.

16 Moreover, District Courts in California have routinely approved settlement agreements,
17 which allocate **less than 1%** of the overall settlement amount to PAGA penalties. *See, e.g., Chu v.*
18 *Wells Fargo Investments, LLC* (N. D. Cal., Feb. 16 2011, No. C 054526MHP) 2011 WL 672645 at
19 *1 (approving allocation of \$10,000 to park at penalties out of us \$6,900,000 settlement); *see also*
20 *Schiller v. David’s Bridal, Inc.* (E.D. Cal June 11, 2012, No. 1:10 CV 00616 AWI) 2012 WL
21 2117001 at *14. (approving allocation of \$7,500 to PAGA penalties out of \$518,245 settlement).

22 Defendants, and their counsel, deserve credit for their willingness to consider – and address
23 – the allegations. Specifically, Defense Counsel, (who have extensive experience and knowledge in
24 “Wage and Hour” litigation) engaged Plaintiff’s counsel in good faith arms-length negotiation to
25 resolve the matter prior to protracted litigation commencing. Following successful settlement
26 efforts, the parties have reached a proposed settlement. That includes a payment of penalties under
27 PAGA. Rotshtein Decl. ¶ 19.

28 Here, the parties seek to allocate **\$39,816.00** of the Gross Settlement Amount to the total
value of the PAGA Penalties. Of this amount, the LWDA will receive **\$29,862.50** and the Third
Party Administrator will receive **\$5,650.00**. Rotshtein Decl. ¶ 4, 8; Exhibit A §§ 1.9, 1.10, 1.26. The
remaining **\$9,954.17** will be allocated and distributed among the PAGA Employees. *Id.* Each
PAGA member would receive an average payment of approximately **\$18.13**. *Id.*

1 The Parties contend the PAGA Settlement agreement amount is fair, adequate, and
2 reasonable. Rotshtein Decl. ¶¶ 10, 19. The release only applies to the PAGA claims for penalties,
3 based upon the allegations in Plaintiff's operative complaint. *Id.*

4 **E. The LWDA Was Notified Multiple Times, And Does Not Object.**

5 On October 15, 2024, Plaintiff's counsel uploaded via the LWDA's electronic filing portal,
6 the PAGA Settlement Agreement. Rotshtein Decl. ¶ 5. To date, Plaintiff's counsel has not received
7 a notice that the LWDA would intervene. *Id.*

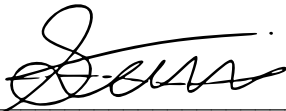
8 On October 15, Plaintiff's counsel uploaded via the LWDA's electronic filing portal, copies
9 of this entire Motion, including the Notice, this supporting Memorandum, Declaration, Proposed
10 Order & Judgment, and PAGA Settlement Agreement. Rotshtein Decl. ¶ 6. To date, Plaintiff's
11 counsel has not received any opposition from the LWDA. *Id.* If the LWDA contacts Plaintiff's
12 counsel at any time prior to the June 16, 2023, hearing, Plaintiff's counsel will provide an updated
13 declaration to the Court. Rotshtein Decl. ¶ 7.

14 **IV. CONCLUSION**

15 The Parties have negotiated a fair, adequate and reasonable settlement of the PAGA claims.
16 For the foregoing reasons, Plaintiffs respectfully request that this Court issue an Order Granting
17 their Motion for Approval of the PAGA Settlement.

18
19
20 Dated: October 15, 2024

GRUENBERG LAW

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22 _____
23 JOSHUA D. GRUENBERG, ESQ.
24 KATHERINE D. KREBS, ESQ.
25 SAMUEL F. ROTSHTSTEIN
26 Attorneys for Plaintiff
27 YESENIA MURILLO
28