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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

PARASTOO MABOUDI, an individual, on
behalf of herself, and on behalf of all persons
similarly situated,

Plaintiff,

vs.

THE NEIMAN MARCUS GROUP LLC, a
Delaware Limited Liability Company; and
DOES 1 through 50, Inclusive;

Defendants.

Case No. 21CV391973

Action Filed: December 15, 2021

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR APPROVAL
OF PAGA ACTION SETTLEMENT**

Hearing Date: June 26, 2024

Hearing Time: 1:30 p.m.

Judge: Hon. Theodore C. Zayner

Department: 19

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Parastoo Maboudi and Francesco Masiello (collectively “Plaintiffs”) seek approval of
4 the PAGA Settlement Agreement (“Agreement”)¹, which if approved, would provide valuable monetary
5 relief for approximately 2,663 “Aggrieved Employees,” defined as all current and former employees
6 who were employed in an hourly-paid, non-exempt role by The Neiman Marcus Group LLC
7 (“Defendant”) who were employed in California during the period between October 8, 2020 through
8 October 30, 2023 (the “PAGA Period”). Agreement at § A(1)-(2). This is only a settlement of Plaintiffs’
9 PAGA claims for civil penalties and is not a class settlement and does not release the individual wage
10 claims, if any, of the affected employees or the Plaintiffs themselves. Cal. Lab. Code § 2699(g)(1);
11 *Iskanian v. CLS Transportation*, 59 Cal. 4th 348, 381 (2014); *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175,
12 182 (2019) (unpaid wages are not recoverable under PAGA).

13 If approved, the Aggrieved Employees and the California Labor Workforce and Development
14 Agency (“LWDA”) will share in a Gross Settlement Amount of One Million, Seven Hundred Fifty
15 Thousand Dollars and Zero Cents (\$1,750,000). Agreement at § B(3). 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 § B(3). An objective evaluation of the proposed Settlement confirms that the relief
19 negotiated on behalf of the Aggrieved Employees and the LWDA is fair and reasonable. The Settlement
20 is a product of informed, adversarial, and non-collusive and mediated negotiations between experienced
21 counsel. As discussed below, the proposed Settlement satisfies all criteria for PAGA settlement
22 approval. Accordingly, Plaintiffs and Plaintiffs’ Counsel respectfully request this Court grant approval
23 of the Agreement. JCL Dec., at ¶ 9.

24 ///

25 ///

26 ///

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

II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Exhaustion of Administrative Remedies Under PAGA And Civil Action Against Defendant

On October 8, 2021, Plaintiff Maboudi, 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-847931-21). JCL Dec., at ¶ 10. The 65-day "waiting period" on Plaintiff Maboudi's rights to file a civil action under PAGA, *see* Cal. Lab. Code § 2699.3(a)(2)(A), lapsed without the LWDA notifying Plaintiff Maboudi that they intended to investigate the claims in her PAGA Notice. To date, the LWDA still has not advised Plaintiff Maboudi of any intent to take action with respect to the claims in her PAGA Notice. JCL Dec., at ¶ 11.

On December 15, 2021, Plaintiff Maboudi filed a PAGA representative action complaint against Defendant alleging a single cause of action for violations of the Private Attorney General Act. The complaint sought civil penalties for Defendant's alleged failure to provide compliant meal and rest periods, failure to provide compliant rest periods, failure to pay all minimum and regular wages, failure to pay all overtime and double time wages, failure to maintain true and accurate records, failure to provide accurate itemized wage statements, failure to reimburse employees for required business expenses, failure to pay overtime, double time, meal and rest period premiums, and sick pay at the regular or proper rate of pay, and failure to timely pay wages due during, and upon termination of employment. JCL Dec., at ¶ 12.

On May 24, 2023, Plaintiff Masiello, 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-957220-23). JCL Dec., at ¶ 12. The 65-day "waiting period" on Plaintiff Masiello's rights to file a civil action under PAGA, *see* Cal. Lab. Code § 2699.3(a)(2)(A), lapsed without the LWDA notifying him that they intended to investigate the claims in his PAGA Notice. To date, the LWDA still has not advised Plaintiff Masiello of any intent to take action with respect to the claims in Plaintiff Masiello's PAGA Notice. JCL Dec., at ¶ 13.

1 On August 1, 2023, the Parties attended a full-day mediation with experienced wage and hour
2 class and PAGA action mediator Jeffrey Ross. In advance of the mediation, Defendant provided
3 Plaintiffs with sufficient information to properly evaluate Defendant's liability exposure for civil
4 penalties to the Aggrieved Employees. Among the data and documents Defendant produced included,
5 but was not limited to, the total number Aggrieved Employees, pay periods, written wage and hour
6 policies, employee handbooks, and time and payroll records for Aggrieved Employees. JCL Dec., ¶ 14.
7 At the conclusion of the mediation, and with the assistance of the mediator, the Parties reached a
8 settlement. The Parties subsequently executed a binding and enforceable Memorandum of
9 Understanding ("MOU"). After reaching an agreement in the principle, the Parties drafted and
10 negotiated a long-form settlement which is the subject of the instant motion. The Settlement was
11 negotiated in light of all known facts and circumstances and the uncertainty associated with litigation –
12 including the risk of Plaintiffs not being able to maintain representative claims and establishing
13 manageability, the risk of Plaintiffs' individual PAGA claims being compelled to arbitration amidst a
14 changing legal landscape regarding PAGA arbitrability (as both Plaintiffs purportedly signed arbitration
15 agreements), the difficulty of proving Plaintiffs' claims in a manageable trial, the merits of Defendant's
16 potential defenses, and the significant delay and potential appellate issues inherent to litigation – and
17 was reached after extensive arm's length negotiations, with the assistance of the mediator. JCL Dec., at
18 ¶ 15. Following the Parties' mediation, the Parties stipulated to permit Plaintiff Maboudi to file a First
19 Amended Complaint ("FAC") in order to add Masiello as a named plaintiff in the action. The FAC was
20 filed on January 16, 2024. JCL Dec., at ¶ 15.

21 The Settlement is intended to fully and finally resolve the Released PAGA Claims asserted by
22 Plaintiffs on behalf of the Aggrieved Employees and State of California. This is only a Settlement of
23 the PAGA claims for civil penalties and is not a class settlement and does not release the individual
24 claims, if any, of the Aggrieved Employees. This Settlement does not release any claim that is not a
25 PAGA claim.² Nor does this Settlement waive Defendant's right to assert *res judicata* or other available
26 defenses to any asserted claim or lawsuit. JCL Dec., at ¶ 16. Pursuant to California Labor Code Section
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."

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

III. TERMS OF THE PAGA SETTLEMENT

A. The Gross Settlement Amount

The PAGA settlement is subject to Court approval consistent with Labor Code § 2699(1)(2). The Settlement Agreement negotiated by the Parties provides for a "Gross Settlement Amount" payment in the amount of One Million Seven Hundred and Fifty Thousand Dollars (\$1,750,000.00) to resolve the PAGA claims. From the Gross Settlement Amount, there is a deduction of Attorneys' Fees of up to one-third of the Gross Settlement Amount (or \$583,333.33), reimbursement of incurred Attorneys' Expenses in an amount not to exceed \$35,000.00, and payment of Claims Administration Expenses to the Settlement Administrator in an amount not to exceed \$13,500.00. Agreement at §§ B(30)(a)-(c). After these deductions, the amount remaining is the "Net Settlement Amount," which is estimated to be \$1,118,166.67. Of the "Net Settlement Amount," seventy-five percent (75%) shall be paid to the LWDA and the remaining twenty-five percent (25%) shall be paid to the Aggrieved Employees as Individual PAGA Payments. Agreement at §B(30)(d). This allocation is required by Labor Code § 2699 as explained by *ZB, N.A. v. Superior Court*, 8 Cal.5th 175 (2019).

B. Allocation of Individual PAGA Payments

The Individual PAGA Payments to the Aggrieved Employees shall be based on the number of PAGA Pay Periods each Aggrieved Employee worked during the PAGA Period as a percentage of the total PAGA Pay Periods worked by all Aggrieved Employees during the PAGA Period. Agreement at § B(33). At the time of mediation, Defendant estimated that there were approximately 2,663 Aggrieved Employees who worked approximately 88,000 PAGA Pay Periods during the PAGA Period based on company records. Should the number of pay periods for Aggrieved Employees in the Settlement Period increase by more than 10% over 88,000 pay periods (i.e., by more than 8,800 additional pay periods), the Gross Settlement Amount will increase proportionally for the number of pay periods over 110% of

88,000. Agreement at § B(34).

C. Funding and Distribution

Provided that an order approving this Settlement is entered by the Court, Defendant shall fund the Gross Settlement Amount into a Qualified Settlement Fund (“QSF”) established by the Claims Administrator within 10 business days after occurrence of all of the following: (1) the Effective Date, (2) Plaintiffs’ filing of the First Amended Complaint (if the Court requires it to be separately filed), and (3) establishment of the QSF and Defendant being provided wiring instructions for the same in three installments. Agreement at §B(31). The “Effective Date” is 65 days after service of notice of entry of the Court’s Order approving this Settlement and judgment thereon, or if an appeal is taken from any aspect of the Court’s Order regarding approval of this Agreement and/or the judgment entered thereon, then 21 days after the later of either (i) the appeal being withdrawn or (ii) the exhaustion of all available appellate review and an appellate decision affirming the Order granting approval of the Settlement or judgment thereon becoming final and not subject to further appellate review. Agreement at §B(5).

Within fifteen (15) calendar days of its receipt from Defendant of a database of contact information for the Aggrieved Employees, the Settlement Administrator will disburse the Gross Settlement Fund by (a) sending to the Aggrieved Employees, by U.S. Mail, a check representing their pro-rata share of the 25% of the Net Settlement Amount, along with a copy of the Notice of Settlement; (b) issuing payment to Plaintiffs’ Counsel for Plaintiffs’ attorneys’ fees as approved by the Court up to \$583,333.33 and up to \$35,000 for Plaintiffs’ litigation costs as approved by the Court; (c) issuing payment to the LWDA for 75% of the Net Settlement Amount; and (d) issuing payment to the Settlement Administrator for its costs as approved by the Court. Agreement at § B(37). Settlement checks issued to Aggrieved Employees will expire one hundred eighty (180) days from the date they are issued by the Settlement Administrator. Agreement at § B(38). If the check remains uncashed by the expiration of the 180-day period, the Settlement 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. Agreement at § B(38). The individual Aggrieved Employee Payments are 100% penalties and interest and shall be reported using IRS Form 1099s. Agreement § B(42). JCL Dec., at ¶59

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1 **D. Release of Claims**

2 When the Gross Settlement Amount is fully funded by Defendant in accordance with the terms
3 agreed upon by the Parties, Plaintiff, the LWDA the Aggrieved Employees shall release the Released
4 Parties from the Released Claims. Agreement at § B(46). The Released Claims means any claim for
5 civil penalties under the PAGA and all other related remedies available under the PAGA for all
6 allegations, claims, debts, rights, demands, charges, complaints, actions, causes of action, guarantees,
7 interest, costs, expenses, attorneys' fees, damages, obligations or liabilities of any and every kind
8 recoverable under the PAGA, contingent or accrued, that are, were or reasonably could have been
9 alleged or asserted based upon the facts and/or theories alleged in the operative pleading and/or in any
10 notice provided pursuant to PAGA by Maboudi or Masiello to the LWDA and Defendant (including,
11 without limitation, in Maboudi's October 8, 2021 PAGA notice letter and Masiello's May 24, 2023
12 PAGA notice letter, respectively), arising out of, based on or related to any violation of Labor Code § §
13 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.2, 226.3, 226.7, 246, 510, 512, 558, 1174, 1174.5,
14 1194, 1197, 1197.1, 1197.14, 1198, 1199, 2802 and 2804 that occurred, arose or accrued at any time
15 during the PAGA Period. Agreement at § B(12). The release does not include underlying wage and
16 hour claims, claims for wrongful termination, discrimination, unemployment insurance, disability, and
17 workers' compensation, and claims outside of the PAGA Period. The Released Claims do not include
18 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 agency
22 at the same time that it is submitted to the court.” Further, the Court in *Moniz v. Adecco USA, Inc.*
23 (2021) 72 Cal.App.5th 56, 77 stated that “the trial court must review and approve a PAGA settlement
24 (§ 2699, subd.(l)(2)), and the Supreme Court has in dictum referred to this review as a safeguard.”
25 (Citing *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 88; internal quotations omitted.)
26 “The Supreme Court has also observed that trial court approval ensures that any negotiated resolution
27 is fair to those affected,” leading the Court in *Moniz* to determine that “adoption of a standard of review
28 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. (1)(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 \$1,750,000 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 \$7,229,478.15 in PAGA penalties. JCL Dec., ¶ 18. Defendant’s exposure is detailed below.

1. Estimated Penalties for Plaintiffs’ Rest Period Claim

Plaintiffs contends that Defendant pays sales associates and other employees via a compensation structure that pays them *either* an hourly wage or their commission, whichever is greater. JCL Dec., ¶ 19. When the employee’s commission is greater, Plaintiff alleges that this structure amounts to a commission-only compensation plan. Under such a compensation plan, the law requires an employer to separately compensate employees for non-selling time, such as such as time spent in meetings, in trainings, and during rest periods. See *Vaquero v. Stoneledge Furniture LLC*, 9 Cal. App. 5th 98, 103 (2017), *as modified* (Mar. 20, 2017). Separately compensating employees for non-selling time is particularly important because, as the *Vaquero* court explained, commission-based compensation plans discourage employees from taking rest breaks. *Id.* at 113. JCL Dec., ¶ 20.

Plaintiffs also alleged that Defendant failed to provide compliant rest periods to the Aggrieved Employees. Specifically, Plaintiffs alleged that Aggrieved Employees were sometime required to work in excess of four hours without being provided a rest period as a result of their rigorous work schedule, and Defendant’s inadequate staffing. Plaintiffs estimated Defendant’s total liability under this claim to

1 be approximately \$1,440,950. JCL Dec., ¶ 20

2 In calculating this number, Plaintiffs took into account 28,819 total pay periods and multiplied
3 this by \$50. In assigning \$50 per rest break violation as the rate when calculating Defendant's exposure
4 under PAGA, Plaintiffs considered a variety of defenses presented by Defendant before, during, and
5 after the mediation and subsequent settlement negotiations, all of which resulted in Plaintiffs discounting
6 the value of their PAGA claims for purposes of this analysis. Specifically, Defendant argued that
7 increased civil penalties for subsequent violations do not apply unless the plaintiff can present evidence
8 that the Labor Commissioner or a court notified the employer that it was in violation of the Labor Code.
9 (*Gunther v. Alaska Airlines, Inc.* (2021) 72 Cal.App.5th 334, 355-356, citing *Bernstein v. Virgin*
10 *America, Inc.* (2021) 3 F.4th 1127, 1144; see *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th
11 1157, 1209 ["Until the employer has been notified that it is violating a Labor Code provision ... the
12 employer cannot be presumed to be aware that its continuing underpayment of employees is a 'violation'
13 subject to penalties."]) JCL Dec., ¶ 21. Separately, Defendant argued that courts have considerable
14 discretion to reduce the penalty awards under PAGA. In *Carrington v. Starbucks Corp.* (2018) 30
15 Cal.App.5th 504, the trial court reduced the maximum PAGA penalty amount by 90%. The Court of
16 Appeal affirmed a judgment after trial which only provided for a PAGA penalty of \$5 per pay period.
17 JCL Dec., ¶ 22. In *Magadia v. Wal-Mart Associates, Inc.* (2019) 384 F.Supp.3d 1058, a federal court
18 reduced PAGA penalties by 66.4%. In *Fleming v. Covidien*, 2011 U.S. Dist. LEXIS 154590 (C.D. Cal.
19 2011), a federal court reduced PAGA penalties from \$2,800,000 to \$500,000, a reduction of 82.2%
20 because the court found maximum penalties "unjust" because the employees had suffered no injuries.
21 Some trial courts have even awarded no civil penalties, even when Labor Code violations are
22 established. (See *In re Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 589 (affirming an award of
23 \$0 in PAGA penalties in a wage and hour class action); *In re Taco Bell Wage & Hour Actions*, 2016
24 U.S. Dist. LEXIS 48557, *40-43 (E.D. Cal. Apr. 6, 2016) (PAGA penalties denied after trial).)
25 Accordingly, it is unlikely that Plaintiffs would recover full penalty amounts even if they prevailed in
26 establishing the underlying Labor Code violations. Plaintiffs are not aware of any Court in California
27 that has awarded the full \$100 per pay period rate, let alone the subsequent rate of \$200 per pay period.
28

1 JCL Dec., ¶ 23.

2 PAGA provides penalty amounts “[f]or all provisions of this code **except those for which a civil**
3 **penalty is specifically provided.**” (Cal. Lab. Code § 2699(f).) Pursuant to California Labor Code
4 section 558(a)(1), an employer is subject to a penalty of \$50 for violations of a Labor Code section
5 regulating hours and days of work, including meal period and rest period violations. Accordingly,
6 because section 558(a)(1) specifically provides for a civil penalty, Plaintiffs used a \$50 penalty per
7 violation for the meal and rest break claims. Moreover, in assigning \$50 per violation as the rate when
8 calculating Defendant’s exposure under PAGA, Plaintiffs also considered a variety of issues and
9 defenses related to Defendant’s liability and related to the scope of employees affected by the various
10 claims. These considerations were also an important factor in Plaintiffs’ discounted valuation.
11 Specifically, Defendant maintains that Plaintiffs cannot demonstrate the ability to pursue a statewide
12 representative action on this claim for all of the Aggrieved Employees that worked pursuant to this
13 compensation structure. In particular, the group of Aggrieved Employees is comprised of individuals
14 that worked at ten separate locations, and Defendant does not believe that Plaintiffs can demonstrate the
15 ability to pursue this claim on behalf of employees at nine of the California locations at which Plaintiffs
16 did not work. Moreover, Defendant believes that determining which employees were paid either their
17 hourly rate or their commissions each pay period would create an individualized inquiry not well-suited
18 for a PAGA action. JCL Dec., ¶ 24.

19 **2. Estimated Penalties for Defendant’s Miscalculation of Regular Rate of Pay**

20 Defendant maintains that its employees are not compensated via a commission-only plan. Under
21 the theory that all Aggrieved Employees were paid an hourly wage, Plaintiffs allege that Defendant is
22 liable for its failure to properly calculate the regular rate of pay for purposes of paying overtime, sick
23 pay, and meal period premiums. Defendant maintains that its method for calculating employees’ regular
24 rate of pay is proper, pursuant to an unpublished Ninth Circuit decision, *Bowen v. Target Corp.*, No. 21-
25 56136, 2022 WL 16570815, at *2 (9th Cir. Nov. 1, 2022). JCL Dec., ¶ 25.

26 In light of the defenses raised by Defendant related to their calculation of the regular rate of pay,
27 supported by a recent Ninth Circuit decision, Plaintiffs have discounted the value of this claim by 50%.
28 Taking into account this discount, Plaintiffs estimate Defendant’s total liability pursuant to this claim to

1 be approximately \$1,638,150. JCL Dec., ¶ 26. This number was calculated using 32,763 pay periods
2 and a rate of \$100 per violation. JCL Dec., ¶ 26.

3 **3. Estimated Penalties for Defendant’s Meal Period Violations**

4 Plaintiffs allege Defendant failed to provide meal periods, provided late meal periods, and
5 provided short meal periods, in violation of California law. Plaintiffs further allege that Defendant
6 maintained improper written policies, which failed to notify California employees of their right to take
7 a meal break before the end of their fifth hour of work, their right to take a second meal period if they
8 work more than 10 hours, or their right to one meal period premium per day for each day on which
9 compliant meal periods are not offered by Defendant. JCL Dec., ¶ 27. In reviewing the data provided
10 by Defendant, Plaintiffs’ expert noted that on average, breaks were late, short or missed in approximately
11 66.5% of pay periods. Moreover, while Defendant paid meal period premiums, Plaintiffs allege that it
12 did so in less than 2% of all instances in which a meal period was non-compliant. JCL Dec., ¶ 27.

13 Defendant raised a number of defenses to this claim. Namely, Defendant maintains that it is not
14 required to “police” meal breaks under the law, and that evidence that an employer knew that employees
15 worked during breaks does not, standing alone, establish liability. *See Brinker v. Sup. Ct.*, 53 Cal.4th
16 1004, 1040 (2012). Quoting *Brinker*, Defendant maintains that “employees cannot manipulate the
17 flexibility granted them by employers to use their breaks as they see fit to generate such liability.” *Id.*
18 Accordingly, per Defendant, the Aggrieved Employees’ timesheets that appear to show a missed, short
19 or late break is not sufficient evidence to demonstrate that a failure to take a timely or compliant break
20 was the result of some *affirmative conduct* by Defendant that *forced* employees to *forego* their breaks,
21 nor do they indicate whether or not the opportunity to take a timely, 30-minute meal break was actually
22 provided. Defendant also argues that it had well-established policies and procedures, that it instructs
23 employees to utilize reporting procedures if a meal period is missed, late, or short, and moreover that
24 this process became automated in May 2022. Defendant argues that Plaintiffs cannot proffer any
25 substantial and concrete contravention of its established policies. JCL Dec., ¶ 28.

26 Taking into account the defenses raised by Defendant, Plaintiffs have discounted the value of this
27 claim by 50%. Plaintiffs estimate Defendant’s total liability pursuant to this claim to be approximately
28 \$1,456,200. JCL Dec., ¶ 29. This calculation is based on 58,248 workweeks, and a rate of \$50 per

violation. The \$50 rate was used in this calculation for the same reasons as detailed above, in section IV(A)(1). JCL Dec., ¶ 29.

4. Estimated Penalties for Defendant's Violations Pursuant to Labor Code § 203

Plaintiffs further alleged that as a result of Defendant's failure to pay employees for all time worked, failure to pay employees at the correct regular rate of pay for meal period premiums, overtime and sick pay, and failure to pay all premiums owed, Plaintiffs and the Aggrieved Employees are entitled to waiting time penalties. Defendant argues that this claim has no value because Plaintiffs have no evidence of willfulness for assessing liability – i.e., that Defendant intentionally failed to pay any wages of any kind and/or failed to provide and authorize and permit compliant meal and rest periods, respectively. At best, Defendant believes that “mini-trials” would be required for each allegedly aggrieved employee to determine whether a final wage violation occurred, including whether Defendant acted willfully and whether there is a good faith dispute that wages are due. Defendant also argued that a good faith dispute that any wages are due is an affirmative defense that will preclude imposition of waiting time penalties under Labor Code section 203. Per Defendant, there is a good faith dispute here as to whether any unpaid wages are due. JCL Dec., ¶ 30.

In light of the arguments raised by Defendant, Plaintiffs discounted Defendant's total estimated liability here by 50%, to \$69,450. JCL Dec., ¶ 31. This number was calculated by taking into account 1,389 former employees in the PAGA period, multiplying this by \$100 per violation, and assuming each of the 1,389 former employees incurred one violation. JCL Dec., ¶ 32.

5. Estimated Penalties for Defendant's Failure to Reimburse Employees

Plaintiffs allege that they and other sales associates frequently delivered orders to customers' home and offices using their personal vehicles, and used their personal cell phones for business purposes. Plaintiffs allege that they were not reimbursed mileage or for personal cell phone usage by Defendant. Defendant maintains that it had proper policies and procedures in place to reimburse employees for personal cell phone usage and mileage associated with the use of their personal vehicles, however employees first had to alert Defendant and request such reimbursement. No reimbursement was triggered, per Defendant, unless and until Defendant was put on notice of the expense incurred. In light of this defense, Plaintiffs discounted Defendant's total estimate liability here by 70%, to \$433,803. JCL

Dec., ¶ 33. This number was calculated by taking an estimated 14,460 pay periods and multiplying it by a \$100 violation rate. JCL Dec., ¶ 33.

6. Estimated Penalties for Unpaid Wages

Plaintiff Maboudi alleged that they and other Aggrieved Employees worked off the clock when undergoing bag searches required by Defendant. Per Plaintiff Maboudi, the amount of time she would have to wait after clocking out, in order to have her bag searched, varied depending on how busy the sales floor was. At mediation, Defendant presented evidence of its policies and procedures related to bag checks, including a comprehensive explanation of where the bag check locations were relative to where time clocks were located. Per Defendant, it is its policy and practice for employees to clock out after undergoing a bag check, and moreover, that to complete these tasks in the reverse order, while not impossible, would require employees to walk to from the center of the stores the exits, scan their employee badge to clock out, then walk *back* into the center of the stores, in order to undergo a bag check. Per Defendant, such behavior is not only against their policy, but wholly illogical. Plaintiffs also alleged that Aggrieved Employees worked off-the-clock in responding to communications from Defendant's customers. Defendant denies requiring any such work, and notes that employees were aware of its policy prohibiting off-the-clock work and had sufficient control over their schedules to simply clock out after they had completed their work. Moreover, Defendant maintains that it is the responsibility of employees to alert Defendant of any work completed when not clocked in, in order to be compensated for such. JCL Dec., ¶ 34.

In light of the defenses raised by Defendant, Plaintiffs discounted this claim by 75%, to \$2,190,925. This number was calculated by taking a 75% discount of \$8,763,300, a number that represents a \$100 violation for each Aggrieved Employee, during each pay period worked. JCL Dec., ¶ 34.

7. Derivative Claims for Inaccurate Wage Statements

Plaintiffs alleged that when Aggrieved Employees missed meal and rest breaks, or were paid inaccurate missed meal and rest period premiums, or were paid non-discretionary incentive and/or bonus compensation, or were not paid for all hours worked, Defendant also failed to provide them with complete and accurate wage statements, in violation of Labor Code 226. As this claim was wholly derivative of the other claims asserted by Plaintiff, Defendant maintains that any such penalties

1 associated with this claim would constitute improper “stacking”. Plaintiffs have not included penalties
2 under Labor Code 226 into their calculation, as this claim is derivative of the other claims alleged. JCL
3 Dec., ¶ 35.

4 **B. The Gross Settlement Compares Favorably to The Likely Recovery**

5 In light of the above, the Gross Settlement Amount is approximately 24% of Defendant’s potential
6 PAGA exposure. The Gross Settlement Amount compares favorably to the likely recovery of PAGA
7 penalties through continued litigation. JCL Dec., ¶36.

8 Defendant’s maximum exposure to PAGA penalties is not a realistic outcome of the litigation
9 because it fails to account for the risks of continued litigation including, but not limited to, Defendant’s
10 defenses. *See, Zayerz v. Kiewit Infrastructure West*, 2018 U.S. Dist. LEXIS 14918, *14 (C.D. Cal.
11 January 18, 2018). For instance, Defendant contended that Plaintiffs’ PAGA claims could potentially
12 be wiped out in the light of the United States Supreme Court decision in *Viking River Cruises v.*
13 *Moriana*, (2022) 142 S.Ct. 1906. JCL Dec., ¶ 37. In *Viking River*, the U.S. Supreme Court held that
14 PAGA claims are preempted by the Federal Arbitration Act, where, as here, arbitration agreements were
15 signed by the employees. This posed a very significant risk to Plaintiffs’ case which was ultimately
16 realized. *See Viking River Cruises v. Moriana*, (2022) 142 S.Ct. 1906. Defendant produced arbitration
17 agreements for both Plaintiff Maboudi and Plaintiff Masielo. Were Defendant to compel Plaintiffs’
18 individual PAGA claims to arbitration, Plaintiffs risk losing their standing to assert representative PAGA
19 claims on behalf of the Aggrieved Employees. JCL Dec., ¶38.

20 Second, Defendant argued that it can only be assessed civil penalties for actual violations of the
21 Labor Code. *See* Lab. Code § 2699(f)(2). In other words, to recover any civil penalties, Plaintiffs would
22 be required to prove the underlying Labor Code violations. (*Cardenas v. McLane Foodservice, Inc.*,
23 2011 U.S. Dist. LEXIS 13126, *10 (C.D. Cal. 2011) [“Given the statutory language [of PAGA], a
24 plaintiff cannot recover on behalf of individuals whom the plaintiff has not proven suffered a violation
25 of the Labor Code by the defendant.”].) To do this, Plaintiffs would need to prove each Aggrieved
26 Employee was subject to the alleged Labor Code violation, which would be difficult to do, since
27 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in this
28 action. JCL Dec., ¶ 39. Thus, Defendant contended that Plaintiffs would be required to “prove Labor

Code violations with respect to each and every individual on whose behalf Plaintiffs seek to recover civil penalties under PAGA.” *Hibbs-Rines v. Seagate Technologies*, 2009 WL 513496, *4 (N.D. Cal. Mar. 2, 2009). When “determining whether the employer committed Labor Code violations with respect to each employee” is impractical, the PAGA action can be dismissed. *Wesson v. Staples the Off. Superstore*, 2021 WL 4099059, *11 (Cal. Ct. App. Sept. 9, 2021). JCL Dec., ¶ 40.

Third, Defendant contended that PAGA actions with numerous employees, many locations, and different types of employees are not manageable and may be dismissed on that basis. *See, Wesson v. Staples the Office Superstore*, (2021) 68 Cal.App.5th 746 (holding that courts can dismiss PAGA claims if significant variation exists among aggrieved employees, who have unique factual situations) *see also, Ortiz v. CVS Caremark Corp.* (N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 36833 (dismissing PAGA claim as unmanageable because “a multitude of individualized assessments would be necessary”); *Lifty v. Merrill Lynch & Co.* (C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 160448 (striking PAGA claim as unmanageable because “individualized issues predominate in this action” and a “multitude of individualized assessments would be necessary”); *Amiri v. Cox Communs. Cal., LLC* (C.D. Cal.) 272 F.Supp.3d 1187, 1194 (striking PAGA claim as unmanageable). Here, with over 1,000 Aggrieved Employees working in different types of jobs, Defendant asserted that Plaintiffs’ theories were unmanageable. *Cf. Estrada v. Royalty Carpet Mills, Inc.*, (Cal.App. 4th Dist. March 30, 2022) (disagreeing with *Wesson* and creating a split among the Courts of Appeal on whether manageability is a prerequisite to bringing a PAGA claim). JCL Dec., ¶ 41.

Fourth, a ballot initiative to eliminate PAGA has qualified for the 2024 ballot. See <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 pursue civil penalties via a representative action. Plaintiffs view this initiative as a significant additional risk due to the potential limitation on their ability to recover penalties against Defendant should litigation continue. JCL Dec., ¶ 42.

Fifth, Defendant contends that both Plaintiffs signed legally binding arbitration agreements that require them to arbitrate their individual PAGA claims in order to determine whether they have standing to move forward with pursuing PAGA claims on behalf of the Aggrieved Employees. Individual

1 arbitrations would pose, at best, a significant delay in this litigation and at worst, an impediment that
2 could undermine Plaintiffs' PAGA suit. JCL Dec., ¶ 43.

3 Finally, the maximum penalty figure does not consider that Courts have complete discretion to
4 "award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the
5 facts and circumstances of the particular case, to do otherwise would result in an award that is unjust,
6 arbitrary and oppressive, or confiscatory." (Cal. Lab. Code § 2699(e)(2)). In fact, as noted above, Courts
7 routinely exercise their authority to reduce PAGA penalties by 85% to 95%. *See e.g. Carrington v.*
8 *Starbucks Corp.*, 30 Cal. App. 5th at 529 (reducing PAGA penalties to \$5 per pay period; "Although the
9 trial court may have disagreed with Starbucks regarding the issue of liability, it clearly took the
10 circumstances proffered by Starbucks into consideration when it imposed the penalty ... only \$5 per
11 initial violation"); *Kaanaana v. Barrett Bus. Servs., Inc.*, 29 Cal App 5th 778, 788 (2018), review granted
12 on other grounds (noting that the trial court "exercised its discretion to reduce the [PAGA] penalties to
13 13 percent of the full amount [requested, because] [o]n average, plaintiffs were deprived of 13 percent
14 of the 30-minute meal period"); *Fleming v. Covidien, Inc.*, 2011 WL 7563047, *4 (C.D. Cal. 2011)
15 (exercising discretion to reduce the maximum amount of PAGA civil penalties for plaintiffs' section
16 226 claims from \$2,800,000 to \$500,000 because the employees suffered no injuries as a result of the
17 erroneous wage statements and made no complaints about the errors or omissions in the wage
18 statements, thus reducing the maximum penalty by 82%); *see also, Gola v. University of San Francisco*,
19 San Francisco Superior Court Case No. CGC-18-5655018, Proposed Statement of Decision, dated July
20 21, 2020, Judge Curtis A. Karnow of San Francisco Complex (concluding after a full-blown bench trial
21 that a penalty of 15% of the maximum PAGA penalties was the appropriate penalty). The gross amount
22 obtained by Plaintiffs' Counsel is reasonable in light Defendant's arguments. Further, the adverse
23 decisions in *Viking River Cruises* and *Wesson* pose very significant, and even fatal, risk to Plaintiffs'
24 case. JCL Dec., ¶ 44.

25 Defendant's substantial compliance could also operate to prevent the imposition of PAGA
26 penalties. JCL Dec., ¶ 45. A corollary of PAGA being an enforcement action is that "substantial
27 compliance with statutory directives will suffice if the purpose of the statute is thereby
28 satisfied." *Downtown Palo Alto v. City Council*, 180 Cal.App.3d 384, 395 (1986) (emphasis

1 supplied); *see also Hernandez v. BCI Coca-Cola Bottling Co.*, 2012 WL 12272348, at *8 (C.D. Cal.
2 Apr. 12, 2012), *aff'd*, 554 F. App'x 661 (9th Cir. 2014) (granting defendant's motion for summary
3 judgment based on defendant's "substantial compliance" with Labor Code section 226). In this regard,
4 "[t]he paramount consideration is the objective of the statute." *Id.* "Where there is compliance as to all
5 matters of substance[,] technical deviations are not to be given the stature of noncompliance." *Cal-Air*
6 *Conditioning v. Auburn Union School Dist.*, 21 Cal.App.4th 655, 668 (1993) (emphasis supplied).
7 "Unless the intent of a statute can only be served by demanding strict compliance with its terms,
8 substantial compliance is the governing test." *County of Tulare v. Campbell*, 50 Cal. App. 4th 847, 853
9 (1996) (emphasis supplied). Given Defendant's defenses to the claimed Labor Code violations at issue,
10 and the risks and costs of continued litigation, Plaintiffs and Plaintiffs' Counsel believe that the Gross
11 Settlement Amount is fair and reasonable. This settlement was negotiated by experienced counsel at
12 arm's length. JCL Dec., ¶¶ 8-45. The LWDA has been provided notice of this motion and the PAGA
13 settlement, and the decision of LWDA to accept the PAGA settlement and not oppose the motion should
14 be given considerable weight. Moreover, the LWDA is a sophisticated government entity that can assert
15 and protect its own rights. JCL Dec., ¶¶ 5, 46.

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

17 Although PAGA requires that a court approve the proposed PAGA settlement, Labor Code §
18 2699(1) does not require that a court approve any other elements of the proposed settlement. Because
19 there are no class allegations for which Plaintiffs seek approval, the approval provisions applicable to
20 class settlements under Cal. Code Civil Proc. § 382 do not apply. Accordingly, the Court only needs to
21 approve the settlement of the civil penalties sought in the PAGA claim. Nevertheless, as explained
22 herein, the settlement terms for attorneys' fees and costs are reasonable.

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

24 Plaintiffs' Counsel seeks approval of Attorneys' Fees in the amount of \$583,333.33 (one-third of
25 the Gross Settlement Amount) and Attorneys' Expenses not to exceed \$35,000.00³ for reimbursement
26 of actually incurred litigation expenses. PAGA does not have any requirements for reviewing attorneys'
27

28 ³ As detailed *infra*, at the time of filing this motion, Plaintiffs' Counsel incurred \$18,929.71 litigating this matter. Plaintiffs will provide the Court with a final amount of litigation costs at the time of hearing on this motion.

fees, and Plaintiffs' 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., ¶ 47.

A. The Requested Attorneys' Fee is Fair and Reasonable

The requested Attorneys' Fee of \$583,333.33 and reimbursement of Attorneys' Expenses of up to \$35,000.00 is fair, reasonable, and justified by the result achieved. Agreement at § B(46); JCL Dec., ¶ 48. Plaintiffs' Counsel negotiated a recovery of \$1,750,000, 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. Defendant's defenses to the merits of the case created difficulties with proof and complex legal issues for Plaintiffs' Counsel to overcome. Here, several defenses asserted by Defendant present serious threats to the claims of Plaintiffs and the Aggrieved Employees. Defendant asserted that its employment practices complied with all applicable Labor laws. If successful, Defendant's factual and legal defenses would eliminate *any recovery* to the Aggrieved Employees. While Plaintiffs believe that these defenses could be overcome, Defendant maintains that these defenses have merit and therefore present a serious risk to recovery. The Settlement was possible because, in Plaintiffs' Counsels' eyes, Plaintiffs' Counsel was able to persuade Defendant that there was an appreciable risk that Plaintiffs would prevail on the factual and legal issues underlying liability and overcome difficulties in proof as to monetary relief. JCL Dec., ¶ 49.

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). JCL Dec., ¶50.

As detailed in Plaintiffs' Counsels' time and billing records submitted herewith, Plaintiffs' Counsels' current combined loadstar is \$288, 075.75 JCL Dec., ¶¶47-56; Declaration of Shani Zakay ("Zakay Dec.") at ¶¶ 3-5. Thus, Plaintiffs' Counsels' fee request is equal to Plaintiffs' Counsel's loadstar with a negligible multiplier of 2.0 and well within the recognized multiplier range between 2 and 4. 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 *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).

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 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 of this motion, Plaintiffs' Counsel collectively expended \$18,929.71 prosecuting this action (JCL Law Firm, APC - \$8,605.44, Zakay Law Group, APLC - \$10,324.27). JCL Dec. ¶¶ 7, 57; Zakay Dec., ¶¶ 7-8. Plaintiffs' 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. ¶¶ 6, 58.

VI. PLAINTIFFS' INDIVIDUAL SETTLEMENTS

Plaintiffs entered into individual settlements with Defendant in which they received separate, additional consideration in exchange for their release of their individual, non-PAGA claims against Defendant. Notably, the consideration provided for in Plaintiff Maboudi's individual settlement agreement takes into account her individual wage and hour claims in addition to the claims identified in the complaint she filed with the California Civil Rights Department, for which she obtained a Right to Sue (CRD No. 202307-21168003).

VII. CONCLUSION

Based on the foregoing, Plaintiffs 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: February 13, 2024

**JCL LAW FIRM, APC
ZAKAY LAW GROUP, APLC**

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