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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

KERRY HURLEY and LILI-ANN BOYENS, on behalf of the State of California, as private attorneys general, PLAINTIFFS, v. LASERAWAY MEDICAL GROUP, INC.; a Corporation; LASERAWAY, LLC, a Limited Liability Corporation; and DOES 1 thru 50, inclusive, DEFENDANTS.	Case No. CIV2201120 [Case Assigned for All Purposes to Hon. Stephen P. Freccero in Dept. A] **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** *[Filed concurrently with Declarations of Kelsey M. Szamet; Kyle R. Nordrehaug, Lisa Mullins of ILYM Group, Inc.; Plaintiff Kerry Hurley, and Plaintiff Lili-Ann Boyens; [Proposed] Order, and Judgment]* Date: TBD Time: TBD Dept.: A Complaint Filed: April 21, 2022 FAC: July 9, 2024 Trial Date: None Set

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on TBD at TBD in Department A of the above-entitled court, Plaintiffs KERRY HURLEY and LILI-ANN BOYENS will move the Court for an Order Granting Approval of Representative Action Settlement.

The Motion will be made on the grounds that the proposed Settlement is fair, adequate, reasonable, and in the best interest of Plaintiff, all aggrieved employees, and the Parties.

The Motion will be based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Kelsey M. Szamet, the PAGA Settlement Agreement (Exhibit "1" to the concurrently filed Szamet Declaration), all other papers and records on file in this action, and on such oral and documentary evidence as may be presented at the hearing on this Motion.

DATED: August 13, 2024

KINGSLEY & KINGSLEY, APC

By: ____________________________

Kelsey M. Szamet
Attorneys for Plaintiffs and all aggrieved employees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

State Regulations

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Kerry Hurley and Lili-Ann Boyens ("Plaintiffs") submit this Memorandum of Points and Authorities in support of Motion for Approval of Representative Action Settlement. Plaintiffs and Defendants LASERAWAY MEDICAL GROUP, INC. and LASERAWAY, LLC, ("Defendants") (collectively, the "Parties") have reached a proposed settlement documented in the PAGA Settlement Agreement ("Agreement"), attached to the concurrently-filed declaration of Kelsey M. Szamet.[1]

This is a Settlement under the Private Attorneys General Act of 2004, Labor Code §2699, et seq. ("PAGA"). The Gross Settlement Amount is $794,000.00. After deduction of any court-approved attorney's fees and litigation expenses, litigation enhancement to Plaintiffs, and settlement administration costs as discussed in the Agreement, the anticipated remaining amount to be divided between the Labor and Workforce Development Agency ("LWDA") and the aggrieved employees as required by Labor Code section 2699(i) is $488,783.33, with $366,587.50 (or 75%) going to the LWDA and $112,195.83 (or 25%) distributed to the aggrieved employees.[2]

Plaintiffs request that the Court "review and approve any settlement of any civil action filed pursuant to this part" (*See* Lab. Code § 2699(1)(2).) If the Court deems the Settlement fair and acceptable, Plaintiffs request that the Court: (1) enter an order approving the Settlement and ordering the Parties to carry the terms of the Settlement Agreement; and (2) enter Final Judgement thereon.[3]

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[1] The Parties also entered into separate confidential settlement agreements for Plaintiffs' individual claims. Plaintiffs had individual claims for wage and hour violations as part of the Complaint in this Action. Plaintiff Boyens' individual claims were pending in arbitration. The individual claims were not at issue in this action and exist independent and apart from the PAGA claims at issue before the Court. See *Kim v. Reins Int'l Cal., Inc*., 9 Cal. 5th 73, 80 (2020) (the "[s]ettlement of individual claims does not strip an PAGA Employee of standing, as the state's authorized representative, to pursue PAGA remedies" nor resolve the PAGA claims.).

[2] Pursuant to PAGA, civil penalties recovered by aggrieved employees shall be distributed 75 percent to the Labor and Workforce Development Agency ("LWDA") and 25 percent to the aggrieved employee(s). Lab. Code § 2699(i).

[3] Plaintiff's Motion for Approval of Representative Action Settlement will be concurrently uploaded to the LWDA's website on the date this Motion is filed. Proof of submission of Plaintiff's Motion for Approval of Representative Action Settlement, all related documents, and copy of the email from the LWDA confirming receipt can be provided to the Court upon request. (Szamet Decl. ¶199.)

II. BACKGROUND OF THE CASE AND RELEVANT PROCEDURAL HISTORY

A. Litigation Overview and Procedural History

1. The *Hurley* Action

On February 11, 2022, Plaintiff Kerry Hurley submitted a letter to the Labor and Workforce Development Agency ("LWDA") and served Defendant LaserAway Medical Group, Inc. regarding penalties pursuant to Labor Code § 2699 for alleged violations of California Labor Code §§ 201, 202, 203, 204 et seq., 210, 221, 226(a), 226.7, 227.3, 246 et seq., 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, and alleged violation of the applicable Industrial Welfare Commission Wage Order(s). (Declaration of Kelsey M. Szamet ¶5) ("Szamet Decl.")[4] Plaintiff did not receive any response from the LWDA to the formal written notice. (Szamet Decl. ¶6). Pursuant to Labor Code section 2699.3, subd.(a), Plaintiffs contend that gave timely written notice to Defendant and the LWDA by sending the PAGA Notices. (Szamet Decl. ¶7).

On April 21, 2022, Plaintiff Kerry Hurley commenced this action by filing a Private Attorneys General Act ("PAGA") complaint against Defendant titled *Kerry Hurley v. LaserAway Medical Group, Inc.*, Marin County Superior Court Case No. CIV2201120, for penalties pursuant to Labor Code § 2699 for Defendant LaserAway Medical Group, Inc.'s alleged violations of Labor Code §§ 201, 202, 203, 204 et seq., 210, 221, 226(a), 226.7, 227.3, 246 et seq., 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, and alleged violation of the applicable Industrial Welfare Commission Wage Order(s). (Szamet Decl. ¶8).

2. The *Boyens* Action

On March 9, 2022, Plaintiff Lili-Ann Boyens submitted a letter to the LWDA and served Defendant regarding penalties pursuant to Labor Code §§ 2699 for violations of California Labor Code §§ 201, 202, 203, 204(d), 210, 226, 226(a), 226.7, 512, 1198.5, and 2802. (Szamet Decl. ¶12). Also on March 9, 2022, Plaintiff Lili-Ann Boyens filed a class action complaint against Defendant LaserAway Medical Group, Inc. in Los Angeles County Superior Court, case no.

[4] As a part of the Agreement in this case, Plaintiffs agreed to supplement their respective PAGA Letters to the LWDA to name LaserAway, LLC as a named defendant. (Szamet Decl. ¶9) Plaintiff Lili-Ann Boyens submitted an amended PAGA letter on February 22, 2024. (Szamet Decl. ¶10). Plaintiff Kerry Hurley submitted an amended PAGA letter on March 7, 2024. (Szamet Decl. ¶11)

22STCV08618. (Szamet Decl. ¶13). On May 16, 2022, Plaintiff Lili-Ann Boyens amended her case to add an additional cause of action pursuant to PAGA for the Labor Code violations previously alleged. (Szamet Decl. ¶14).

Defendant LaserAway Medical Group, Inc. successfully compelled Plaintiff Lili-Ann Boyens' individual claims to arbitration and Plaintiff was ordered to dismiss the class claims on July 27, 2022. (Szamet Decl. ¶15). Plaintiff Lili-Ann Boyens submitted her individual claims to arbitration on August 15, 2022. (*Id.*)

Having reached an agreement to coordinate their litigation efforts, Plaintiff Hurley filed a First Amended Complaint to add Plaintiff Lili-Ann Boyens as an additional PAGA representative, (ii) add any facts, theories, or claims alleged by Boyens, (iii) add any facts or theories of liability raised by Plaintiffs at mediation, and (iv) add LaserAway, LLC as a named defendant in the Action, on July 9, 2024. (Szamet Decl. ¶16) The First Amended Representative Action Complaint is the operative complaint (the "Operative Complaint.") in the Action. (*Id.*)

B. Related Cases

Plaintiffs now seek approval in this matter because it was the first-filed case. (Szamet Decl. ¶17)

On October 26, 2022, Defendant filed a Notice of Related Case, requesting Hon. David Cunningham formally relate the *Hurley v. Laseraway Medical Group, Inc.*, Case No. CV2201120 (*Hurley* PAGA Action) with: Boyens *v. Laseraway Medical Group, Inc.*, Case No. 22STCV08618 (*Boyens* PAGA Action); *Hurley v. Laseraway Medical Group, Inc.*, Case No. CIV2200617 (*Hurley* Class Action); *Zakhrabova v. Laseraway Medical Group, Inc.*, Alameda Superior Court, Case No. 22CV011653[5]; and *Gonzalez v. Laseraway Medical Group, Inc.*, Case No. 22STCV21526. (Szamet Decl. ¶18) On December 13, 2022, the Court formally related the *Gonzalez* and *Boyens* Actions, deeming the *Boyens* Action as the lead case. (Szamet Decl. ¶19)

On August 21, 2023, Defendant filed another Notice of Related Case, seeking to relate an additional case, *Pich v. Laseraway Medical Group, Inc.*, Case No. 23STCV01082, to the *Boyens*

[5] It is Plaintiffs' understanding that the *Zahkrabova* Action is no longer at issue and is thus only mentioned here for procedural background.

action. (Szamet Decl. ¶20) On August 31, 2023, the Court formally related the *Pich* Action. (Szamet Decl. ¶21)

Plaintiffs Hurley and Boyens represent non-exempt employees in this Action. (Szamet Decl. ¶22) In contrast, it is Plaintiffs' understanding that the *Pich* and *Gonzalez* Actions involve draw/commission-based remote sales employees who were classified as outside and/or inside salespersons. (Szamet Decl. ¶23)

As of the filing of this motion, it is Plaintiffs' understanding that the *Gonzalez* Action has also settled separate and apart from this Action. (Szamet Decl. ¶24) The *Gonzalez* settlement has no effect on the settlement reached here, given that the *Gonzalez* Action represents a different group of Laseraway's employees, and there is no overlap. (Szamet Decl. ¶25)

C. <u>The Discovery Process and Mediation</u>

The Parties engaged in informal pre-mediation discovery. Prior to mediation, Plaintiffs obtained, through informal discovery, Plaintiffs' personnel files, time records, and pay data, along with time and pay data for a sampling of the Aggrieved Employees. (Szamet Decl. ¶26).

On January 24, 2024, the Parties participated in an all-day mediation presided over by Kevin T. Barnes which led to this Agreement to settle the Action. (Szamet Decl. ¶27). Thereafter, the Parties engaged in good faith, arms-length negotiations concerning possible resolution of the claims asserted in the Litigation. (Szamet Decl. ¶28) The Parties were able to reach a tentative settlement subject to finalization of a formal PAGA Settlement Agreement and the approval of the Court. (*Id.*) The Parties negotiated the terms and conditions of the Settlement and now present the agreed-upon Settlement to the Court for Approval. (Szamet Decl. ¶29)

Although Defendants deny that it violated any pertinent law, it recognized the risks and attendant costs of litigation, and the Parties were able to reach a tentative settlement subject to finalization of a formal PAGA Settlement Agreement and the approval of the Court. (Szamet Decl. ¶30.) The Parties negotiated the terms and conditions of the Agreement and now present the agreed-upon Settlement to the Court for Approval. (*Id.*)

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III. PAGA ACTIONS AND THE REQUIREMENTS

A. The PAGA Statutory Scheme

PAGA creates a means of "deputizing" citizens as private attorney generals to enforce the Labor Code on behalf of the LWDA. *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501, review den. (Oct. 19, 2011, No. S195850), *cert. denied* (Apr. 16, 2012) 132 S.Ct. 1910. A plaintiff may not — and Plaintiff here does not — bring a PAGA claim simply on his or her own behalf as an individual claim, but "as the proxy or agent of the state's labor law enforcement agencies." *Id.*, at 986; *see also Reyes v. Macy's, Inc.* 202 Cal.App.4th 1119, 1123-1124(2011); *Iskanian v. CLS Transp. Los Angeles*, LLC, 59 Cal. 4th 348, 380).

When an aggrieved employee brings a PAGA claim, "the government is always the real party in interest." *Securitas Sec. Servs. USA, Inc. v. Sup. Ct. of San Diego Cnty.*, 234 Cal.App.4th 1109, 1119 (2015); *Montano v. The Wet Seal Retail, Inc.* 232 Cal.App.4th 1214, 1222 (2015) ("[A] PAGA action is a dispute between an employer and the State agency."). Accordingly, a plaintiff that brings a PAGA claim represents "the same legal right and interest as state labor law enforcement agencies," in that the plaintiff is seeking to recover those civil penalties that otherwise would have been assessed and collected by the LWDA. *Arias*, *supra*, 46 Cal.4th at 986; Lab. Code § 2699 (a) & (f); *Securitas*, *supra*, 234 Cal.App.4th at 1119; *see also Medina v. Vander Poel* (E.D. Cal. 2015) 523 B.R. 820, 825 (holding "PAGA plaintiffs do not have property rights in their cases."). This is borne out by the fact that the LWDA receives 75 percent of any civil penalties recovered; thus, recoveries are principally for the state and only secondarily for aggrieved employees. Lab. Code § 2699 (i). Therefore, when a plaintiff brings a PAGA claim, he or she is properly conceived of as a private attorney general prosecuting violations of California's labor laws on behalf of the state.

An employee may commence a PAGA action by fulfilling the requirements of Cal. Lab. Code § 2699.3 (a)(1), which simply states:

> "The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation."

Lab. Code § 2699.3 (a)(1)

As explained above, Plaintiffs have complied with the notice requirements and have properly pled a PAGA cause of action. (Ex. 1, ¶ 2.3.)

B. The Court Has Discretion When Awarding the Amount of Penalties

PAGA provides for penalties in the amount of one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation. Lab. Code § 2699(f)(2).

"PAGA penalties...are mandatory, not discretionary" and must be awarded upon a showing that Defendant violated the Labor Code.[6] *Amaral v. Cintas Corp. No. 2* 163 Cal. App. 4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code §2699(e)(2) states that "a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." Here, Defendants deny that it violated any law or that it engaged in any knowing or intentional conduct giving rise to liability, and expressly deny that any employees suffered harm.

C. There is a Strong Risk the Higher $200 Civil Penalty Triggered for "Subsequent" Violations Will Not Apply

Plaintiffs believe there is a strong risk that the Court will not award the $200 civil penalty triggered for "subsequent" violations. Labor Code section 2699(f)(2). If this case were to proceed to trial, Plaintiffs would argue that a "subsequent" violation simply means that Defendants violated section 226(a) more than once for a given employee. Plaintiffs are not aware of any case law that interprets "subsequent" in the context of section 2699. However, Defendants are likely to rely on *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157 (2008) because it rejected a purely temporal understanding of the term "subsequent" and interpreted its use in Labor Code sections 210 and 225.5 to require that "the employer has been notified that it is

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[6] *See also Willner v. Manpower Inc., supra. 35 F. Supp. 3d at 1136*; *McKenzie v. Federal Exp. Corp, supra,* 765 F.Supp.2d at 1232.

violated a Labor Code provision" before higher penalties are triggered. *Id*. at 1209. Defendants presumably will take the position that it has not been notified that it actually violated any provisions of the Labor Code until the Labor Commissioner has issued a formal citation or this Court made a finding that a violation existed.

D. Recent Amendments to the PAGA Statute

An additional and important issue to consider when evaluating the risks associated with a representative PAGA claim are the recent amendments to the statute. (Szamet Decl. ¶31.) On July 1, 2024, Governor Newsom signed AB 2288 and SB 92 which reformed PAGA's penalty structure as well as its standing requirements. (Szamet Decl. ¶32.) Specifically, the new legislation caps penalties imposed on employers who quickly cure the Labor Code violations after receiving a PAGA notice, and also requires that the representative plaintiff personally experience the alleged Labor Code violations brought in the action. (Szamet Decl. ¶33.) While this new legislation is not retroactive, courts may still take these reforms into consideration when adjudicating a PAGA action at trial. (Szamet Decl. ¶34.)

E. Standards for Settlement Approval

When approving a settlement of a PAGA action, the statute simply requires the Court to "review and approve any settlement of any civil action filed pursuant to this part." (Lab. Code § 2699(*l*)(2).) PAGA does not set forth standards for evaluating such settlements, and the California appellate courts have not weighed in on the issue. However, trial courts have approved PAGA settlements where the penalties are "genuine and meaningful" and "consistent with the underlying purpose" of the statute. (See *O'Connor v. Uber Techs., Inc*. (N.D. Cal. 2016) 201 F. Supp. 3d 1110, 1113.) Additionally, as explained in *Arias v. Superior Court* (2009) 46 Cal.4th 969, class action procedural rules do not apply in PAGA cases, including the two-step preliminary and final approval process. Rather, the approval process consists of one step where the court decides if the settlement should go into effect.

IV. THE SETTLEMENT

Defendants will pay the total sum of $794,000.00 in full and final settlement of the PAGA claims alleged. (Szamet Decl. ¶35., Exhibit 1, ¶3.1.) Per the Agreement, the amount is allocated as follows:

Gross Settlement Amount:	$794,000.00
PAGA Counsel Fees Payment:	$264,666.67
PAGA Counsel Litigation Expenses Payment:	$15,810.33[7]
Administrator Expenses Payment:	$10,550.00
Named Plaintiff Litigation Enhancement Payment :	$10,000.00 ($5,000.00 to each Plaintiff)
PAGA Penalties:	**$492,973.00** ***($369,729.75 to the LWDA; $123,243.25 to Aggrieved Employees)***

(Szamet Decl. ¶36., Exhibit 1, ¶3.)

For settlement purposes, the Aggrieved Employees are defined as: "all individuals who are or previously were employed by Defendants LaserAway Medical Group, Inc. and/or LaserAway, LLC (collectively "Defendants") in a non-exempt capacity in California at any time during the period from February 11, 2021 through March 24, 2024. The Aggrieved Employee group excludes any employees who worked as outside sales employees during the PAGA Period, except to the extent such employees also worked in a non-exempt capacity at any time during the PAGA Period, in which case such employees are included" ("Aggrieved Employee"). (Szamet Decl. ¶39., Exhibit 1, ¶1.4.)

The PAGA Period is February 11, 2021, to March 24, 2024. (Szamet Decl. ¶40, Exhibit 1, ¶1.19.)

Each aggrieved employee shall receive a pro-rata portion of the remaining amount in PAGA penalties by dividing the amount of the aggrieved employees' 25% share of PAGA Penalties by the total number of PAGA Period Pay Periods worked by all aggrieved employees during the PAGA Period, and then multiplying the result by each aggrieved employee's PAGA Period Pay Periods. (Szamet Decl. ¶41., Exhibit 1, ¶3.2.4.1.)

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[7] The Agreement provided for counsel to receive cost reimbursement up to $20,000. However, counsel's final costs come to $15,810.33. (Szamet Decl. ¶37, Ex. 5) The extra $4,189.67 will remain in the net settlement fund, causing the net amount for distribution to the LWDA and Aggrieved Employees to be slightly higher than the $488,783.33 contemplated in the settlement agreement. (Szamet ¶38, Ex. 1, ¶3.2.1)

V. ARGUMENT

A. The Court Should Approve the Agreement

The Parties recognize that in accordance with Labor Code §2699(l), Court approval is required in the event of a settlement of a PAGA action on a representative basis. However, as explained in *Arias v. Superior Court* 46 Cal.4th 969 (2009), the Parties are not obligated to follow the class action procedural rules in PAGA cases and therefore need not obtain approval of the PAGA settlement through a motion for primary or final approval. Nonetheless, in order to comply with the requirements of Labor Code §2699, the Parties submit the instant Motion and the Agreement (Exhibit "1" to the Szamet Declaration) for Court approval.

B. The Risks of Moving Forward with Plaintiffs' PAGA Claim

To help the Court evaluate the fairness of the Settlement, a discussion of the risk evaluation and discount taken follows. (Szamet Decl. ¶42.) Plaintiffs believed that Defendants may persuasively argue that the Court should exercise its discretion under PAGA to significantly reduce or altogether waive any penalties under PAGA. (Szamet Decl. ¶43.) Pursuant to Labor Code §226.3, the Labor Commissioner has the discretion to "decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake." (Szamet Decl. ¶44.) And in accordance with PAGA, the court in a PAGA action has the same discretion "to assess a civil penalty" that the Labor Commissioner would have, as well as complete discretion to "award a lesser amount than the maximum civil penalty amount specified [by PAGA] if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." (Labor Code § 2699(e)(1) and (e)(2)). (Szamet Decl. ¶45.)

PAGA Counsel anticipated that, at trial, Counsel for Defendants could make a potentially persuasive argument that Defendants: (1) the Aggrieved Employees were properly paid and/or reimbursed in accordance with Defendants' lawful policies and practices, and that any alleged failure to compensate the Aggrieved Employees was the result of inadvertence and clerical error; (2) the Aggrieved Employees were provided with the opportunity to take meal and rest breaks in compliance with California law; (3) until this Action was filed, no employees had compliance about any alleged failure to pay wages, provide meal and/or rest breaks, reimburse expenses, issue accurate itemized wage statements; (4) none of Defendants' employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiff's allegations. (Szamet Decl. ¶46.) All of which, Counsel for Defendants would argue, should mitigate in factor of significantly reducing or waiving any PAGA penalties. (*Id.*)

While Plaintiff disagrees that this analysis is legal correct or persuasive, PAGA Counsel had to consider the foregoing facts and arguments and how they might impact any judgment ultimately awarded to Aggrieved Employees if the Court were persuaded by them. (Szamet Decl. ¶47.)

1. The Risks Associated with the Minimum Wage/Overtime Claim

"California employees are entitled to compensation for all hours worked, which means "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Title 8 Cal. Code of Regs., § 11080(2)(G); *See Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 845, as modified on denial of reh'g (Aug. 29, 2018).) Time is compensable if an employee is "*subject to the control* of an employer" even if not working, or if an employee "is *suffered or permitted to work*" even if not "under the employer's control, provided the employer has or should have knowledge of the employee's work." (*Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1046, reh'g denied (May 13, 2020) (citations omitted.) An employer controls an employee if the employer directs an employee and the employee is unable to use their time how they wish. (*Id.* at p. 1047.) Other factors courts may consider include whether the activity is required, "the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures." (*Id.* at p. 1056; *Cf. Gibbs v. TWC Administration, LLC* (S.D. Cal., Jan. 3, 2020, No. 17CV01513DMSAGS) 2020 WL 42768, at *9 (denying Defendant's motion for summary judgment when plaintiff-employees conducted off-the-clock pre-shift activity in preparation to start work right when they clocked in).)

In *Troester*, employees spent four to ten minutes completing tasks to close up the store, such as setting the alarm and locking the door. (*Troester*, 5 Cal.5th 829 at p. 843.) The Court held that California law prohibits employers from requiring employees to work off the clock, even for minutes, without compensation. (*Id.* at p. 848.) The Court explained:

> An employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine. As the facts here demonstrate, a few extra minutes of work each day can add up. . . . . What Starbucks calls "de minimis" is not de minimis at all to many ordinary people who work for hourly wages.

(*Id.* at p. 847.)

Additionally, California workers are statutorily entitled to overtime compensation, unless they are properly classified as falling within one of the narrow exemption categories. Under California law, "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek…shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." (Lab. Code, § 510, subd. (a).) Furthermore, "[a]ny work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee." (Lab. Code, § 510, subd. (a).)

Pursuant to Cal. Lab. Code § 204, other applicable laws and regulations, and public policy, an employer must timely pay its employees for all hours worked. Cal. Lab. Code § 1197 provides the minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed in unlawful. Cal. Lab. Code § 1194 establishes an employee's right to recover unpaid wages, including minimum wage compensation and interest thereon, together with the costs of suit.

Here, Plaintiffs contend that Defendants did not pay Aggrieved Employees for all time worked, meaning the time during which an employee is subject to the control of an employer, including all the time the employee is suffered or permitted to work. (Szamet Decl. ¶48.) Specifically, Plaintiffs and the Aggrieved Employees were allegedly required to perform pre-shift work. (Szamet Decl. ¶49.) At the start of each shift, Plaintiffs and the Aggrieved Employees contend that they were required to clock in using computers shared with other employees. (Szamet Decl. ¶50.) There was off-the-clock time incurred: finding an available computer, interrupting nurses who may have been using the computer, then loading the software used to officially clock in. (Szamet Decl. ¶51.) Plaintiffs also allege that they and other Aggrieved Employees were often required to accept linen or courier deliveries before they were allowed to clock in at the start of their scheduled shift. (Szamet Decl. ¶52.) Additionally, Defendants required Plaintiffs and Aggrieved Employees to submit to mandatory temperature checks and symptom questionnaires for COVID-19 screening prior to clocking into Defendants' timekeeping system for the workday. (Szamet Decl. ¶53.)

Moreover, Plaintiff Boyens contends that she and other Aggrieved Employees were expected to clock out for meal periods but continue working off the clock. (Szamet Decl. ¶54.) Plaintiff Boyens argued that she was also often single-staffed with no one to relieve her of her duties but was required to remain at the front desk and attend to patients as needed. (Szamet Decl. ¶55.) Thus, Plaintiff and other Aggrieved Employees allege that they are entitled to wages earned for the work performed off-the-clock. (Szamet Decl. ¶56.)

Plaintiffs further allege that they were required to communicate with Defendants' supervisors outside of working hours regarding work-related issues. (Szamet Decl. ¶57.) Plaintiffs and the Aggrieved Employees were also not compensated for off the clock travel time between Defendants' locations. (Szamet Decl. ¶58.) Plaintiffs and the Aggrieved Employees were also required to undergo mandatory drug testing or any other testing and/or examination required as a condition of employment. (Szamet Decl. ¶59.)

As a result, Plaintiffs and the Aggrieved Employees allege that they were not paid at the minimum wage, for overtime wage compensation, and for on-duty meal breaks at the applicable rates. (Szamet Decl. ¶60.)

Defendants vehemently disputed this claim. (Szamet Decl. ¶61.) First, it maintained that all of its written policies clearly prohibited any off the clock work and if it was incurred, that it must be promptly reported to a supervisor. (Szamet Decl. ¶62.) Second, Defendants argued that Plaintiff's theories of liability would each be extremely difficult to prove on a representative basis. (Szamet Decl. ¶63.) Because there are no written time or pay records that could be used by Plaintiffs to substantiate their claim, Defendants argued that this case would devolve into a series of mini-trials wherein Defendants would have the right to question each and every allegedly aggrieved employees as to whether they contended that they worked any unpaid time and, if so, why they contend the time was not properly paid. (Szamet Decl. ¶64.)

Specifically as to off the clock work, Defendants argued that it did not instruct employees to perform any duties off the clock, that employees who did perform these duties off-the-clock did so without permission, or that it was unaware that employees were working of the clock because it was never reported and this off-the-clock work was unauthorized. (Szamet Decl. ¶65.) Defendants would likely argue that if there was any unauthorized pre-shift waiting time to clock in at shared computers or the time spent undergoing temperature checks was *de minimis*. (Szamet Decl. ¶66.) It also argued that it paid meal premiums for any non-compliant meal periods. (Szamet Decl. ¶67.)

State law provides that employees must be paid overtime and meal and rest break premiums at one-and-one-half times their "regular rate of pay." Plaintiffs and the Aggrieved Employees are compensated at an hourly rate plus incentive pay that is tied to specific elements of an employee's performance. (Szamet Decl. ¶68.) The non-discretionary incentive program provided all employees paid on an hourly basis with incentive compensation when the employees met the various performance goals set by Defendants. (Szamet Decl. ¶69.) However, when calculating the regular rate of pay in order to pay overtime and meal and rest break premiums to Plaintiffs and the Aggrieved Employees, Plaintiffs allege that Defendants failed to include the incentive compensation as part of the employees' "regular rate of pay" for purposes of calculating overtime pay and meal and rest break premium pay. (Szamet Decl. ¶70.) Thus, Plaintiffs allege that Defendants' failure to do so has resulted in an underpayment of overtime compensation and meal and rest break premiums to Plaintiffs and the Aggrieved Employees by Defendants. (Szamet Decl. ¶71.)

However, Plaintiffs believed that at trial, Defendants would likely argue that any purported failure to blend violations were merely a result of a clerical error. (Szamet Decl. ¶72.) Defendants would likely argue that it did properly pay Plaintiffs and the Aggrieved Employees all wages owed, or at the very least, it demonstrated good-faith in paying all wages owed. (Szamet Decl. ¶73.) Further, Defendants would argue that if there was any such blending mistake made, it would result in an underpayment of very small amounts such as a few cents here or there and it would not likely result in a court awarding large civil penalty against it. (Szamet Decl. ¶74.)

Taken together, Plaintiffs acknowledge that there is substantial risk in pursing this wage claim and determined that the present settlement was fair and reasonable in light of these risks. (Szamet Decl. ¶75.)

2. The Risks Associated with the Meal Period Claim

California law requires employers to provide employees a duty-free, uninterrupted thirty (30) minute meal period when an employee works more than five (5) hours in a workday, and it must be provided within the first five (5) hours the employee works. Lab. Code 512; IWC Wage Order 4-2001, §11(A) and (C); *Brinker Restaurant Corp. v. Sup. Court* (2012) 53 Cal.4th 1004.

Here, Plaintiffs alleged that Defendants violated California's meal break laws by not allowing aggrieved employees to take actual daily meal breaks. (Szamet Decl. ¶76.) Indeed, due to the hectic nature of their job, Plaintiffs alleged that they and other aggrieved employees were frequently unable to take a compliant meal period. (Szamet Decl. ¶77.) Because Plaintiffs allege that they and aggrieved employees were required to communicate with and assist customers and schedule appointments for customers throughout their shifts, they had no time to take lawful uninterrupted meal periods if they were to complete their required assignments. (*Id*.) If Plaintiffs or aggrieved employees ever failed to complete their assignments, they would be subject to potential discipline up to and including termination. (*Id*.) Thus, Plaintiffs alleged that they and aggrieved employees were routinely discouraged and prevented from taking uninterrupted meal periods in order to complete their assignments and avoid the imposition of potential disciplinary measures. (Szamet Decl. ¶78.) Plaintiffs also alleged that Defendants violated California's meal period laws by not paying Plaintiffs and aggrieved employees an extra hour of wages for each missed or improper meal period. (Szamet Decl. ¶79.)

In response, first and foremost, Defendants argued that it maintained a valid written meal period policy at all times and that aggrieved employees were provided with legally compliant meal periods. (Szamet Decl. ¶80.) As with the wage claim, Defendants argued that Plaintiff's theory of liability would be extremely difficult to prove on a representative basis because the time records largely showed compliant meal periods, so Defendants would argue that it would be entitled to inquire of each aggrieved employee, on each day whether or not they were provided with compliant meal periods. (Szamet Decl. ¶81.) Defendants would also have argued that it has no obligation to "guarantee" or "ensure" that meal periods are taken by all employees at all times. *Brinker, supra*, 53 Cal. 4th at 1040 (employers are "not obligated to police meal breaks and ensure no work thereafter is performed"). Rather, an employer satisfies (as Defendants would argue) its obligation to provide meal periods if "it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." (*Id.*)

Plaintiffs were confident that Defendants would attempt to gather testimonial evidence from aggrieved employees indicating that the records were accurate and either they took compliant meal breaks as reflected in the records or were paid a meal period premium in lieu thereof. (Szamet Decl. ¶82.) Though Plaintiffs do not believe this was the case, Plaintiff must acknowledge it poses risks at trial. (Szamet Decl. ¶83.) There is risk as to both sides as to what declarations and depositions of aggrieved employees might reveal. (Szamet Decl. ¶84.) Indeed, Plaintiffs had to consider that Defendants could secure several declarations from aggrieved employees that all compliant breaks were "provided", but that they may have chosen to take late breaks or forego breaks on occasion. (Szamet Decl. ¶85.) Taken together, Plaintiff acknowledged there was significant risk as to establishing liability on the meal period claim on a representative basis. (Szamet Decl. ¶86.) Considering these risks, Plaintiff believes it is fair and reasonable to discount the meal period claim for settlement purposes. (Szamet Decl. ¶87.)

3. The Risks Associated with the Rest Period Claim

Employees are entitled to a paid ten (10) minute rest break for every four (4) hours worked, or major fraction thereof. (Cal. Code Regs., tit. 8, § 11040, subd. 12(A).) Labor Code section 226.7, subdivision (c), requires an employer to pay an additional hour of compensation for each workday the employer fails to provide a rest period according to law.

Here, Plaintiffs rest period claim arises from an allegedly common course of conduct wherein Defendants failed to provide employees with the opportunity to take 10-minute rest breaks in compliance with California law because the nature of the job was so hectic. (Szamet Decl. ¶88.) These alleged violations were due to heavy workload and short staffing by Defendants. (Szamet Decl. ¶89.) The California Supreme Court has held: "Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours and so on." (*Brinker, supra*, 53 Cal.4th at 1029.)

In its defense, Defendants argued that Plaintiffs' rest period claim cannot readily be proven as to all aggrieved employees because California law does not require employees to record rest periods. (Szamet Decl. ¶90.) Absent a shift-by-shift, break-by-break, employee-by-employee inquiry, Defendants would have argued that there was simply no way to know (1) whether a break was taken on any given day; and (2) if not, why not. (Szamet Decl. ¶91.) For each instance where an employee contends that she did not take a 10-minute rest period by the end of the fourth hour of work, the trier of fact would still have to determine why that particular employee had less than their full allotment of rest time. (Szamet Decl. ¶92.) Defendants accordingly would have argued that rest break claims are inherently individualized in nature because employers only need to "authorize and permit" breaks; they need not ensure that rest breaks are taken. (*Id.*) *Brinker*, 53 Cal. 4th at 1004. To succeed, "[a]n employee must show that the employer prevented the employee from taking breaks; mere proof of knowledge that the employee was forgoing breaks is insufficient." As such, Plaintiffs had to acknowledge that it could potentially be easy for Defendants to defeat this claim if it was able to gather testimonial evidence from aggrieved employees indicating that they were provided the opportunity to take all required rest breaks each day. (Szamet Decl. ¶93.) Though Plaintiffs do not believe this was the case, Plaintiff must acknowledge it poses serious risks as to establishing liability. (Szamet Decl. ¶94.) Just as with meal periods, there is risk as to both sides as to what declarations and depositions of aggrieved employees might reveal. (Szamet Decl. ¶95.)

Thus, Plaintiffs believe discounting this claim for Settlement purposes was appropriate periods. (Szamet Decl. ¶96.)

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4. The Risks Associated with the Wage Statement Claims

California Labor Code §226(a) requires Defendants to provide its employees with an accurate, itemized written wage statement that shows, in relevant part, total hours worked by the employee, their name and address of the legal entity that is the employer, and all applicable hourly rates and the corresponding number of hours worked. Specifically, Labor Code §226(a) requires employers to furnish accurate itemized wage statements in writing that show total hours worked by the employee and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. (Labor Code §§ 226(a)(2) and (9) respectively.)

Plaintiffs allege that Defendants failed to provide them and the Aggrieved Employees with complete and accurate wage statements which failed to show, among other things, the correct gross and net wages earned. (Szamet Decl. ¶97.) Plaintiffs and the Aggrieved Employees were paid on an hourly basis, and thus, this claim is derivative of Plaintiffs' wage (including regular rate), meal, and rest claims. (Szamet Decl. ¶98.) As such, Plaintiffs contend the wage statements should reflect all applicable hourly rates during the pay period and the total hours worked, and the applicable pay period in which the wages were earned pursuant to California Labor Code Section 226(a). (*Id.*) The wage statements Defendants provided to Plaintiffs and the Aggrieved Employees allegedly failed to ***accurately*** identify such information, because the wage statements did not properly list wages for off-the-clock work, any overtime as a result thereof, and all meal/rest premiums owed. (Szamet Decl. ¶99.) Further, Plaintiffs also allege that when they and the Aggrieved Employees were issued itemized wage statements with meal or rest premiums, they were either not listed at the accurate rate, or were paid at the wrong rate due to Defendants' failure to blend. (Szamet Decl. ¶100.)

Again the risks flow from the underlying unpaid wages and meal/rest claims, but the main risk taken into account is that wage statement claims are vulnerable to an argument that aggrieved employees did not suffer any harm. (Szamet Decl. ¶101.) Defendants commonly argue that, without more, wage statement claims are nothing but technical violations for which a court should award a dramatically reduced civil penalty, if anything at all. (Szamet Decl. ¶102.)

5. The Risks Associated with the Labor Code Section 204 and 210 Claims

Cal. Lab. Code § 204(d) provides, the requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven (7) calendar days following the close of the payroll period. Cal. Lab. Code § 210 provides:

> [I]n addition to, and entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections. . . .204. . .shall be subject to a civil penalty as follows: (1) For any initial violation, one hundred dollars ($100) for each failure to pay each employee; (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars ($200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.

Again, this claim is derivative to the underlying unpaid wages claim discussed above. (Szamet Decl. ¶103.) Defendants vehemently denied that it ever failed to timely pay wages that were due and owing. (Szamet Decl. ¶104.) Plaintiffs and their Counsel believes it is fair and reasonable to discount this claim for settlement purposes. (Szamet Decl. ¶105..)

6. The Risks Associated with the Sick Pay Claims

Labor Code § 246(a)(1) provides "[a]n employee who, on or after July 1, 2015, works in California for the same employer for 30 or more days within a year from the commencement of employment is entitled to paid sick days as specified in this section." Subsection (l) further states:

> For the purposes of this section, an employer shall calculate paid sick leave using any of the following calculations:
> (1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.
> (2) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
> (3) Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Labor Code § 246(l)(1)-(3)

In discussing Section 246, the California Supreme Court has held that the "regular rate of pay is a weighted average reflecting work done at varying times, under varying circumstances, and at varying rates. *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 569, as modified (Apr. 25, 2018).

Here, Plaintiffs alleged that Defendants failed to provide paid sick leave in accordance with Section 246 above. By failing to accurately record all hours actually worked and failing to pay for all hours worked as described above, Defendants failed to provide all paid sick leave. (Szamet Decl. ¶106.) Specifically, Plaintiffs alleged that Defendants provided less paid sick leave than actually owed since the hours used to accrue sick leave were allegedly inaccurate during meal periods and thus providing less paid sick leave than actually owed since the hours used to accrue sick leave were inaccurate. (Szamet Decl. ¶107.) In response, Defendants denied this claim and argued that it provided compliant sick leave at all times during the liability period and that it did itemize the sick pay correctly. (Szamet Decl. ¶108.) A review of the itemized wage statements suggests Defendants are correct and the likelihood of success of the merits was not strong. (Szamet Decl. ¶109.) Accordingly, Plaintiff believes it was reasonable to dramatically discount this claim for settlement purposes. (Szamet Decl. ¶110.)

7. The Risks Associated with the Waiting Time Penalties Claim

Under Labor Code section 203, if an employer fails to provide wages at the time of an employee's termination or within seventy-two (72) hours of resignation, then the employee's wages shall continue as a penalty for up to thirty (30) days. (Labor Code § 203.) Section 203 reflects a public policy that favors the full and prompt payment of earned wages. (See, e.g., *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.)

Here, Plaintiffs and numerous Aggrieved Employees are no longer employed by Defendants, and Plaintiffs allege that Defendants failed to pay all wages owed and due upon their termination and/or resignation. (Szamet Decl. ¶111.) Plaintiffs contend that Defendants failed to properly pay all wages due and all overtime for any work in excess of eight (8) hours per day and/or any work in excess of forty (40) hours per week. (Szamet Decl. ¶112.) The risk analysis for the section 203 claim flows from the risk analysis for the underlying wage claim discussed above as derivative waiting-time penalties are only as strong as the underlying predicate claims and are subject to good faith defenses. (Szamet Decl. ¶113.) If Defendants could prove, as it contends, that Aggrieved Employees were properly paid for all hours worked and any meal/rest periods actually owed, there would be no recovery of wages and no waiting time penalties that flow therefrom. (Szamet Decl. ¶114.)[8]

The other significant risk that Plaintiff analyzed, however, is that to establish liability for waiting time penalties, Plaintiff would have to establish not only that the underlying violations occurred, but also that Defendants' conduct was "willful." (Labor Code § 203; Szamet Decl. ¶115.) If Defendants could establish that any alleged failure was the result of mistake or oversight and not "willful", then it is possible that Plaintiff would not be able to recover penalties for this claim. (Szamet Decl. ¶116.) Because of this risk, Plaintiff determined that accepting a discount for settlement purposes was appropriate. (Szamet Decl. ¶117.)

8. The Risks Associated with the Labor Code Section 221 Claim

Labor Code § 221 states that it is "unlawful for any employer to collect or receive from an employee any part of wages." Moreover, Labor Code § 226.3 provides for heightened penalties where "the employer fails to provide the employee a wage deduction statement or fails to keep [required] records."

Plaintiffs alleged Defendants maintain a consistent policy of unlawfully deducting wages from Plaintiffs' and all aggrieved employees in violation of Labor Code § 221. (Szamet Decl. ¶118.) By making these unauthorized deductions from Plaintiffs and all aggrieved employees' earned wages, Plaintiffs alleged that they and all aggrieved employees were paid less than the applicable minimum wage required under California law. (Szamet Decl. ¶119.) This claim is also derivative to the underlying unpaid wages claim discussed above. (Szamet Decl. ¶120.) Again, Defendants vehemently denied that it ever withheld wages. (Szamet Decl. ¶121.) Taking this argument into account, Plaintiff and his Counsel believes it is fair and reasonable to discount this claim for settlement purposes. (Szamet Decl. ¶122.)

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[8] Plaintiff also alleged that Defendants owes waiting time penalties by not paying former alleged employees all wages owed and all premium payments for non-compliant meal or rest periods, Labor Code § 226.7

9. The Risks Associated with the Reimbursement Claim

Labor Code section 2802 provides that an employer must "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties . . . ." (Lab. Code, § 2802, subd. (a).)

Here, Plaintiffs allege that they and the Aggrieved Employees were required by Defendants to use their own personal cellular phones and computers as a result of and in furtherance of their job duties, but were not reimbursed for this business use. (Szamet Decl. ¶123.) Specifically, Plaintiffs and the Aggrieved Employees were required by Defendants to use their own computers, download and pay for phone applications on their personal cell phones, be available by cell phone, and answer/use their personal cell phones consistently to perform their job duties. (Szamet Decl. ¶124.) These cell phones and computers were not provided by Defendants and, as a result, Plaintiffs allege that they and the Aggrieved Employees incurred unreimbursed business expenses which included, but were not limited to, costs related to the use of their personal cellular phones and computers in violation of Labor Code §2802. (Szamet Decl. ¶125.)

The main risk here is the factual dispute at hand. (Szamet Decl. ¶126.) Defendants contends that it does not require Aggrieved Employees to use personal cellphones and that it provides work phones that are readily available and computers for email usage. (Szamet Decl. ¶127.) Thus, Defendants argued that there was no need for any other non-exempt employees to use personal cellphones or travel between stores. (Szamet Decl. ¶128.) The main risk taken into account here is that Plaintiffs contend they sometimes worked from home during a limited timeframe due to covid restrictions. (Szamet Decl. ¶129.) Plaintiffs anticipated that Defendants would argue primarily that it provided all necessary tools, but to the extent it did not, any exposure was limited to a very small group of Aggrieved Employees for a short window of time who may have chosen to use their personal cellphones for work related purposes out of convenience. (Szamet Decl. ¶130.) If Defendants were able to establish such, there could be no recovery at all for this claim. (Szamet Decl. ¶131.) Based on these risks, Plaintiffs determined that discounting this claim for settlement purposes was fair and reasonable. (Szamet Decl. ¶132)

In light of all these significant risks to the alleged Labor Code violations and given that PAGA gives the Court broad discretion to reduce any penalties ultimately awarded, PAGA Counsel determined that the Gross Settlement Amount of $794,000.00 was fair and reasonable. (Szamet Decl. ¶133, Exhibit 1, ¶3.1.)

C. <u>A Court May Exercise its Discretion to Reduce the Maximum Civil Penalty Awarded for Technical Violations of the Labor Code</u>

"PAGA penalties…are mandatory, not discretionary" and must be awarded upon a showing that Defendant violated the Labor Code. *Amaral v. Cintas Corp. No.* 2 163 Cal. App 4th 1157, 1213 (2008); *Moreno v. Autozone, Inc.* (N.D. Cal. June 5, 2007) No. C05-04432 MJJ, 2007 WL 1650942, at *3.

However, PAGA does provide the Court with discretion when it awards these penalties. Labor Code section 2699(e)(2) states that "a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory."

In *Fleming v. Covidien Inc.* (C.D. Cal., Aug. 12, 2011, No (OPX)), 2011 WL 7563047, the Court exercised its discretion to reduce the PAGA penalty amount. There, the plaintiff brought a PAGA claim for violations of section 226(a) based on the following issues: (a) the statements did not show either an employee identification number or the last four digits of the social security number of the employee; (b) the statements did not show the beginning date of the pay period for which the employee was paid; (c) the statements identified Covidien as the employee's employer. (*Id*. At *2). There were approximately 28,000 wage statements at issue. (*Id*. at *3). The *Fleming* court calculated the maximum potential civil penalty exposure at $2.8 million ($100 per wage statement). (*Ibid*; *see also* Labor Code § 2699(f)(2)). After a bench trial, the Court elected to exercise its discretion to reduce the civil penalty per wage statement to $18 per wage statements, reflecting 18% of the potential exposure. (*Id*. at *4). The Court reasoned:

> Here, the aggrieved employees suffered no injury due to the erroneous wage statements, and made no complaint of the errors or omissions contained therein prior to filing suit. Also, Defendants were not aware that the wage statements violated the law and took prompt steps to correct all violations

> once notified. Given these circumstances, the Court finds a $2.8 million penalty unjust according to § 2699(e)(2). Accordingly, in its discretion, the Court reduces the penalty to $500,000.

Id. at *4. A court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence. *See e.g., Carrington v. Starbucks Corp*. (2018) 30 Cal. App. 5th 504, 529 (awarding 10% of maximum civil penalty for meal break claims in light of Starbuck's "good faith attempts" to comply and because the violations were minimal).

Here, as explained above, Plaintiffs' counsel anticipated that, at trial, Counsel for Defendants would argue that: (1) the Aggrieved Employees were properly paid and/or reimbursed in accordance with Defendants' lawful policies and practices, and that any alleged failure to compensate the Aggrieved Employees was the result of inadvertence and clerical error; (2) the Aggrieved Employees were provided with the opportunity to take meal and rest breaks in compliance with California law; (3) until this Action was filed, no employees had compliance about any alleged failure to pay wages, provide meal and/or rest breaks, reimburse expenses, issue accurate itemized wage statements; (4) none of Defendants' employees suffered any harm from or actual damage as a result of the conduct that forms the basis for Plaintiffs' allegations. All of which, Counsel for Defendants would argue, should mitigate in favor of significantly reducing the civil penalty.

Furthermore, Plaintiffs also considered the effect the recent PAGA reform may have on the court's decision at trial. While the amendments make a passing reference to a court's ability to "stack" penalties for numerous violations, there is a dearth of caselaw even before the amendment where a court has utilized "stacking." (Szamet Decl. ¶134.) Moreover, the new legislation caps penalties imposed on employers who quickly cure the Labor Code violations after receiving a PAGA notice, and also requires that the representative plaintiff personally experience the alleged Labor Code violations brought in the action, which could impact a court's decision in awarding PAGA penalties to Plaintiffs here, who may have not experienced every single Labor Code violation. (Szamet Decl. ¶135.) While this new legislation is not retroactive, courts may still take these reforms into consideration when adjudicating a PAGA action at trial. (Szamet Decl. ¶136.)

After engaging in pertinent informal discovery in this Action, Plaintiffs' counsel determined that a settlement of $794,000.00 is reasonable given the above risks.

D. Based on the Risks Above and the Analysis of the Maximum Penalties Available, Plaintiff Believes this Settlement is Fair and Reasonable

Based on these figures, the maximum potential exposure for the PAGA claims for the Aggrieved Employees is $4,150,000 (41,500 pay periods at issue multiplied by $100 a pay period) without the "stacking" of penalties. (Szamet Decl. ¶137.) Given the risks to the merits above, and in light of the immense discretion available, Plaintiffs believe the Settlement is reasonable. (Szamet Decl. ¶138.) While there is no authority available on this issue, a court could conceivably "stack" per pay periods violations, and the full potential value could balloon up to over $37,000,00.00 ($4,150,000 x 9 distinct claims alleged), but in light of the immense discretion available, Plaintiffs believe that is not a likely outcome and the Settlement is reasonable. (Szamet Decl. ¶139.)

First, Plaintiffs acknowledge that several violations, such as the meal or rest violations, could be very difficult to prove on a representative basis. (Szamet Decl. ¶140.) Second, a court exercising its discretion to significantly reduce the civil penalty awarded under PAGA is not a rare occurrence. (Szamet Decl. ¶141.) (See e.g., *Carrington v. Starbucks Corp*. (2018) 30 Cal.App.5th 504, 529 [awarding only 10% of maximum civil penalty for meal break claims in light of Starbuck's "good faith attempts" to comply and because the violations were minimal]; see also *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 681 [noting that a court should consider whether a violation was inadvertent when assessing penalties].)[9] If the Court found that Defendants made good-faith attempts to comply, that violations were minimal, or that the violations were inadvertent, the amount of PAGA penalties awarded could significantly be reduced. (Szamet Decl. ¶142.)

Again, there is little guidance for the Court here, but if the Court were ultimately to award 10% of the maximum civil penalty as occurred in *Carrington, supra*, 30 Cal. App. 5th 504, the result here far exceeds that range as 10% of a single-stack of PAGA penalties in this case would be only $415,000, nearly half of the Settlement obtained here. (Szamet Decl. ¶143.) Likewise, if

[9] On May 11, 2016, following a bench trial, Los Angeles Superior Court Judge John Wiley reduced PAGA penalties from $409,950 to $53,294 after finding the maximum statutory penalty amount to be unjust, arbitrary, oppressive, and/or confiscatory. (*Kaanaana et al. v. Barrett Business Serv.s Inc., et al.*, L.A. Super. Ct., Case No. BC 496090.))

this Court were to ultimately award $18 per pay period as the trial court did in *Fleming v. Covidien Inc.*, *supra*, the present Settlement is actually higher at $19.13 per pay period (for comparison the $18/pay period in *Fleming* would be $747,000 here as 41,500 pay periods x $18 = $747,000).

Given that this Settlement is for $794,000.00, Plaintiff believes this is a very fair and reasonable settlement.

VI. THE REQUEST FOR ATTORNEYS' FEES AND COSTS

As detailed fully in the Settlement, the settlement provides for Defendants to create a Gross Settlement Amount of $794,000.00. (Szamet Decl. ¶148; Ex. 1 at ¶¶3.2.1.) From that fund, Plaintiffs requests an award of attorneys' fees for PAGA Counsel in the amount of $264,666.67, or 33.33% of the Gross Settlement Amount, and $15,810.33 in reimbursement for litigation costs. (*Id*; Ex. 1 at ¶3.2.1.)

A. Plaintiffs' Counsel are Entitled to a Fee from the Common Fund

On August 11, 2016, the California Supreme Court decided *Laffitte v. Robert Half International*, which addressed the correct methodology for awarding fees in a class action settlement. (*Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 205 Cal.Rptr.3d 555, 573.) The *Laffitte* Court approved awarding fees as a percentage of the settlement fund in cases like the present one, where a settlement results in the creation of a common fund on behalf of a class:

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards Class Counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.

(*Id.* at 573.) The Court then set out several reasons why the percentage-of-the-fund method is preferred over the alternative lodestar-multiplier approach in California courts:

> The recognized advantages of the percentage method—including relative ease of calculation, alignment of incentives between counsel and the class, a better approximation of market conditions in a contingency case, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation [citations]—convince us the percentage method is a valuable tool that should not be denied our trial courts.

(*Id.* at 573.)

An award of 33.33% of the common fund is appropriate here under the "substantial benefit" theory. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1810; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254.) That theory permits a litigant who has sued in a representative capacity to recover fees when the litigant's efforts have created a substantial, actual, and concrete benefit for members of an ascertainable class and the court's jurisdiction over the subject matter makes possible an award which spreads the cost proportionately among the members of the benefitted class. (*See Ciani v. San Diego Trust & Sav. Bank* (1994) 25 Cal.App.4th 563, 578.)

This doctrine rests on the understanding that attorneys should normally be paid by their clients, and that unless attorneys' fees are paid out of the common fund, those who benefitted from the fund would be unjustly enriched. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 943; *Save El Toro Ass'n v. Days* (1979) 98 Cal.App.3d 544, 548-49.) To prevent this unfair result, courts exercise their inherent equitable powers to assess attorneys' fees against the entire fund, thereby spreading the cost of those fees among all those who benefitted. (*Serrano III*, 20 Cal.3d at p. 35.) "A court, in the exercise of its equitable discretion, may decree that those receiving the benefit should contribute to the costs of its production." (*Save El Toro Assn., supra*, 98 Cal.App.3d at 548.) As this approach "better approximates the workings of the marketplace than the lodestar approach," there is "a greater judicial willingness to evaluate a fee award as a percentage of the recovery" in common fund cases. (*Lealao v. Beneficial Calif., Inc.* (2000) 82 Cal.App.4th 19, 31, 48.)

B. <u>The Attorneys' Fees Request Are Well Within the Range of Fees in Comparable Cases</u>

Courts historically award fees in the twenty-to-fifty percent range, depending on the circumstances of the case. As stated in Newberg:

> No general rule can be articulated on what is a reasonable percentage of a common fund. Usually 50% of the fund is the upper limit on a reasonable fee award from a common fund in order to assure that the fees do not consume a disproportionate part of the recovery obtained for the Class, although somewhat larger percentages are not unprecedented.

(Newberg on Class Actions, 3rd Ed., 1992, § 14.03; *and see Chavez v. Netflix, Inc*. (2008) 162 Cal.App.4th 43, 66, fn 11 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery."].) Thus, PAGA Counsel's requested fee of 33.33% is not only well within the range of reasonableness, but lower than the average fee award of 35% and is fair compensation for undertaking this complex, risky, expensive, and time-consuming litigation on a contingent basis.

C. PAGA Counsel's Fee Request is Reasonable Under a Lodestar Crosscheck

Courts may "cross-check" the results of the common fund method against the lodestar method. (*See In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557.) The lodestar is calculated by multiplying the reasonable hours expended by a reasonable hourly rate. (*Serrano v. Priest*, 20 Cal.3d 25, 48-49 (1977) *("Serrano III")*.) Those rates reflect "the general local hourly rate for a fee-bearing case" and do "not include any compensation for contingent risk, extraordinary skill, or any other factors." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1138.) The court may then enhance the lodestar with a multiplier. (*Wershba, supra*, 91 Cal.App.4th at 254; *Serrano III, supra*, 20 Cal.3d at 49.)

The purpose of using the lodestar/multiplier method is to mirror the legal marketplace. Counsel will not handle cases for straight hourly fees payable only if they win; therefore, an enhancement is often awarded so that the fee received is commensurate with what attorneys could expect to be compensated for services in similar circumstances. (*See Tulare Valley Audubon Soc., Inc. v. County of Tulare* (1984) 155 Cal.App.3d 738, 755 [an award must be large enough "to entice competent counsel to undertake difficult public interest cases"].) No specific findings reflecting the court's calculations are required. (*Wershba, supra*, 91 Cal.App.4th at 254; *Rebney, supra*, 232 Cal.App.3d at p. 1349.) "The record need only show that the attorney fees were awarded according to the 'lodestar' or 'touchstone' approach." (*Ibid.*)

Here, a lodestar cross-check confirms that the percentage requested is reasonable. (Szamet Decl. ¶157.) PAGA Counsel have an aggregate lodestar in the amount of $349,690.00 which represents 496.35 hours of attorney work on this litigation from its inception through the date of this filing of Plaintiff's instant Motion. (*Id*.) As such, PAGA Counsel is not asking for a lodestar multiplier. (Szamet Decl. ¶158.) Typically, the lodestar is merely the starting point of the calculation of a reasonable fee, and courts often multiply the lodestar by a factor to account for the risk of non-payment, delay in payment, the quality of work, and the novelty and difficulty of the issues involved. (*See Radar v. Thrasher,*(1962) 57 Cal.2d 244, 253; *Beasley v. Wells Fargo Bank,* (1991) 235 Cal.App.3d 1407, 1419; *Coal. for L.A. County Planning v. Bd. of Supervisors,* (1997) 76 Cal.App.3d 24 1, 251.)

This case dealt with difficult legal and factual questions. (Szamet Decl. ¶159.) Significantly, the risk attendant to the underlying claims in this matter was great considering Defendants' defenses as discussed in detail above. *(Ibid.)* Were this case to proceed, Defendants would have a strong incentive to litigate tenaciously. *(Ibid.)* There are genuine issues in dispute. *(Ibid.)* Furthermore, PAGA Counsel was able to obtain close to the full value for this case. (Szamet Decl. ¶160.)

As discussed above, PAGA Counsel are skilled wage and hour practitioners with decades of experience who diligently prepared and litigated this matter. (Szamet Decl. ¶161.) To achieve the ultimate result in this case, my firm had to incur substantial risk and expense, and were precluded from taking other fee generating employment for 496.35 hours of attorney time. (Szamet Decl. ¶162.) This matter had been handled purely on a contingency fee basis and my firm has advanced many thousands of dollars in costs while deferring all payment of fees, with no guarantee that any of the fees incurred or costs advanced would ever be recovered and diverting significant firm resources to prosecution of this matter. (Szamet Decl. ¶163.) PAGA Counsel believe this is an exceptional result that has been well received by the Aggrieved Employees. (Szamet Decl. ¶164.)

VII. THE COURT SHOULD APPROVE THE REQUEST FOR REIMBURSEMENT OF COSTS

In addition to their request for fees, PAGA Counsel further request reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred by them in connection with this litigation, in the amount of $20,000.00 (Szamet Decl. ¶188.) To date, PAGA Counsel has incurred $15,210.33 in costs. (Szamet Decl. ¶189.) PAGA Counsel anticipates incurring an additional

$600.00 in costs to file and serve this motion, but the Settlement provides for a reimbursement of litigation costs of up to $20,000.00. (Szamet Decl. ¶190.) As such, counsel is requesting a cost reimbursement of $15,810.33. (Szamet Decl. ¶191.)

All of the requested costs are reasonable in amount and were necessarily incurred by PAGA Counsel in prosecuting this litigation. (Szamet Decl. ¶192.); Exhibit 2 [Cost Report].) Expenses in this matter to date include costs for filing fees, research, mediation, and additional costs for the prosecution of this case evidenced in the costs spreadsheet attached to the Declaration of Kelsey M. Szamet. All of these costs have been incurred in the course of this litigation, and all costs advanced have already been paid by PAGA Counsel, with the exception of the anticipated cost of filing the present motion. (Szamet Decl. ¶193.)

Accordingly, the requested reimbursement of the reasonable out-of-pocket expenses advanced and/or incurred is appropriate and justified as part of the overall settlement and the Court should approve the request for reimbursement in the amount of $15,810.33 (Szamet Decl. ¶194.)

VIII. ENHANCEMENT TO PLAINTIFFS

The Settlement calls for an enhancement payment of $10,000.00 to the named Plaintiffs ($5,000.00 each), to be paid from the Gross Settlement Amount. (Szamet Decl. ¶195; Ex. 1 at ¶3.2.2.) Incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 958-59. "[I]t is established that named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk they have incurred in conferring a benefit on other members of the class." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal.App.4th 399, 412 (citing *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 805-806; *Staton v. Boeing Co.* (9th Cir.2003) 327 F.3d 938, 977)).

Here, the enhancement takes into consideration the time, effort, and expense incurred by Plaintiffs in coming forward to litigate this matter on behalf of the Aggrieved Employees. The time spent by Kerry Hurley and Lili-Ann Boyens includes identifying competent counsel, providing information to PAGA Counsel regarding Plaintiffs' relevant employment experiences, compiling documents, meeting with PAGA Counsel frequently to discuss the status of the case and the theories of liability, reviewing settlement documents, and making themselves available for a full day of mediation. (Szamet Decl. ¶196.)

PAGA Counsel considers this to be a fair and reasonable enhancement. (Szamet Decl. ¶197.) The enhancement takes into consideration the time, effort, risks, and expense incurred by Plaintiffs in coming forward to litigate this matter on behalf of the Aggrieved Employees. (Szamet Decl. ¶198.) Accordingly, Plaintiffs should be awarded the agreed-upon enhancement of $10,000.00.

IX. CONCLUSION

Plaintiffs and Plaintiffs' Counsel submit that the proposed Settlement as documented in the Agreement is fair, adequate, reasonable, and in the best interest of the Parties and the State of California. Plaintiffs respectfully request that the Court approve the Settlement and Order that the Settlement is carried out according to the terms of the Agreement.

DATED: August 13, 2024

KINGSLEY & KINGSLEY, APC

By: ______________________________

KELSEY M. SZAMET
Attorneys for Plaintiffs LILI-ANN BOYENS and all aggrieved employees

(PROOF OF SERVICE)
[CCP 1013(a)(3)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436.

On August 13, 2024, I served all interested parties in this action the following documents described as: **NOTICE OF MOTION AND MOTION FOR APPROVAL OF REPRESENTATIVE ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP Norman B. Blumenthal Kyle R. Nordrehaug Aparajit Bhowmik Piya Mukherjee Charlotte James 2255 Calle Clara La Jolla, CA 92037 ABRAMSON LABOR GROUP WILLIAM ZEV ABRAMSON Wza@abramsonlabor.com 11846 Ventura Blvd., Suite 100 Studio City, CA 91604	EPSTEIN BECKER & GREEN, P.C. KEVIN D. SULLIVAN ksullivan@ebglaw.com MICHAEL S. KUN mkun@ebglaw.com Brooke Scott bcscott@ebglaw.com 1925 Century Park East, Suite 500 Los Angeles, CA 90067-2506

[XX] **BY ELECTRONIC SERVICE:** I caused a true and correct copy thereof to be electronically filed using the Labor and Workforce Development Agency Electronic Filing ("EF") System (https://dir.tfaforms.net/315) and service was completed by electronic means by transmittal of the documents referenced herein on the EF System.

[XX] **(BY ELECTRONIC MAIL TRANSMISSION)**: I caused the document to be send to the persons at the e-mail address(es) listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A pdf copy of which was sent via email to the above email address(es).

[XX] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 13, 2024, at Woodland Hills, California.

Michelle Tanzer